TEXAS REGISTER

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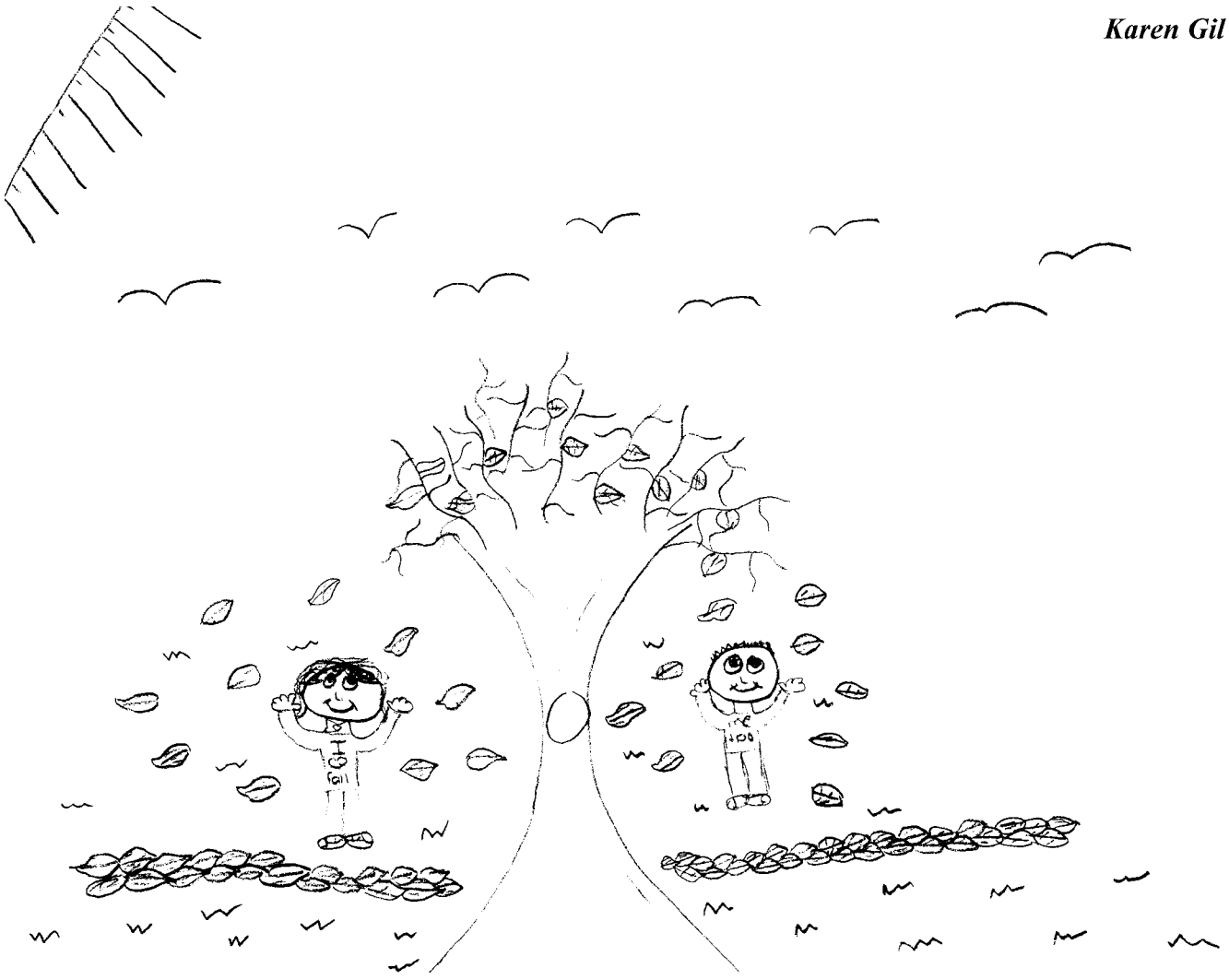
Karen Gil



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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IN ADDITION

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 September 13, 2012

Appointed to the Board of Pilot Commissioners for Galveston County Ports for a term to expire February 1, 2015, W. Bradshaw "Brad" Boney of Galveston (replacing James Toups, Sr. of League City who resigned).

Appointed to the Central Colorado River Authority for a term to expire February 1, 2015, Herman Law of Burkett (replacing David McWhorter of Albany who resigned).

Appointed to the State Health Services Council for a term to expire February 1, 2013, Maria F. Teran of El Paso (replacing Jacinto Juarez of Laredo whose term expired).

Appointed to the Texas Commission on Fire Protection for a term to expire February 1, 2017, Laurence P. "Pat" Ekiss of Taylor (replacing Christopher Connealy of Cedar Park who resigned).

Appointed to the Texas Crime Stoppers Council for a term to expire September 1, 2016, Jorge E. Gaytan of Houston (Mr. Gaytan is being reappointed).

Appointed to the Texas Crime Stoppers Council for a term to expire September 1, 2016, Emerson Lane, Jr. of Beaumont (Mr. Lane is being reappointed).

Appointed to the Texas Crime Stoppers Council for a term to expire September 1, 2016, Ernesto "Ernie" Rodriguez, Jr. of McAllen (replacing Nelda Garcia of Ben Bolt whose term expired).

Appointed to the Advisory Council on Emergency Medical Services for a term to expire January 1, 2018, Jodie Harbert, III of College Station (Mr. Harbert is being reappointed).

Appointed to the Advisory Council on Emergency Medical Services for a term to expire January 1, 2018, Donald G. Phillips of Weatherford (Dr. Phillips is being reappointed).

Appointed to the Advisory Council on Emergency Medical Services for a term to expire January 1, 2018, Karen M. Pickard of Ovilla (replacing Peter Wolf of Windthorst whose term expired).

Appointed to the Advisory Council on Emergency Medical Services for a term to expire January 1, 2018, Shirley Scholz of Ransom (Ms. Scholz is being reappointed).

Appointed to the Advisory Council on Emergency Medical Services for a term to expire January 1, 2018, Alan H. Tyroch of El Paso (replacing Luis Fernandez of Tyler whose term expired).

Appointments for September 21, 2012

Appointed as Deputy Administrator and Commissioner for the Interstate Compact for Juveniles for a term to expire at the pleasure of the Governor, Daryl Liedecke of Austin (replacing Donna Bonner of Round Rock who resigned).

Appointing Clinton Harp as designee to serve as an Ex-Officio/Non-Voting member of the Texas Economic Development Corporation for a term at the pleasure of the Governor. Mr. Harp replaces Kathy Walt.

Appointed to the North Central Texas Regional Review Committee for a term at the pleasure of the Governor, Joseph E. Helmberger of Farmersville (replacing Christy Schell of Nevada).

Rick Perry, Governor

TRD-201204965

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Proclamation 41-3307

TO ALL TO WHOM THESE PRESENTS SHALL COME:

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, Archer, Bailey, Bandera, Baylor, Blanco, Borden, Briscoe, Brooks, Brown, Burnet, Callahan, Cameron, Castro, Childress, Clay, Cochran, Coke, Comal, Concho, Cottle, Crane, Crockett, Crosby, Culberson, Dawson, Dickens, Duval, Eastland, Ector, Fannin, Fisher, Floyd, Foard, Gaines, Garza, Gillespie, Glasscock, Grayson, Hale, Hall, Hardeman, Haskell, Hidalgo, Hockley, Howard, Hudspeth, Irion, Jack, Jeff Davis, Jim Hogg, Jim Wells, Jones, Kendall, Kenedy, Kent, Kerr, Kimble, King, Kleberg, Knox, Lamb, Llano, Loving, Lubbock, Lynn, Martin, Mason, McCulloch, Medina, Menard, Midland, Mitchell, Montague, Motley, Nolan, Nueces, Oldham, Parmer, Presidio, Randall, Reagan, Real, Red River, Runnels, San Saba, Schleicher, Scurry, Shackelford, Starr, Stephens, Sterling, Stonewall, Sutton, Swisher, Taylor, Terrell, Terry, Throckmorton, Tom Green, Upton, Val Verde, Ward, Webb, Wichita, Wilbarger, Willacy, Williamson, Winkler, Wise, Yoakum and Young.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I, LIEUTENANT GOVERNOR DAVID DEWHURST, Acting Governor of the State of Texas, 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 7th day of September, 2012.

David Dewhurst, Lieutenant Governor

Acting Governor

TRD-201204966

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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-1083-GA

Requestor:

The Honorable Isidro R. Alaniz

District Attorney

49th Judicial District

Post Office Box 1343

Laredo, Texas 78042

Re: Whether a member of a governmental body may leave an open meeting to confer privately with the employees of that governmental body (RQ-1083-GA)

Briefs requested by October 24, 2012

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

TRD-201205120
Katherine Cary
General Counsel
Office of the Attorney General
Filed: September 26, 2012

♦ ♦ ♦

Opinions

Opinion No. GA-0969

Raymund A. Paredes, Ph.D.

Commissioner of Higher Education

Texas Higher Education Coordinating Board

Post Office Box 12788

Austin, Texas 78711-2788

Re: Authority of the Texas Higher Education Coordinating Board to promulgate a rule that would permit a veteran who is entitled to two kinds of federal education benefits to be eligible to apply for benefits under section 54.341, Education Code, based upon the federal program to which the veteran opts to apply rather than on the federal program which he or she is entitled to use (RQ-1053-GA)

S U M M A R Y

Under section 54.341 of the Education Code, a court would likely conclude that the Texas Higher Education Coordinating Board has authority to adopt a rule which would allow a veteran applying for the state Hazlewood Act Tuition Exemption who is otherwise entitled to federal Chapter 33 benefits to not first exhaust his or her Chapter 33 benefits.

Opinion No. GA-0970

Mr. Zak Covar

Executive Director

Texas Commission on Environmental Quality

Post Office Box 13087

Austin, Texas 78711-3087

Re: Whether a state agency's demand for restitution based upon an unadjudicated claim for breach of a grant contract constitutes a "debt" to the state for purposes of section 403.055, Government Code (RQ-1054-GA)

S U M M A R Y

The act of sending a letter requesting restitution damages based upon an unadjudicated claim for breach of a grant contract issued under chapter 386 of the Health and Safety Code will not, by itself, establish a debt to the state for purposes of section 403.055 of the Government Code. The Texas Commission on Environmental Quality could establish the existence of a debt to the state if specific contract terms that create an agreement between the state and grantee establish a debt, if the Commission can allege the existence of a debt by statutory reference, or if the Commission can establish the debt by some other lawfully effective means, including a TCEQ internal administrative process that provides the grantee with the requisite due process.

Once the Commission has established a debt to the state and provided grantees with due process, including an opportunity to contest the amount or existence of a contract breach, the Commission may report a person to the comptroller as indebted to the state under Government Code subsection 403.055(f).

Opinion No. GA-0971

The Honorable Russell W. Malm

Midland County Attorney

500 North Loraine, Suite 1101

Midland, Texas 79701

Re: Authority of a county bail bond board with regard to attorneys who execute bail bonds: Clarification of Attorney General Opinion No. GA-0197 (2004) (RQ-1058-GA)

S U M M A R Y

A bail bond board may use a felony conviction to suspend or revoke the authorization granted to an attorney under Occupations Code section 1704.163 only if the conviction resulted from conduct involved with the practice of executing a bail bond or acting as a surety.

If a bail bond board determines that an attorney has committed a felony that may be used to suspend or revoke his or her right to act under Occupations Code section 1704.163, the board would be the appropriate body to determine how the attorney may remedy the felony conviction and whether such remedial action has occurred in a given instance.

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

TRD-201205093
Katherine Cary
General Counsel
Office of the Attorney General
Filed: September 25, 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 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 17. MARKETING AND PROMOTION

The Texas Department of Agriculture (department) proposes amendments to Chapter 17, Subchapter B, §§17.30 - 17.33, concerning the department's livestock facilities, Subchapter C, §§17.51 -17.53, 17.55 - 17.57, 17.59, and 17.60, concerning the GO TEXAN certification and marketing program, and Subchapter D, §17.73, concerning the department's farmers market certification program; new §§17.61 - 17.63, concerning the department's GO TEXAN certification and marketing program; and new Subchapter J, §§17.600 - 17.604, concerning the department's GO TEXAN certified retirement community program, and the repeal of §17.54, concerning denial of applications, and Subchapter J, §§17.600 - 17.610, concerning the GO TEXAN Wildlife Program. The amendments to §§17.30 - 17.33 are proposed to clarify references to the department's export-import facilities, and make those consistent with the Texas Agriculture Code, Chapter 146, Subchapter B. The amendment to the title of Subchapter C, as well as amendments made throughout that subchapter are proposed to correct the terminology used to refer to the GO TEXAN certification mark, previously referred to as the "GO TEXAN and Design Mark." The amendments to §17.51 clarify and add definitions related to the GO TEXAN program. The amendments to §17.52 add a reference to the new §17.63, as well as correct terminology referring to the GO TEXAN certification mark. The amendment to §17.53 incorporates the application denial process defined in §17.54, which is proposed for repeal. The amendments to §17.55 add renewal application procedures for those authorized to utilize the GO TEXAN certification mark. The amendments to §17.56 and §17.59 correct the terminology used to refer to the GO TEXAN certification mark. The amendments to §17.57 clarify persons eligible to qualify for associate GO TEXAN registration, as well as terminology associated with eligible registrants. The amendments to §17.60 outline benefits available to GO TEXAN Restaurant Program registrants, and clarifies requirements to be eligible for the program.

New §17.61 incorporates Subchapter J, GO TEXAN Wildlife Program, which is proposed for repeal, into Subchapter C. New §17.62 creates a new GO TEXAN program for farm and ranch registrants and outlines application and eligibility requirements. New §17.63 defines eligibility for licensing of the GO TEXAN certification mark for commercial use, including definition of application, licensing and royalty fees. The amendments to §17.73 define a minimum percentage of Texas grown products that farmers markets are required to provide, and also makes a grammatical correction. New Subchapter J, GO TEXAN Certified Retirement Community Program, §§17.600 - 17.604, transfers this program from 4 TAC Chapter 29, Subchapter C, to Chapter 17, with no substantive changes made to eligibility requirements or fees.

New §17.62 and §17.63 include provisions related to fees. These fees are necessary to comply with changes made to the funding of the department's marketing program by the 82nd Texas Legislature. The Legislature has required that all of the costs of administering this program be entirely offset by revenue generated for the program and has authorized the agency to collect fees accordingly. In order to meet this Legislative mandate, the department has first reviewed programs for cost savings and efficiencies, then restructured programs, as needed, to provide the best service possible at a reasonable cost to program users. Proposed new §17.62 and §17.63 will authorize fees so that the GO TEXAN program may continue, under the cost recovery requirement imposed by the 82nd Legislature.

Bryan Daniel, Chief Administrator, Trade and Business Development, has determined that for the first five years the amended and new sections and repeals are in effect, there will be fiscal implications for state government as a result of administering or enforcing the proposed new and amended sections in Subchapter C, due to the collection of application, license and royalty fees for program participation in the GO TEXAN promotional marketing program. It is not possible to determine the amount of revenue applications, license agreements and royalty fees will generate. Applicants to the new Farm and Ranch Program established under §17.62 will pay a fee based upon the level of membership, with fees ranging from $100 to $5,000. Applicants for a license to use the GO TEXAN certification mark under §17.63 will pay an application fee of $35, and upon approval of an application, will pay a $250 licensing fee. In addition, a licensee will pay a royalty fee of 3.0 percent of annual gross receipts from the sale of licensed products in excess of $5,000. The charging of fees is necessary to enable the continued operation of a leaner, cost-efficient program due to a new Legislative requirement that this program generate revenue to completely offset its costs. The ability of the department to provide a quality program will be impacted if the department does not assess a fee that recovers the full cost of the program. There will be no fiscal implications for local government.

Mr. Daniel has also determined that for each year of the first five years the proposed amended and new sections are in effect, the public benefit anticipated as a result of enforcing the amended and new sections will be increased recognition of the GO TEXAN certification mark through additional outreach methods and an increase in consumption of Texas agricultural products through the continuation of the GO TEXAN Program. There will be a cost to individuals, small and micro-businesses that choose to partic-

ipate in the department's GO TEXAN programs. Applicants to the new Farm and Ranch Program established under §17.62 will pay a fee based upon the level of membership, with fees ranging from $100 to $5,000. Applicants for a license to use the GO TEXAN certification mark under §17.63 will pay an application fee of $35, and upon approval of an application, will pay a $250 licensing fee. In addition, a licensee will pay a royalty fee of 3.0 percent of annual gross receipts from the sale of licensed products in excess of $5,000.

Comments on the proposal may be submitted to Bryan Daniel, Chief Administrator, Trade and Business Development, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

SUBCHAPTER B. LIVESTOCK FACILITIES

4 TAC §§17.30 - 17.33

The amendments to §§17.30 - 17.33 are proposed pursuant to the Texas Agriculture Code (the Code), §146.021, which provides the department with the authority to operate livestock facilities to receive and hold for processing animals and animal products transported in international trade and establish and collect reasonable fees for yardage, maintenance, feed, medical care, facility use, and other necessary expenses incurred in the course of processing those animals; and the Code, §12.016, which provides the department with the authority to adopts rules as necessary to administer its duties under the Code.

The code affected by the proposal is the Texas Agriculture Code Chapters 12 and 46.

§17.30. Purpose and Definitions.

(a) Purpose. The purpose of these rules is to ensure that the animals at the Texas Department of Agriculture livestock [~~export~~] facilities are secured in quarters that meet the requirements and guidelines established by the United States Department of Agriculture and the receiving country.

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

(1) (No change.)

(2) Livestock [~~export~~] facilities--The Texas Department of Agriculture livestock export, import, inspection and processing facilities located in Brownsville, El Paso, Houston, [~~Del Rio,~~] Eagle Pass, and Laredo.

(3) Consignor--Owner, broker, or other person consigning livestock to the livestock [~~export~~] facilities or otherwise engaging the services of the facilities.

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

§17.31. Operation of Livestock [~~Export~~] Facilities.

(a) Any service or use of the livestock [~~export~~] facilities not clearly or specifically described in this section shall be subject to agreement between each facility manager and each consignor prior to implementation, and shall be subject to the policies of the department and the State of Texas.

(b) Selling, buying, bargaining, trading, or change of ownership of livestock is strictly forbidden on the premises of the livestock [~~export~~] facilities. However, the department may utilize the facilities for official departmental livestock marketing functions.

(c) Livestock [~~export~~] facilities will not supply feed. The consignor may provide his own feed or may make arrangements with a local feed supplier. The consignor shall be solely responsible for payment for feed. Labor for the feeding of livestock at the facilities will be furnished by the department at no additional charge. If the consignor fails to provide feed for his livestock, the livestock [~~export~~] facility may obtain feed on behalf of the consignor and the consignor shall reimburse the facility for all expenses incurred in obtaining the feed.

(d) The following schedule of fees applies to all livestock [~~export~~] facilities with the exception of the Houston facility. Scheduled fees include necessary water, pen space and necessary labor for feeding of livestock and assisting in conducting any inspections requested. Stall space, bedding, hay, feed, spray, and any overtime fees or wages are not included in the fee schedule. Stalls are available on a first-come, first-served basis. The cost of stalls is $20 per head for the first 24 hours and $20 per head for each additional 24 hours. For horses, mules, cattle and calves, except feeder/slaughter cattle: first 24 hours or fraction thereof: $5.00; each 24 hours thereafter: $8.00. For breeding sheep and goats: first 24 hours or fraction thereof: $2.00; each 24 hours thereafter: $3.50. For breeding hogs: first 24 hours or fraction thereof: $3.00; each 24 hours thereafter: $4.50. For feeder/slaughter sheep and goats: first 24 hours or fraction thereof: $1.00; each 24 hours thereafter: $1.00. For feeder/slaughter hogs: first 24 hours or fraction thereof: $2.00; each 24 hours thereafter: $2.00. For feeder/slaughter cattle: first 24 hours or fraction thereof: $3.00; each 24 hours thereafter: $3.00. For poultry: first 24 hours or fraction thereof: $2.50; each 24 hours thereafter: $2.50. For baby chicks or fertile eggs: first 24 hours or fraction thereof: $50 per load; each 24 hours thereafter: $50. For exotic livestock or exotic fowl: first 24 hours or fraction thereof: $5.00; each 24 hours thereafter: $5.00.

(e) The following schedule of fees applies to the Houston livestock [~~export~~] facility only. Scheduled fees include necessary water, pen space and necessary labor for feeding of livestock and assisting in conducting any inspections requested. Stall space, bedding, hay, feed, spray, and any overtime fees or wages are not included in the fee schedule. Stalls are available on a first-come, first-served basis. The cost of stalls is $40 per head for the first 24 hours and $40 per head for each additional 24 hours. For cattle, horses and mules: first 24 hours or fraction thereof: $10; each 24 hours thereafter: $10. For sheep, goats and hogs: first 24 hours or fraction thereof: $5.00; each 24 hours thereafter: $5.00. For poultry: first 24 hours or fraction thereof: $2.50; each 24 hours thereafter: $2.50. For baby chicks or fertile eggs: first 24 hours or fraction thereof: $50 per load; each 24 hours thereafter: $50. For exotic livestock or exotic fowl: first 24 hours or fraction thereof: $10; each 24 hours thereafter: $10.

(f) (No change.)

(g) At the request of the consignor, the livestock [~~export~~] facility may detain the consignor's livestock at the facility until such time as the consignor authorizes their release.

(h) (No change.)

(i) The consignor of the livestock shall be responsible for the outcome of inspections and any injuries or damages incidental to such inspections or use of the services, quarters, or grounds of the livestock [~~export~~] facilities.

(j) Pursuant to the Texas Agriculture Code, §146.024 [~~146.024 (Vernon's 1982)~~], livestock or other animals left in the livestock [~~export~~] facilities for longer than 30 calendar days may be sold at public auction to satisfy any unpaid fees or other indebtedness to the department and private suppliers.

(k) Fees are due and payable at the conclusion of each permitted transaction. Payment by certified check or money order may be required of any user whose previous payment by check has been returned due to insufficient funds. Users who are in default of payment to the facilities may be denied use of the facilities until such time as all outstanding fees have been paid in full. For purposes of this section, a permitted transaction may include the importation or exportation of one or more loads of livestock through the department's facilities by one or more consignors during a one-week period.

(l) (No change.)

§17.32. Hours of Operation of Livestock [~~Export~~] Facilities.

(a) Business hours. Business hours for the livestock [~~export~~] facilities shall be from 8 a.m. until 5 p.m. Monday through Friday, except for official state and federal holidays. When necessary, livestock [~~export~~] facility managers may, at their discretion, alter these normal hours of operation. If deemed necessary by the department, livestock [~~export~~] facilities located along the Texas-Mexico border may remain open on certain state or national holidays. Consequently, the facilities may close on official Mexican holidays.

(b) Special arrangements. Arrangements for receiving, shipping, handling, or feeding of livestock during times other than normal working hours must be made with the respective livestock [~~export~~] facility manager or office manager prior to 4 p.m. on normal work days, Monday through Friday, exclusive of holidays. Requests for operation of facilities during nonbusiness hours shall be made at least 24 hours in advance.

(c) Operations during nonbusiness hours. Consignors who use the livestock [~~export~~] facilities at times other than the business hours provided in subsection (a) of this section shall be assessed a surcharge consisting of $50 per shipment plus $10 per departmental employee per hour or portion of an hour that is worked during the nonbusiness hours. The surcharge established by this subsection is not applicable to the Houston livestock [~~export~~] facility.

§17.33. Access to Livestock [~~Export~~] Facilities.

(a) General public. Users of the livestock [~~export~~] facilities are permitted to operate their motor vehicles and livestock trailers in the facility parking and loading/unloading areas. These persons may also use the facility waiting areas and rest rooms. Due to safety and security concerns, non-employees are forbidden from entering all other areas of the livestock [~~export~~] facilities, including livestock holding pens, lanes, and chutes, as well as all inside office and storage areas. Anyone seeking access to the inside offices, livestock holding pens, lanes, and chutes must obtain the approval of, or be accompanied by a facility employee.

(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.

Filed with the Office of the Secretary of State on September 21, 2012.

TRD-201205000
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 463-4075

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SUBCHAPTER C. GO TEXAN CERTIFICATION MARK

4 TAC §§17.51 - 17.53, 17.55 - 17.57, 17.59 - 17.63

The amendments to §§17.51 - 17.53, 17.55 - 17.57, 17.59, 17.60, and new 17.61 - 17.63 are proposed pursuant to the Texas Agriculture Code, §12.0175, which provides the department with authority to establish programs by rule to promote and market agricultural products and other products grown, processed, or produced in the state, and charge a membership fee, as provided by department rule, for each participant in a program, and adopt rules to administer a program established under §12.0175, and §12.031, as amended by Senate Bill 1086, 82nd Legislature, 2011, which provides the department with the authority to assess and collect fees or royalties on department-owned registered certification marks and to collect event fees or royalties for marketing and promotional activities authorized by §12.0175.

The code affected by the proposal is the Texas Agriculture Code Chapter 12.

§17.51. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. For purposes of this subchapter, the department shall have the sole discretion to determine whether a product meets the qualifications defined in this section.

(1) Associate GO TEXAN Registrants [~~members/licensees~~]--Persons who apply and are granted limited use of the mark by the department for assistance in the promotion and implementation of the GO TEXAN program.

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

(5) Fishing--The act or sport of capturing fish.

(6) [~~(5)~~] Food--Agricultural products produced or processed in Texas for human consumption.

(7) Genetics--The business, engineering, and science of cloning, creating, harvesting, implanting, manipulating, marketing, producing, researching, or selling animal eggs, embryos, genes, genetic characteristics, or semen.

(8) [~~(6)~~] GO TEXAN Certification [~~and Design~~] mark--The GO TEXAN certification [~~and Design~~] mark is a certification mark that is registered with the United States Patent and Trademark Office and the Texas Secretary of State's office by the department.
Figure: 4 TAC §17.51(8)
[~~Figure: 4 TAC §17.51(6)~~]

(9) [~~(7)~~] GO TEXAN Restaurant Program--A program, as defined in §17.60 of this title (relating to GO TEXAN Restaurant Program) established by the department to allow Texas restaurants to participate in the GO TEXAN marketing program.

~~[(A) Permitted restaurant establishments that:]~~

~~*[(i)* provide restaurant service;]~~

~~*[(ii)* are located in Texas;]~~

~~*[(iii)* are permitted in accordance with all state and local laws and regulations; and]~~

~~*[(iv)* are using and/or serving Texas agriculture products.]~~

[~~(B) Persons who apply are granted use of the mark for the promotion and assistance of the GO TEXAN program.~~]

(10) [~~(8)~~] Horticulture products--Nursery, floral and greenhouse plants or plant products produced in Texas from seeds, rootings, cuttings, tissue cultures, seedlings or other propagation materials. Non-Texas plants being produced for such a period during which they are transplanted or increased in plant size and volume of container. Texas and non-Texas produced plant-based horticulture products processed in Texas.

(11) Hunting--The capturing or harvesting of wildlife.

(12) [~~(9)~~] Livestock feed, feed supplements and pet food--Agricultural products produced or processed in Texas for animal consumption.

(13) Mobile food establishment--A vehicle mounted food establishment that is readily moveable that meets the requirements set forth in Title 25, Part 1, Chapter 229, Subchapter K, §229.169 of the Texas Administrative Code (relating to Mobile Food Establishments).

(14) [~~(10)~~] Natural fibers--Fibers which have been produced from Texas crops or shorn from Texas livestock, and which are used in textiles, apparel, and other goods. The term "natural fibers" also includes leather made from the hides of animals and reptiles.

(15) [~~(11)~~] Natural woods--Forestry products produced from Texas hardwood and softwood timber and may include, but not be limited to, furniture, home furnishings, building construction materials, pulp and paper.

(16) [~~(12)~~] Other Products--

(A) Any product produced in Texas which is not a Texas agricultural product, as defined in paragraph (24) [~~(19)~~] of this section, but is:

(i) produced, manufactured, constructed or created within the state; or

(ii) is processed within the state such that it has been altered by a mechanical or physical value-added procedure in Texas to change or add to its physical characteristics; and

(iii) such product enhances the GO TEXAN program;

(B) Products described in subparagraph (A) of this paragraph which are produced in Texas, but processed outside of Texas do not meet GO TEXAN program requirements, unless facilities for processing are not reasonably available in Texas.

(C) For purposes of this subchapter, the department shall have the sole discretion to determine whether a product qualifies as being an "other product" or processed other product and shall have the sole discretion to determine whether a product enhances the GO TEXAN program.

[~~(13) Person--An individual, firm, partnership, corporation, governmental entity, or association of individuals.~~]

(17) [~~(14)~~] Processed food product--Non-Texas agricultural food product which has undergone a value-added procedure in Texas to change or add to its physical characteristics, including, but not limited to, cooking, baking, heating, drying, mixing, grinding, churning, separating, extracting, cutting, fermenting, distilling, eviscerating, preserving, or dehydrating. [~~For purposes of this subchapter, the department shall have the sole discretion to determine whether a product qualifies as being a processed food product.~~]

(18) [~~(15)~~] Processed natural fiber or natural wood product--Non-Texas raw, natural fiber or natural wood which has undergone mechanical or physical changes in Texas resulting in a finished, distinct product. [~~For purposes of this subchapter, the department shall have the sole discretion to determine whether a product qualifies as being a processed natural fiber and wood product.~~]

(19) [~~(16)~~] Produced in Texas--An agricultural product is produced in Texas if:

(A) the agricultural product is grown, raised, nurtured, sown, or cultivated within the state; or

(B) the agricultural product has been altered by a mechanical or physical value-added procedure in Texas to change or add to its physical characteristics.

(C) Products produced in Texas, but processed out of Texas do not meet GO TEXAN program requirements, unless facilities for processing are not reasonably available in Texas.

(20) [~~(17)~~] Producer--Any person who:

(A) produces agricultural product(s) grown, raised, nurtured, sown, or cultivated in the State of Texas;

(B) produces Texas processed agricultural product(s); or

(C) produces Texas product(s) that is/are not processed outside of Texas, unless facilities for processing are not reasonably available in Texas.

(21) Registrant--A person in good standing with the department who is authorized to use the GO TEXAN certification mark for the purpose of verifying their product or service as grown, produced, manufactured or provided in Texas.

(22) Restaurant--An operation that stores, prepares, serves, vends, or otherwise provides food for human consumption, such as a restaurant, satellite or catered feeding location; or mobile food establishment. Restaurant registrants do not include:

(A) any establishment that offers only prepackaged foods;

(B) a produce stand that only offers whole, uncut fresh fruits and vegetables;

(C) a food processing plant;

(D) a kitchen in a private home if prepared for sale or service at a function such as a religious or charitable organization's bake sale; or

(E) a bed and breakfast.

(23) [~~(18)~~] Texas processed agricultural product--Non-Texas agricultural product, excluding processed food product and processed natural wood and natural fiber product, which has undergone a value added procedure in Texas that changes or adds to its physical characteristics. [~~For purposes of this subchapter, the department shall have the sole discretion to determine whether a product qualifies as being a Texas processed agricultural product.~~]

(24) [~~(19)~~] Texas agricultural product--An agricultural, apicultural horticultural, silvicultural, viticultural, or vegetable product, either in its natural or processed state, that has been produced, processed, or otherwise had value added to the product in this state, including:

(A) equine species;

(B) feed for use by livestock or poultry;

(C) fish or other aquatic species;

(D) livestock, a livestock product, or a livestock by-product;

(E) planting seed;

(F) poultry, a poultry product, or a poultry by-product; or

(G) wildlife processed for food or by-products.

§17.52. Application for Registration to Use the GO TEXAN Certification [and Design] Mark.

(a) No person shall use, employ, adopt, or utilize the GO TEXAN certification [and Design] mark, unless prior application for registration [or licensing] has been made to the department and permission [to make such use, employment, adoption, or utilization] has been granted. In addition to any other fee that may be assessed under this chapter, the department may assess a fee or royalty as described in §17.63 of this title (relating to Licensing of the GO TEXAN Certification Mark) for use of the GO TEXAN certification mark.

(b) Unless permission is otherwise granted by the department, the GO TEXAN certification [and Design] mark may only be used by registrants [and licensees] to certify and promote the following Texas [agricultural] products:

(1) (No change.)

(2) agricultural food products processed in Texas, regardless of origin, and unprocessed agricultural food products grown in Texas. A food service company, excluding restaurants, is not eligible for membership unless it processes a packaged product for resale, in which case, the mark may only be used to promote the specific program-eligible products. Food service companies may not use the mark [in any general fashion] to promote the approved business or its services in a manner that would mislead consumers to believe it was a GO TEXAN member;

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

(5) leather, textile, or apparel products approved by the department [commissioner] as being:

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

(6) (No change.)

(7) meat(s). In order to be certified as "GO TEXAN", meat(s), applicants must meet the following criteria:

(A) Livestock or exotic animals must [Beef. Must be from cattle that] have been born, raised, fed, slaughtered and/or fabricated in Texas.

[(B) Lamb and goat. Must be from sheep or goats that have been born, raised, fed, slaughtered and/or fabricated in Texas.]

[(C) Pork. Must be from domesticated swine that have been born, raised, fed, slaughtered and/or fabricated in Texas.]

[(D) Poultry. Must be from poultry that have been born, raised, slaughtered and/or fabricated in Texas.]

[(E) Exotics. Must be from exotic animals that have been born, raised, fed, slaughtered and/or fabricated in Texas.]

(B) [(F)] For purposes of this paragraph, "fabricated" shall be defined as the process of taking a carcass and cutting the carcass into wholesale or retail cuts of meat.

(8) - (15) (No change.)

(16) Texas processed agricultural product(s); [and]

(17) Texas restaurants as provided for in §17.60 of this title (relating to GO TEXAN Restaurant Program);[.]

(18) other products produced, manufactured, constructed or created within the state; or processed within the state as described in §17.51 of this title; and

(19) wildlife services as described in §17.61 of this title (relating to GO TEXAN Wildlife Program).

(c) Applications submitted under this section shall be made in writing on a form prescribed by the department. Application forms may be obtained by contacting the Texas Department of Agriculture Marketing and International Trade Section [Promotion Division] at P.O. Box 12076 [12847], Austin, Texas 78711, phone (512) 463-7624.

(d) Applications shall be submitted to: [the assistant commissioner for] Marketing and International Trade Section [Promotion], Texas Department of Agriculture, P.O. Box 12076 [12847], Austin, Texas 78711; or electronically, as prescribed by the department.

(e) Applications will not be processed without [If approved, applicants shall remit] the required registration fee [with the application].

(f) Upon approval of the application [receipt of the registration fee], the department shall provide [mail to] the registrant [or licensee] a certificate of registration, which is valid for one year and shall expire on the last day of the month corresponding to the license anniversary date. The department shall also provide copies of the mark, suitable for reproduction, upon request of the registrant.

(g) Other than the authorized use of the mark, no registrant [or licensee] shall use any statement of affiliation or endorsement by the State of Texas or the department in the selling, advertising, marketing, packaging, or other commercial handling of GO TEXAN products and services, or operation of [operating] GO TEXAN restaurants.

(h) Registrants [and licensees] shall indemnify and hold harmless the commissioner, the State of Texas, and the department for any claims, losses, or damages arising out of or in connection with that person's advertising, marketing, packaging, manufacture, or other commercial handling of GO TEXAN products and services, or the operation of restaurants.

(i) (No change.)

(j) Registrants shall do nothing inconsistent with the ownership of the mark in the department, and all use of the mark by any registrant shall inure to the benefit of and be on behalf of the department. Further the registrants shall not have any right, title, or interest in the mark, other than the right to use the mark as authorized in accordance with the certificate of registration. Registrants waive the right to attack [must agree not to attack the title of] the department's ownership, use of and permissions granted by the department associated with [department to] the mark[, or attack the validity of the certificate of registration or the permission granted by the department].

(k) The nature and quality of the goods sold by registrants in connection with the mark shall conform to any standards which are [may be] set [from time to time] by the department. Registrants shall cooperate with the department [commissioner] by permitting reasonable inspection of the registrant's operation and promptly supplying the department [commissioner] with specimens of use of the mark upon request. Registrants shall not use the mark on goods sold or marketed as products from another country or state, or as products from a city or region outside of Texas, unless prior written authorization is received from the department.

(l) Registrants [~~and licensees~~] shall comply with all applicable laws and regulations and obtain all appropriate governmental approval pertaining to the selling, advertising, marketing, packaging, manufacturing, or other commercial handling of the products or operation of restaurants covered by the certification of registration.

(m) Registrants shall use the mark only in the form and manner, and with appropriate legends, as prescribed [~~from time to time~~] by the department [~~commissioner~~].

(n) The department shall have the sole right and discretion to bring infringement or unfair competition proceedings involving the GO TEXAN certification [~~and Design~~] mark. Failure to bring proceedings does not constitute a waiver of the department's rights and does not preclude all other available legal actions.

(o) The department may consider in its evaluation of an applicant or registrant any information regarding an applicant or member that could impair the department's efforts to promote the development of markets for Texas agriculture and other products. This includes information that the product may not enhance the integrity and positive image of the program, including, but not limited to, a review of the applicant's criminal background, as authorized by applicable laws and regulations.

[~~(p) The consideration of information as provided in subsection (o) of this section may include consideration of any information that may not enhance the integrity and positive image of the program, including, but not limited to, a review of criminal information, as allowed by applicable laws and regulations.~~]

§17.53. Action on Application.

(a) Application. Within [~~The assistant commissioner for Marketing and Promotion, Texas Department of Agriculture, within~~] 30 days of receipt of an application for registration , the department [~~or license to use the GO TEXAN and Design mark,~~] shall make an initial determination of whether such registration permission shall be granted or denied, and notify the applicant in writing [~~of his decision~~]. If the applicant is denied registration, then the applicant shall be provided a reason for such denial.

(b) Denial. An application or renewal of registration to use the GO TEXAN certification mark may be denied if:

(1) application is not made in compliance with §17.52 of this title (relating to Application for Registration to Use the GO TEXAN Certification Mark);

(2) the applicant cannot provide adequate assurances that the product, service or restaurant for which application is made qualifies and will continue to qualify for the program(s) in which it is enrolled;

(3) the product is of a quality markedly inferior to that representative of similar products produced in Texas;

(4) the applicant has misused the GO TEXAN certification mark prior to the date of application; or

(5) applicant's use of the GO TEXAN certification mark would either:

(A) impair or frustrate the department's efforts to expand or encourage development of the markets for Texas agricultural and other products; or

(B) fail to enhance the integrity and image of the program, as determined by the department; or

(6) it has been determined not to be in accordance with department policy.

(c) [~~(b)~~] Appeal. If the applicant wishes to contest such initial determination, notice of protest shall be filed by the applicant with the department [~~commissioner~~] within 15 days of receipt by the applicant of notice of such initial determination. The date of notification is the date the notice was mailed by first class mail or sent electronically to the applicant. Should notice of protest be timely filed, the applicant's request shall be administered as a contested case as provided for the Administrative Procedure Act, Texas Government Code, Chapter 2001, and Chapter 1 of this title (relating to General Procedures [~~Practice and Procedure~~]).

(d) [~~(c)~~] Failure to file Notice of Protest. If notice of protest has not been filed with the department [~~commissioner~~] within 15 days of receipt by the applicant of notice of such initial determination, such initial determination shall become final.

§17.55. Registration and [~~of Those Entitled to~~] Use of the GO TEXAN Certification [~~and Design~~] Mark.

[~~(a) The commissioner shall enroll in a register the names of all persons granted permission under these sections to use the GO TEXAN and Design mark. The register shall be available for public inspection during normal business hours in the offices of the Texas Department of Agriculture, 1700 North Congress Avenue, Austin, Texas.~~]

[~~(b) The procedure for annual renewal of registration of persons authorized to use the GO TEXAN and Design mark is as follows:~~]

[~~(1) Forty-five days before the expiration date of the registration, the department shall mail to each person previously registered or licensed to use the GO TEXAN and Design mark a statement setting forth the amount due as an annual registration fee.~~]

[~~(2) All payments are due by the expiration date of the registration.~~]

[~~(3) Within 30 days of receipt by the department of the renewal statement, together with the annual registration fee, the department will mail to the registrant a renewal certificate of registration.~~]

[~~(4) Failure to remit the annual registration fee by the due date shall result in the registrant being designated as inactive. Failure to remit the annual registration fee within 366 days of the due date shall result in the expiration of the registration and a new application for membership will be required for re-instatement to the program.~~]

(a) [~~(c)~~] Membership. An annual fee for registration in the GO TEXAN [~~GO TEXAN, GO TEXAN Associate and/or GO TEXAN Restaurant~~] program shall be paid to the department. Applicants may select from three different levels of membership. Annual fees and benefits for each level of membership are described in paragraphs (1) - (3) of this subsection. The department may, in its sole discretion, from time to time, revise or update the benefits for each level of membership. All benefits are subject to continued authorization and appropriation of the program by the Texas Legislature.

(1) Tier 1 - $100. Benefits for this membership level include licensed use of the GO TEXAN certification mark and listing in GO TEXAN program databases [~~a searchable database of GO TEXAN program members~~].

(2) Tier 2 - $500. Benefits for this membership level include all the benefits provided for Tier 1 members, plus listing in relevant [~~applicable~~] GO TEXAN [~~electronic resources, smartphone applications or~~] publications provided by the department; up to three hours of marketing or advertising consulting services by department staff; eligibility for participation in the department's GO TEXAN Partner Program; [~~and~~] discounts on GO TEXAN program merchandise; enrollment of additional GO TEXAN restaurant locations under the same name at no additional charge.

(3) Tier 3 - $1,000. Benefits for this membership level include all the benefits provided for Tier 2 members, plus increased discounts on GO TEXAN program merchandise, membership award/plaque to denote program participation and display of a company graphic on the GO TEXAN website.

(4) [~~(d)~~] GO TEXAN program members may also participate as sponsors in the program. Sponsorship levels begin at $5,000 and include all benefits available to Tier 3 members, set out in paragraph [~~subsection (c)~~] (3) of this subsection [~~section~~], plus additional benefits that may be provided for in a sponsorship agreement between the GO TEXAN program member and applicant.

(b) Renewal. The procedure for annual renewal of registration of persons authorized to use the GO TEXAN certification mark is as follows.

(1) Thirty days before the expiration date of the registration, the department shall send each person previously registered to use the GO TEXAN certification mark a statement of the amount due as an annual registration fee.

(2) All payments are due by the expiration date of the registration.

(3) After receipt of the renewal and annual fee, the department will send an approved registrant a certificate of registration.

(4) Failure to remit the annual registration fee by the due date shall result in the registrant being designated as inactive. Failure to remit the annual registration fee within 366 days of the due date shall result in the expiration of the registration and a new application for membership will be required for re-instatement to the program.

(c) Limited use restrictions.

(1) Registrant shall be granted a limited, non-exclusive license to use the mark solely in conjunction with the reproduction, display, advertisement and promotion for which registrant has applied, within the United States, for the registration period.

(2) Registrant will immediately cease use of the certification mark upon the expiration of the registration period, unless an application for renewal has been submitted to and approved by the department.

(3) Registrant's proposed use shall be subject to review and acceptance by the Department.

(4) Upon request, registrant shall promptly furnish the department a sample of any material bearing the mark, including but not limited to all advertising, promotional, and display materials, at no charge, for the department's written approval prior to any use thereof.

(5) Registrant's authorized use shall be of high standard that promotes the goodwill and reputation of the program and the department.

(6) As required by the department, registrant shall affix on all items utilized in the authorized use, appropriate legal notices, as follows: "GO TEXAN is a certification mark of, and is used with permission from the Texas Department of Agriculture".

(7) Registrant's authorization to use the certification mark, shall not be construed to grant or assign any right, title or interest in or to the mark or the goodwill attached thereto.

(8) Any and all use of the mark by registrant as allowed under program rules shall inure solely to the benefit of the department.

(d) List of Registrants. A list of registrants and available contact information may be found on the program website at www.gotexan.org.

§17.56. Termination of Registration To Use the GO TEXAN Certification [~~and Design~~] Mark.

(a) Registration to use the GO TEXAN certification [~~and Design~~] mark may be revoked at any time if the mark is misused, as determined by the department.

(b) Misuse of the GO TEXAN certification [~~and Design~~] mark includes, but is not limited to:

(1) (No change.)

(2) use of the mark in the selling, advertising, marketing, packaging, or other commercial handling of a product which is of a quality markedly inferior to that representative of similar products produced in Texas; [~~or~~]

(3) use of the mark that would either:

(A) (No change.)

(B) fail to enhance the integrity and image of the program, as determined by the department; or

(4) use of the mark in a manner violating any rule promulgated by the department [~~commissioner~~].

(c) Proceedings for the revocation of registration to use the GO TEXAN certification [~~and Design~~] mark shall be conducted in the manner provided for contested cases by the Administrative Procedure Act, Texas Government Code, Chapter 2001, and Chapter 1 of this title (relating to General Procedures [~~Practice and Procedure~~]).

(d) A proceeding for revocation of registration to use the GO TEXAN certification [~~and Design~~] mark shall not preclude the commissioner from pursuing any other remedies, including, where applicable, the penal and injunctive remedies provided for by law.

§17.57. Associate GO TEXAN Registrants [~~Members~~].

(a) Statement of purpose; Applicability. This section authorizes retailers, qualified livestock shows, distributors, communities and other entities to become associate GO TEXAN members and assist the department with the promotion and implementation of the GO TEXAN program. [~~The Associate GO TEXAN Member Program is established to provide a marketing program that allows persons interested in assisting the department with the promotion and implementation of the GO TEXAN program use of the Texas Department of Agriculture's GO TEXAN and Design mark only on promotional items that meet standards and rules. In addition to the certification of retailers to use the GO TEXAN and Design mark in their efforts to promote the program, this section provides that livestock shows, distributors, and other entities may be certified as associate GO TEXAN members if they meet requirements of this section.~~]

(b) Application process.

(1) Application to use the GO TEXAN certification [~~and Design~~] mark in accordance with this section, shall be made in the same manner as provided in §17.52 of this title (relating to Application for Registration To Use the GO TEXAN Certification [~~and Design~~] Mark).

(2) (No change.)

(c) Eligibility Requirements and Registrant [~~Membership~~] Categories.

(1) Eligibility requirements. All retailers, livestock shows, distributors and other entities [~~meeting the requirements of the Texas~~

Agriculture Code (the Code), §46.004, and administrative rules promulgated to implement Chapter 46 of the Code,] interested in assisting the department with the promotion and implementation of the GO TEXAN program may apply for Associate GO TEXAN membership.

(2) Limitations. [Licensees granted] Associate GO TEXAN Registrants [membership,] shall only use the mark for the limited purpose stated in the certificate of registration. Use of the mark by Associate GO TEXAN registrants [members] is limited to general promotion of the GO TEXAN program and use is subject to department rules.

(3) Livestock Shows and Festivals. A registrant's [licensee's] use of the mark is limited to promotion of the GO TEXAN program at livestock shows and festivals in Texas that promote Texas agricultural products.[;]

(4) Retailer. A registrant's [licensee's] use of the mark is limited to general promotion of GO TEXAN products as defined in §17.51 and §17.52 of this title (relating to Definitions and Application for Registration To Use the GO TEXAN Certification [and Design] Mark) in its retail locations.[;]

[(5) Equine-related Entities. A licensee's use of the mark is limited to promotional activities for equine species.]

(5) [(6)] Other entities. A registrant's [licensee's] use of the mark is limited to promotion of [the entity's specific commodity(ies) or] the [general] GO TEXAN program, products, and members.

(6) [(7)] Distributors. A registrant's [licensee's] use of the mark is limited to the promotion of GO TEXAN members' products or the general promotion of GO TEXAN products, as defined in §17.51 and §17.52 of this title.

[(d) Limited use restrictions.]

[(1) licensee shall be granted a limited, non-exclusive license to use the mark solely in conjunction with the reproduction, display, advertisement and promotion for which licensee has applied, within the United States, on the date(s) which licensee specified in the application;]

[(2) licensee shall furnish the department a sample of any material bearing the mark, including but not limited to all advertising, promotional, and display materials, at no charge, for the department's written approval prior to any use thereof;]

[(3) licensee's licensed use shall be of high standard;]

[(4) licensee shall affix on all items utilized in the licensed use, appropriate legal notices, as follows: GO TEXAN and Design is a certification mark of, and is used under license from, the Texas Department of Agriculture;]

[(5) licensee's license to use, shall not be construed to grant or assign any right, title or interest in or to the mark or the goodwill attached thereto;]

[(6) any and all use of the mark by registrant as allowed under program rules shall inure solely to the benefit of the department.]

(d) [(e)] Printers and media. Printers' and media companies' use of the mark is limited to reproduction of the mark for use by current program members on their approved products. Printers and media companies are not eligible for the GO TEXAN Partner Program as associate members. A printer may be eligible for GO TEXAN membership if it creates original works produced in Texas; or Associate membership if the printer can demonstrate its desire and ability to assist the promotion of the GO TEXAN program and its members.

§17.59. Non-Agricultural Member; Other Products; Products Produced in this State.

(a) Permission to use the GO TEXAN certification [and Design] mark. Permission to use the GO TEXAN certification [and Design] mark may be granted by the Department to registrants and licensees who have been properly certified as a "Non-Agricultural Member" to promote Texas "Other Products", as defined in §17.51 of this title (relating to Definitions).

(b) Application process:

(1) Application to use the GO TEXAN certification [and Design] mark in accordance with this section, shall be made in the same manner as provided in §17.52 of this title (relating to Application for Registration to [To] Use the GO TEXAN Certification [and Design] Mark).

(2) (No change.)

[(c) Eligibility Requirements and Limited Use Restrictions:]

[(1) licensees granted use of the GO TEXAN and Design mark under this section shall only use the mark for the limited purpose stated in the certificate of registration. Use of the mark is limited and use is subject to department rules.]

[(2) licensee shall be granted a limited, non-exclusive license to use the mark solely in conjunction with the reproduction, display, advertisement and promotion associated with the product for which licensee has applied, within the United States, on the date(s) which licensee specified in the application;]

[(3) licensee shall furnish the department a sample of any material bearing the mark, including but not limited to all advertising, promotional, and display materials, at no charge, for the department's written approval prior to any use thereof;]

[(4) licensee's proposed licensed use shall be subject to review and acceptance by the Department;]

[(5) licensee shall affix on all items utilized in the licensed use, appropriate legal notices, as follows: GO TEXAN and Design is a certification mark of, and is used under license from, the Texas Department of Agriculture;]

[(6) licensee's license to use, shall not be construed to grant or assign any right, title or interest in or to the mark or the goodwill attached thereto; and]

[(7) any and all use of the mark by registrant as allowed under program rules shall inure solely to the benefit of the department.]

(c) [(d)] Eligibility for Participation in the GO TEXAN Partner Program. Registrants [and licensees] admitted into the GO TEXAN [membership] program under this section are not eligible to receive GO TEXAN Partner Program grant funds.

§17.60. GO TEXAN Restaurant Program.

(a) (No change.)

(b) Restaurant Requirements: To be eligible for the GO TEXAN Restaurant Program, members shall meet and agree to the following requirements:

(1) Restaurant members must [shall purchase and] use product(s) made, grown, processed or value added in Texas, and whenever possible, should use [as well as] products produced by GO TEXAN members. If a restaurant does not purchase or use product(s) made, grown, processed or value added in Texas, the restaurant's GO TEXAN membership will be revoked and the restaurant will not be allowed to participate in the program.

[(2) Restaurant members must complete and submit the annual GO TEXAN survey.]

(2) [(3)] Restaurant must be a [permitted] food establishment or mobile food establishment located in Texas permitted and conducting business [providing restaurant service located in Texas that is permitted] in accordance with all federal, state and local laws pertaining to [and] restaurant or food service operations [regulations].

[(c) Restaurants headquartered out of state must have a place of business with a Texas address to be considered eligible for GO TEXAN Restaurant Program membership.]

(c) [(d)] Display of GO TEXAN Restaurant Program Items:

(1) Restaurant members may post their [membership] certificate of registration to give notice that their establishment is an official GO TEXAN Restaurant member.

(2) Restaurant members shall, whenever possible, display, advertise and promote product(s) made, grown, processed or value added in Texas to consumers within the restaurant. Texas Department of Agriculture will provide a copy of the GO TEXAN certification mark [logo] for use in promotion of the Texas restaurant establishment , upon request.

(d) [(e)] Application Process:

(1) Application to use the GO TEXAN certification [and Design] mark in accordance with this section shall be made in the same manner as provided in §17.52 of this title (relating to Application for Registration to Use the GO TEXAN Certification [and Design] Mark).

(2) Applicants must certify on the application that all applicable GO TEXAN Restaurant Program requirements are met.

(3) Except as otherwise provided in this section, all requirements for eligibility [membership] in the general GO TEXAN program shall apply to restaurants registered [certified] under this section.

(4) An applicant must submit a GO TEXAN Restaurant Program [Member] application and an annual GO TEXAN membership fee, based on the benefit [membership] tier or sponsorship selected by the restaurant, as set forth in §17.55 of this title [chapter] (relating to Registration and [of Those Entitled to] Use of the GO TEXAN Certification [and Design] Mark), for each restaurant that applicant would like to be eligible for [participate in] the GO TEXAN Restaurant Program. GO TEXAN Restaurant program registrants will be billed registration fees for all participating locations yearly. [If an applicant operates multiple restaurant locations under the same name, the applicant must submit a GO TEXAN Restaurant Program Member application and pay the annual GO TEXAN membership fee based on the membership tier selected by the applicant for the first or initial restaurant location, as identified in the application. Should the applicant choose to enroll additional locations under the same name, the applicant shall pay an additional $10.00 annual fee for each additional restaurant location that operates under the same name and that is enrolled in the program. GO TEXAN Restaurant Program Members will be billed the annual registration membership fees on an annual basis.]

(A) Tier 1 applicants. If an applicant operates multiple restaurant locations under the same name, the applicant must submit a GO TEXAN Restaurant Program Member application and pay the annual GO TEXAN membership fee as set forth in §17.55 of this title for the first or initial restaurant location, as identified in the application. Should the applicant choose to enroll additional locations under the same name, the applicant shall pay an additional $10.00 annual fee for each additional restaurant location that operates under the same name and that is enrolled in the program.

(B) Tier 2, 3 and sponsor applicants. If an applicant operates multiple restaurant locations under the same name, applicant must submit a GO TEXAN restaurant program member application and pay the annual GO TEXAN membership fee as set forth in §17.55 of this title for the first restaurant location, as identified in the application. The applicant may choose to enroll additional locations under the same name at no additional charge.

(5) For each location application submitted, applicant [Restaurants] must certify that it maintains all necessary food permits, as required by law. [submit a copy of the establishment's food permit that has been issued by the restaurant's applicable licensing agency with the membership application.] If a restaurant establishment loses its permit or if the permit is revoked by the [its] applicable licensing agency, the establishment's GO TEXAN registration [membership] is void, no refund will be provided, and the restaurant must immediately cease use of the GO TEXAN certification mark.

(6) The department may assess and collect additional fees for participation in special events administered, conducted, established, organized, provided for, or sponsored by the department, whether in its own name or in cooperation with others, in connection with the GO TEXAN Restaurant Program.

§17.61. GO TEXAN Wildlife Program.

(a) Statement of Purpose.

(1) Pursuant to §12.0175 and §12.027 of the Texas Agriculture Code, the department establishes the GO TEXAN Wildlife Program to promote businesses and organizations that are based around Texas' diverse and extensive wildlife resources.

(2) Nothing in this subchapter shall affect any statute or rule pertaining to the administration, conservation, governance, or regulation of this state's wildlife or wildlife resources, or have any effect on the construction or interpretation of any other statute or rule.

(b) Eligibility Requirements.

(1) To be eligible for the GO TEXAN Wildlife Program and use of the GO TEXAN certification mark, an application must be made the same manner as provided in §17.52 of this title (relating to Application to Use the GO TEXAN Certification Mark). Applicant must be a business or organization conducting business in Texas that is based around Texas' diverse and extensive wildlife resources.

(2) An eligible applicant may qualify for certification under the program as:

(A) A product - To obtain certification under the program as a product, an eligible entity must produce a product. The applicant must be:

(i) a breeder of wildlife;

(ii) engaged in the field of wildlife genetics;

(iii) a producer, supplier, retailer or wholesaler of wildlife or their byproducts;

(iv) a producer, supplier, retailer or wholesaler of fish or their byproducts;

(v) a manufacturer or producer of a commodity, good, or merchandise utilized for hunting, fishing, or wildlife recreation that has been manufactured in, produced in, or value added in Texas; or

(vi) a manufacturer or producer of any type of commodities, goods, or merchandise consisting of, related to, or utilized in connection with wildlife, including, without limitation, eggs, embryos, genes, or semen.

(B) A service business or organization - To obtain certification under the program as a service, an eligible entity must provide a service in Texas that is based around Texas wildlife. The applicant must possess all applicable licenses and permits, and be:

(i) a landowner that provides leases for hunting or fishing;

(ii) a fishing, hunting, or wildlife guide;

(iii) a hunting ranch, destination or facility;

(iv) a fishing camp, destination or facility;

(v) a wildlife or animal farm, destination or facility;

(vi) a farm or ranch that provides wildlife recreational opportunities to the general public;

(vii) a fishery;

(viii) a wildlife park, destination or facility; or

(ix) a service provider in the area of wildlife genetics; or

(x) a taxidermist or wildlife processing facility.

(C) A promoter - To obtain certification under the program as a promoter, the applicant must promote a wildlife product or service at one or more locations in Texas, including, without limitation, as a tradeshow or wholesaler.

(c) Use of GO TEXAN certification. An applicant approved for certification under the program shall be authorized to use the GO TEXAN certification as authorized by the department as a certification that the business meets the characteristics, requirements and standards set forth in this subchapter and that its business is based upon Texas wildlife. Except as otherwise provided in this section, §§17.53, 17.55, and 17.56 of this title (relating to requirements for membership in the general GO TEXAN program) shall apply to entities certified under this section.

§17.62. GO TEXAN Farm and Ranch Program.

(a) Statement of Purpose. The GO TEXAN Farm and Ranch Program is established to provide a marketing program that authorizes farms and ranches interested in assisting the department with the promotion of the GO TEXAN program use of the GO TEXAN certification mark.

(b) Application process.

(1) Application to use the GO TEXAN certification mark in accordance with this section, shall be made in the same manner as provided in §17.52 of this title (relating to Application for Registration to Use the GO TEXAN Certification Mark).

(2) Except as otherwise provided in this section, §§17.53, 17.55, and 17.56 of this title (relating to requirements for membership in the general GO TEXAN program), shall apply to entities certified under this section.

(c) Eligibility Requirements. All commercial farms and ranches located and operating in Texas may apply for registration with the GO TEXAN Farm and Ranch Program.

(d) Limitations. Registrants granted GO TEXAN Farm and Ranch membership, shall only use the mark for the limited purpose stated in the certificate of registration. A registrant's use of the mark is limited to promotion of the entity's specific commodity, and the general GO TEXAN program. Use of the mark by GO TEXAN Farm and Ranch members is subject to department regulation.

(e) Additional benefits. In addition to the benefits listed in §17.55 of this title (relating to Registration and Use of the GO TEXAN Certification Mark), TDA shall provide Farm and Ranch registrants a GO TEXAN Farm and Ranch Program gate sign to designate their participation in the program. In the event that the registration is not renewed or is terminated, the GO TEXAN Farm and Ranch sign must be removed immediately.

§17.63. Licensing of the GO TEXAN Certification Mark.

(a) Except as specifically authorized under this chapter, no person may depict, display, or use, in any manner, the GO TEXAN certification mark without obtaining prior written permission from the department. A person may seek such permission by filing an application for use of the GO TEXAN certification mark with the department. All information submitted with a request for license becomes the property of the department.

(b) A request for a license under this section must be accompanied by a $35 non-refundable application fee.

(c) Upon approval of a request, and payment of a $250 licensing fee, a license will be issued to the applicant. Failure to pay the licensing fee within 30 days of approval shall result in denial of the license and cancellation of the approved request.

(d) A licensee under this section shall pay a royalty fee of 3.0 percent of annual gross receipts from the sale of licensed products in excess of $5,000.

(e) A license under this section is not required for the depiction, display, or use of the GO TEXAN certification mark under the following circumstances:

(1) use of the GO TEXAN certification mark for an historical, educational, or other purpose that benefits the public if authorized in writing by the department prior to such use; or

(2) use authorized by §§17.52(b), 17.55(c)(1), 17.57(c)(2), 17.59(a), 17.60(b)(2), and 17.61(c) of this title (relating to use of the GO TEXAN certification mark).

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 September 21, 2012.

TRD-201205001
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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SUBCHAPTER C. GO TEXAN AND DESIGN MARK

4 TAC §17.54

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

The repeal of §17.54 is proposed under Texas Agriculture Code, §12.0175, which provides the department with authority to estab-

lish programs by rule to promote and market agricultural products and other products grown, processed, or produced in the state and adopt rules to administer a program established under §12.0175.

The code affected by the proposal is the Texas Agriculture Code Chapter 12.

§17.54. Denial of Application to Use the GO TEXAN and Design Mark.

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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Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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SUBCHAPTER D. CERTIFICATION OF FARMERS MARKET

4 TAC §17.73

The amendments to §17.73 are proposed pursuant to the Texas Agriculture Code, §12.0175, which provides the department with authority to establish programs by rule to promote and market agricultural products and other products grown, processed, or produced in the state and adopt rules to administer a program established under §12.0175.

The code affected by the proposal is the Texas Agriculture Code Chapter 12.

§17.73. Eligibility Requirements.

A farmers market is eligible for certification if:

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

(3) at a minimum, 75 percent [~~the farmers market association bylaws require that a certain percentage~~] of all agricultural products sold through the farmers market are grown in Texas;

(4) [~~the farmers market association bylaws require that a certain number,~~] at least two or more, of its members are farmers selling their own produce; and

(5) [~~the farmers market association bylaws require that~~] all agricultural products sold at the market are [~~shall be~~] of merchantable quality.

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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Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
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SUBCHAPTER J. GO TEXAN WILDLIFE PROGRAM

4 TAC §§17.600 - 17.610

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

The repeal of §§17.600 - 17.610 is proposed pursuant to the Texas Agriculture Code, §12.0175, which provides the department with authority to establish programs by rule to promote and market agricultural products and other products grown, processed, or produced in the state, and charge a membership fee, as provided by department rule, for each participant in a program, and adopt rules to administer a program established under §12.0175.

The code affected by the proposal is the Texas Agriculture Code Chapter 12.

§17.600. Authority.
§17.601. Purpose.
§17.602. Definitions.
§17.603. Qualification for the Program.
§17.604. Application.
§17.605. Standards for Certification under the Product Category.
§17.606. Standards for Certification under the Service Category.
§17.607. Standards for Certification under the Promoter Category.
§17.608. Effect of Application.
§17.609. Selection.
§17.610. Go Texas Certification Mark.

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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Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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SUBCHAPTER J. GO TEXAN CERTIFIED RETIREMENT COMMUNITY PROGRAM

4 TAC §§17.600 - 17.604

The new §§17.600 - 17.604 are proposed pursuant to the Texas Agriculture Code, §12.040, which provides for the department to establish and maintain a Texas Certified Retirement Community Program and adopt rules to implement the program.

The code affected by the proposal is the Texas Agriculture Code Chapter 12.

§17.600. Definitions.

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

(1) Applicant--A unit of general local government seeking membership certification in the Go Texan Certified Retirement Community Program.

(2) Application--Written request for certification under the Go Texan Certified Retirement Community Program in the format prescribed by the department.

(3) Commissioner--The commissioner of agriculture of the State of Texas or the commissioner's designee.

(4) Department--The Texas Department of Agriculture.

(5) Guidelines--Guidelines promulgated by the department for completing the application for the Program and administration of the program.

(6) Local government--An entity defined as a unit of general local government in 42 United States Code, §5302(a)(1).

(7) Program--The Go Texan Certified Retirement Community Program.

(8) Sponsor--A board, organization or panel designated in the application by the applicant to serve as the community's primary contact regarding all aspects of the Program.

(9) Staff--Staff of the department.

§17.601. Statement of Purpose.

The Go Texan Certified Retirement Community Program is established to:

(1) promote Texas as a retirement destination to retirees and potential retirees both in and outside Texas;

(2) assist Texas communities in their efforts to market themselves as desirable retirement locations and to develop communities that retirees would find attractive for a retirement lifestyle;

(3) assist in the development of retirement communities and long term living communities for economic development purposes and as a means of providing a potential workforce and enriching Texas communities; and

(4) increase tourism to Texas by promoting the state as a desirable retirement location to visitors and those seeking retirement options in Texas.

§17.602. Application; Review; Fees.

(a) General information.

(1) An applicant community must be a unit of general local government.

(2) Sponsor required.

(A) The applicant must designate a sponsor that will be responsible for working with the department during the application process and will serve as the primary contact for disseminating information to potential retirees through the Program if the certification is granted. The sponsor should be a recognizable entity within the community, have a physical location with regular office hours, and should have the capacity and resources to manage the community's retirement recruitment efforts.

(B) After approval, a Go Texan Certified Retirement Community may change the sponsor by notifying the department in writing.

(3) Program guidelines and applications are available on the agency website www.retireintexas.org, or from Texas Department of Agriculture, Marketing and International Trade, P.O. Box 12847, Austin, Texas 78711.

(4) Each applicant must submit a completed application to: Texas Department of Agriculture, Marketing and International Trade, P.O. Box 12076, Austin, Texas 78711.

(5) No changes to the application will be allowed after the application is submitted, unless they are a result of Staff recommendations.

(b) Applications must be submitted within the time prescribed by the department and include:

(1) a completed score sheet as provided in the Program Guidelines;

(2) a completed retiree desirability assessment to include the following information regarding the applicant community:

(A) information on the applicant's demographics, geography and climate;

(B) Texas state and local tax structure;

(C) local housing availability, opportunities and cost;

(D) climate;

(E) personal safety or security;

(F) employment opportunities;

(G) availability of health care services and other services along the continuum of care, including home-based and community-based services, housing for the elderly, assisted living, personal care, and nursing care facilities;

(H) availability of emergency medical services and the name and location of any hospital within a 75-mile radius of the community;

(I) public transportation and major highways;

(J) continuing education;

(K) leisure living;

(L) recreation areas and facilities;

(M) the performing arts;

(N) festivals and events;

(O) sports at all levels;

(P) crime statistics;

(Q) any other information requested by the department.

(3) evidence of support from area businesses, churches, clubs, media, and other entities, as necessary for the success of the program in the community;

(4) a marketing plan detailing the Program's mission as applied to the community, the target market, the competition, an analysis

of the community's strengths, weaknesses, opportunities and dangers, and the strategies the community will employ to attain the goals of the Program;

(5) a long-term plan outlining the steps the community will undertake to maintain its desirability as a destination for retirees, including an outline of plans to correct any facility and service deficiencies identified in the retiree desirability assessment; and

(6) any other information required by the Program Guidelines.

(c) Review and approval.

(1) Staff will score the applications and review the applications for eligibility and completeness.

(2) Applicant will be notified of any deficiencies and given 20 days to rectify deficiencies. Staff may work with the applicant to improve or modify the application, with the intent of helping the applicant achieve certification. An application containing an excessive number of deficiencies, or deficiencies of a material nature may not be considered for certification.

(3) After the scoring and application process is complete, Staff will make a recommendation for approval or denial of the request for certification to the commissioner. The commissioner will make the final decision regarding certification.

(4) The department will notify the applicant of approval or denial of the application within 75 days of the date of receipt of the completed application.

(d) Upon notice of approval of the application, an application fee must be promptly submitted in an amount equal to the greater of:

(1) $5,000; or

(2) $0.25 multiplied by the population of the community, as determined by the most recent census.

§17.603. Providing Assistance to Certified Communities.

(a) The department shall provide the following assistance to certified communities:

(1) assistance in the training of local staff and volunteers;

(2) ongoing oversight and guidance in marketing, plus updates on retirement trends;

(3) provide information on eligibility for inclusion in the state's media efforts, public relations campaigns and promotions, including being on the department's internet website;

(4) provide information on eligibility for state financial assistance for brochures, support material, and advertising; and

(5) an evaluation and program assessment on maintaining and improving the community's desirability as a home for retirees.

(b) Upon the department's approval of an application for certification, a staff member will schedule a visit to the applicant community to discuss the Program with the sponsor and other interested parties, including a discussion of what specific assistance will be provided to the certified community by the department.

(c) Staff will consult with the community annually and evaluate the effectiveness of the Program.

(d) The department may revoke approval to use the certification mark GO TEXAN if a community or a sponsor fails to comply with the Program guidelines.

§17.604. Certification and Use of "Texas Certified Retirement Community" or other Department Marks; Expiration and Renewal of Certificate.

(a) Certification. Certification under this program shall allow the approved community to use the words "Texas Certified Retirement Community" as well as any marks created by the department for use in the program, to promote the community to retirees, potential retirees and to any other interested parties.

(b) Expiration and renewal of Certification.

(1) A community's certification expires on the fifth anniversary of the date the initial certification is issued.

(2) To be considered for recertification by the department, an applicant community must:

(A) complete and submit a new application (including appropriate fees); and

(B) submit data demonstrating the success or failure of the community's efforts to market and promote itself as a desirable location for retirees and potential retirees.

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 September 21, 2012.

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Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 463-4075

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CHAPTER 29. ECONOMIC DEVELOPMENT

The Texas Department of Agriculture (the department) proposes an amendment to Chapter 29, Subchapter A, §29.3, the repeal of Subchapter B, §§29.20 - 29.33, concerning the GO TEXAN Rural Community Program, and the repeal of Subchapter C, §§29.50 - 29.56, concerning the GO TEXAN Certified Retirement Community Program. Section 29.3 is amended to eliminate reference to the Texas Department of Economic Development, which no longer exists, and to update the section. Chapter 29, Subchapter B is proposed for repeal to allow for the program and benefits to be incorporated into the GO TEXAN Associate Registrant section located in Chapter 17 of this title, at Subchapter C, §17.57. Chapter 29, Subchapter C is repealed to allow for that subchapter to be added to Chapter 17 of this title as Chapter 17, Subchapter J.

Bryan Daniel, Chief Administrator for Trade and Business Development, has determined that, for the first five-year period the proposed amendment and repeals are in effect, there will be no fiscal implications for state government as a result of the administration or enforcement of the proposed amendment and repeals. There will be no fiscal implications for local government.

Mr. Daniel has also determined that for each year of the first five years the proposed amendment and repeals are in effect, the public benefit anticipated as a result of administration and enforcement of the amendment will be the updating of outdated references, and of the repeals will be the elimination of dupli-

cate rules and clarification and ease of locating information by locating them within the department's Marketing and Promotion rules. There will be no adverse fiscal impact on individuals, small or micro businesses as a result of the proposed amendment and repeals.

Written comments on the proposal may be submitted to Bryan Daniel, Chief Administrator for Trade and Business Development, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

SUBCHAPTER A. ECONOMIC DEVELOPMENT PROGRAM

4 TAC §29.3

The proposed amendment of §29.3 is proposed pursuant to the Texas Agriculture Code, §12.027, which provides the department with the authority to develop and maintain economic development programs for rural areas in the state to promote economic growth in rural areas and assist communities in maximizing potential business opportunities, and to charge member fees for participation in such programs.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§29.3. Staffing; Cooperation with other Agencies.

To implement the tasks set forth in §29.2 of this title (relating to Administration of the Program), the Department will:

(1) (No change.)

(2) cross-train its staff regarding economic development programs administered by the department [~~Texas Department of Economic Development~~];

(3) cooperate with [~~the Texas Department of Economic Development (and any~~] other state, federal, or local agencies engaged in economic development activities[~~)~~] in coordinating meetings with public and private entities to disseminate information beneficial to rural areas; and

(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.

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Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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SUBCHAPTER B. GO TEXAN RURAL COMMUNITY PROGRAM RULES

4 TAC §§29.20 - 29.33

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

The repeal of Chapter 29, Subchapter B, §§29.20 - 29.33, is proposed pursuant to the Texas Agriculture Code, §12.027, which provides the department with the authority to develop and maintain economic development programs for rural areas in the state to promote economic growth in rural areas and assist communities in maximizing potential business opportunities, and to charge member fees for participation in such programs.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§29.20. Statement of Purpose.
§29.21. Definitions.
§29.22. Administration.
§29.23. Eligibility for Certified Membership: Application.
§29.24. Eligibility for Associate Membership; Application.
§29.25. Application Submission and Review.
§29.26. Appeal of Application Determination.
§29.27. Denial of Application.
§29.28. Registration of Those Entitled to Use the Mark.
§29.29. Use of the Mark.
§29.30. Termination of Registration and License to Use the Mark.
§29.31. Benefits of Membership.
§29.32. Expiration and Renewal of Certified Membership.
§29.33. Use of the "Texas Yes!" Mark.

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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Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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SUBCHAPTER C. GO TEXAN CERTIFIED RETIREMENT COMMUNITY PROGRAM

4 TAC §§29.50 - 29.56

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

The repeal of Chapter 29, Subchapter C, §§29.50 - 29.56 is proposed pursuant to the Texas Agriculture Code, §12.040, which provides for the department to establish and maintain a Texas Certified Retirement Community Program and adopt rules to implement the program.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§29.50. Definitions.
§29.51. Overview of Program.
§29.52. Contents of Application; Fees.
§29.53. Application/Selection Process.
§29.54. Providing Assistance to Certified Communities.

§29.55. Use of "Texas Certified Retirement Community" or other Department Marks.

§29.56. Expiration and Renewal of Certification.

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-201205024
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 129. STUDENT ATTENDANCE
SUBCHAPTER AA. COMMISSIONER'S RULES

19 TAC §129.1023

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

The Texas Education Agency (TEA) proposes the repeal of §129.1023, concerning student attendance. The section addresses provisions related to student attendance accounting standards. The proposed repeal would remove from the Texas Administrative Code (TAC) redundant provisions that duplicate those already included in the handbook adopted by reference in 19 TAC §129.1025, Adoption by Reference: Student Attendance Accounting Handbook.

Section 129.1023 was adopted effective May 10, 2001, and amended effective October 23, 2008. The section requires school districts and charter schools to use the student attendance accounting standards established by the commissioner of education and describes the procedures to be included in the annual TEA publication on student attendance accounting standards. The section also specifies that Foundation School Program allotments may be revised as a result of investigative activities by the TEA division responsible for school financial audits.

During the recent statutorily required review of 19 TAC Chapter 129, Subchapter AA, TEA staff determined that the rule is no longer needed as its provisions duplicate those in the student attendance accounting handbook adopted by reference in 19 TAC §129.1025. In addition, stakeholders who participated in the commissioner-initiated rule review process that took place during 2010 and 2011 also recommended that 19 TAC §129.1023 be repealed.

The proposed repeal would have no procedural or reporting implications. The proposed repeal would have no locally maintained paperwork requirements.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the repeal is in effect there will be no additional costs for state or local government as a result of enforcing or administering the repeal.

Ms. Beaulieu has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be the removal of redundant provisions from the TAC. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

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 begins October 5, 2012, and ends November 5, 2012. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-5337. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on October 5, 2012.

The repeal is proposed under the Texas Education Code (TEC), §42.004, which authorizes the commissioner, in accordance with rules of the State Board of Education, to take such action and require such reports consistent with TEC, Chapter 42, as may be necessary to implement and administer the Foundation School Program.

The repeal implements the TEC, §42.004.

§129.1023. Student Attendance Accounting Standards.

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 September 20, 2012.

TRD-201204967
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 475-1497

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19 TAC §129.1025

The Texas Education Agency (TEA) proposes an amendment to §129.1025, concerning student attendance. The section adopts by reference the annual student attendance accounting handbook. The handbook provides student attendance accounting rules for school districts and charter schools. The proposed amendment would adopt by reference the *2012-2013 Student Attendance Accounting Handbook*.

Legal counsel with the TEA has recommended that the procedures contained in each annual student attendance accounting handbook be adopted as part of the Texas Administrative Code (TAC). This decision was made in 2000 as a result of a court de-

cision challenging state agency decision making via administrative letters and publications. Given the statewide application of the attendance accounting rules and the existence of sufficient statutory authority for the commissioner of education to adopt by reference the student attendance accounting handbook, staff proceeded with formal adoption of rules in this area. The intention is to annually update the rule to refer to the most recently published student attendance accounting handbook. Data from previous school years will continue to be subject to the student attendance accounting handbook as the handbook existed in those years.

Each annual student attendance accounting handbook provides school districts and charter schools with the Foundation School Program (FSP) eligibility requirements of all students, prescribes the minimum requirements of all student attendance accounting systems, lists the documentation requirements for attendance audit purposes, specifies the minimum standards for systems that are entirely functional without the use of paper, and details the responsibilities of all district personnel involved in student attendance accounting. The TEA distributes FSP resources under the procedures specified in each current student attendance accounting handbook. The final version of the student attendance accounting handbook is published on the TEA website each July or August. A supplement, if necessary, is also published on the TEA website.

The proposed amendment to 19 TAC §129.1025 would add new subsection (a) to specify that the student attendance accounting guidelines and procedures established by the commissioner of education under 19 TAC §129.21, Requirements for Student Attendance Accounting for State Funding Purposes, and the Texas Education Code (TEC), §42.004, will be published annually. The proposed amendment would also adopt by reference the student attendance accounting handbook for the 2012-2013 school year.

Significant changes to the *2012-2013 Student Attendance Accounting Handbook* from the *2011-2012 Student Attendance Accounting Handbook Version 2* include the following.

Section 1

Text describing the handbook and its purpose would be moved from the middle of Section 1 to the introduction to Section 1.

Requirements related to original documentation of attendance would be clarified.

Information on how to navigate within the electronic version of the handbook would be added.

Section 2

Throughout Section 2, the term "electronic attendance accounting system" would be changed to "automated attendance accounting system."

The statement that failure to provide attendance records during an audit could result in the agency's retaining 100 percent of a district's FSP allotment for the undocumented attendance would be changed to state that this failure will result in the agency's retaining 100 percent of the allotment. Also, a clarification of the term "undocumented attendance" would be added.

Requirements related to period absence reports would be clarified.

Section 3

The example for average daily attendance (ADA) eligibility code 0 that references parentally placed private school students aged 5 through 25 years would be corrected to reference parentally placed private school students aged 5 through 21 years.

A subsection on the funding eligibility of time spent in an on-campus online course that is not provided through the Texas Virtual School Network (TxVSN) would be added.

Information on the enrollment eligibility of students who have received a General Educational Development (GED) certificate or have been court-ordered to obtain one would be added.

A brief statement about the offense of parent contributing to nonattendance would be added.

General attendance-taking rules would be clarified.

Information on "excused" absences for participation in certain short-term classes provided by the Texas School for the Blind and Visually Impaired or Texas School for the Deaf would be added. The statement that a student may be considered in attendance for funding purposes if the student is a Medicaid-eligible child participating in the Early and Periodic Screening, Diagnosis, and Treatment programs implemented by the Texas Health and Human Services Commission would be deleted because it impermissibly requires the solicitation of confidential information. Information on "excused" absences for participation in naturalization oath ceremonies would be clarified. Information about adopting a policy regarding parental consent for student departures from school would be clarified.

A statement that an exemption from taking a final exam is not an exemption from the "2-through-4-hour" requirement would be added.

Because the term "other health impairment" does not apply to regular education students or to the General Education Homebound (GEH) program, the definition of this term would be removed from the GEH program subsection.

A clarification that time spent on campus taking required state assessments cannot count as any part of the number of hours of GEH service for eligible days present would be added.

Information on state funding of summer school would be revised to clarify that, as with any other student, a student participating in the Optional Flexible School Day Program is not eligible to generate more than 180 days' worth of attendance per year. A statement would be added explaining that, for 2012-2013, the only funded program allowing for state funding of instructional days beyond the 180 days making up the state funding year is a program for providing extended school year services to eligible students.

Section 4

The section on special education would be heavily revised and reorganized. Hyperlinked cross-references and links to applicable TEA web pages would be added throughout the section.

Information and coding charts that appear in the subsection on special education eligibility but are not specifically related to special education eligibility would be moved to more appropriate subsections. Eligibility information would be expanded and revised.

Special education enrollment procedures would be clarified.

Special education withdrawal procedures would be revised to address required notification and revocation of parental consent for receipt of special education services.

Information on services for private or home school students who are eligible for and in need of special education would be clarified and moved out of the subsection on general special education enrollment procedures and into two separate subsections.

The subsection on instructional arrangement/setting codes would be reorganized so that coding information appeared in the numerical order of the codes.

Information on instructional arrangement/setting code 00 would be clarified and revised.

The eligibility criteria for the homebound instructional arrangement/setting would be clarified. Also, the subsection on homebound service eligibility criteria for students with chronic illnesses and/or acute health problems would be deleted, as the eligibility criteria for these students are the same as those for any other student who has been determined to be eligible for special education and related services. Information specific to homebound services and students younger than six years of age would be added. Documentation requirements for special education homebound services would be clarified and revised. A clarification that time spent on campus taking required state assessments cannot count as any part of the number of hours of homebound service for eligible days present would be added.

Information on the mainstream instructional arrangement/setting would be reorganized and revised. The paragraph related to community-based preschools would be moved to the subsection on off home campus instructional arrangements/settings.

Information on the resource room/services instructional arrangements/settings would be clarified.

Information on the self-contained, mild/moderate/severe, regular campus instructional arrangements/settings would be clarified.

A clarification regarding foster homes would be added to the subsection on the residential care and treatment facility instructional arrangements/settings.

Information on reporting of students in the off home campus instructional arrangements/settings would be added.

Information on speech therapy indicator codes would be clarified and revised.

A new major subsection on preschool programs for children with disabilities would be added. The coding charts that appear in the subsection on special education eligibility in general and that would be moved to this new subsection would be revised.

Information on special education services for infants and toddlers would appear in its own major subsection.

Information on special education shared services arrangements would appear in its own major subsection. The subsection would include information on regional day school program for the deaf shared services arrangements.

The coding chart titled "Services for Students With Disabilities-Exceptions to the Norm" would appear in its own major subsection. Erroneous instructional arrangement/setting coding information for students served in Head Start programs would be corrected in the chart.

Information on extended school year services would be clarified and would appear in its own major subsection.

Information on eligible days present and contact hours would be clarified.

Special education documentation requirements would be clarified.

The subsection providing special education instructional arrangement/setting coding examples would be reorganized so that coding information appeared in the numerical order of the codes. Examples that appear in the wrong instructional arrangement/setting code subsection would be moved. Speech therapy indicator code examples would be clarified.

Section 5

In the subsection on career and technical education (CTE) contact-hour funding eligibility, requirements related to teacher certification would be clarified. Also, requirements related to the teacher of record would be revised.

Information on auditing of CTE courses and Public Education Information Management System (PEIMS) coding would be added.

Information on how to determine CTE "V" codes would be clarified.

Information on required documentation for CTE Problems and Solutions courses would be revised.

General CTE documentation requirements would be revised.

Information on the PEIMS 415 record and students who drop a CTE course would be clarified.

Section 6

A statement that the terms "limited English proficient student," "English language learner," and "student of limited English proficiency" are interchangeable would be added to the section's introduction. The subsections making up this section would be reordered to place information on withdrawal and evaluation of exited students after information on program eligibility, eligible days present, and service requirements.

A subsection explaining that districts are required to implement the English language proficiency standards would be added.

The chart containing exit criteria for the bilingual and English as a second language (ESL) education programs would be updated.

A statement that all staff serving limited English proficient students must receive training in sheltered instruction would be added.

In the subsection on student record documentation, the word "permanent" would be removed from references to a student's record, as it implies that documentation must be kept indefinitely instead of for five years from cessation of services. Documentation requirements related to assessment participation would be updated. Information about forwarding of records would be updated.

Section 7

Information on prekindergarten eligibility based on automatic eligibility for the National School Lunch Program would be revised, as would information on prekindergarten eligibility based on homelessness.

Section 10

References to the Texas Youth Commission (TYC) or Texas Juvenile Probation Commission (TJPC) would be changed to be references to the Texas Juvenile Justice Department (TJJD).

The subsection on compensatory and accelerated instruction for at-risk students would be removed, as the information in the subsection is unrelated to attendance accounting.

The subsection on Alternative Education Campuses of Choice and residential facilities evaluated under alternative education accountability (AEA) procedures would be removed, as the information in the subsection is unrelated to attendance accounting.

Information on residential alternative education programs for students in residential facilities would be clarified. Also, a statement about statutorily required notifications that residential facilities must make would be added.

Information specific to on-campus and off-campus disciplinary alternative education programs (DAEPs) would be removed, as it is not directly related to attendance accounting.

Information on evaluation of DAEPs and juvenile justice alternative education programs (JJAEPs) would be moved from the deleted subsection related to entities that are evaluated under AEA procedures, which do not apply to DAEPs and JJAEPs, to the subsection related to DAEPs and the subsection related to JJAEPs.

Information on expulsions would be revised to better reflect statute and to reflect statutory changes that are effective with the 2012-2013 school year.

Information on memorandums of understanding for JJAEPs would be revised to reflect statutory changes that are effective with the 2012-2013 school year.

The chart related to ADA eligibility coding for JJAEP students would be updated to include coding information for JJAEP placements under the TEC, §37.309(b).

Section 11

A subsection related to dual credit course eligibility requirements specific to students enrolled in Early College High Schools would be added.

A subsection on dual credit documentation requirements would be added.

TxVSN student eligibility requirements would be clarified, as would information on TxVSN funding and attendance accounting.

A subsection containing guidance related to remote instruction that is not delivered through the TxVSN would be added.

Section 13

Glossary definitions of obsolete terms would be deleted. The definition of "direct, regularly scheduled" would be revised. The entry for "early childhood intervention" would be changed to be an entry for "early childhood intervention services," and information in the entry would be revised. The entry for "nonpublic day school" would be changed to be an entry for "nonpublic school" that included information on both nonpublic day schools and residential nonpublic schools.

The proposed amendment would place the specific procedures contained in the *2012-2013 Student Attendance Accounting Handbook* in the TAC. The TEA distributes FSP funds according to the procedures specified in each annual student attendance accounting handbook. Data reporting requirements are addressed through the PEIMS.

The handbook has long stated that school districts and open-enrollment charter schools must keep all student attendance documentation for five years from the end of the school year. Any new student attendance documentation required to be kept would correspond with the student attendance accounting requirement changes described previously.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Ms. Beaulieu has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be to continue to inform the public of the existence of annual publications specifying attendance accounting procedures for school districts and charter schools. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

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 begins October 5, 2012, and ends November 5, 2012. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-5337. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on October 5, 2012.

The amendment is proposed under the TEC, §30A.153, which requires the commissioner to adopt rules for the implementation of Foundation School Program funding for the state virtual school network, including rules regarding attendance accounting; and the TEC, §42.004, 74th Texas Legislature, 1995, which authorizes the commissioner of education, in accordance with rules of the State Board of Education, to take such action and require such reports consistent with TEC, Chapter 42, as may be necessary to implement and administer the Foundation School Program.

The amendment implements the TEC, §30A.153 and §42.004.

§129.1025. Adoption by Reference: Student Attendance Accounting Handbook.

(a) The student attendance accounting guidelines and procedures established by the commissioner of education under §129.21 of this title (relating to Requirements for Student Attendance Accounting for State Funding Purposes) and the Texas Education Code, §42.004, to be used by school districts and charter schools to maintain records and make reports on student attendance and student participation in special programs will be published annually.

(b) [~~(a)~~] The standard procedures that school districts and charter schools must use to maintain records and make reports on student attendance and student participation in special programs for school year 2012-2013 [~~2011-2012~~] are described in the official Texas Education Agency (TEA) publication *2012-2013* [~~*2011-2012*~~] *Student Attendance Accounting Handbook* [~~*Version 2*~~], which is adopted by this reference as the agency's official rule. A copy of the *2012-2013*

[*~~2011-2012~~*] *Student Attendance Accounting Handbook* [*~~Version 2~~*] is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. In addition, the publication can be accessed from the TEA official website. The commissioner [~~of education~~] will amend the *2012-2013* [*~~2011-2012~~*] *Student Attendance Accounting Handbook* [*~~Version 2~~*] and this subsection adopting it by reference, as needed.

(c) [~~(b)~~] Data from previous school years will continue to be subject to the student attendance accounting handbook as the handbook existed in those years.

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 September 20, 2012.

TRD-201204968
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 107. DENTAL BOARD PROCEDURES

SUBCHAPTER A. PROCEDURES GOVERNING GRIEVANCES, HEARINGS, AND APPEALS

22 TAC §107.2

The Texas State Board of Dental Examiners (SBDE) proposes new §107.2, concerning Effect of Child Support Payment Default on Licensure Application and Renewal.

The section is proposed to address the stipulations of Texas Family Code, §232.0135 relating to denial of license renewal of a child support obligor who has failed to pay child support for six months or more. The proposed section states that the Board shall refuse to grant initial licensure or renewal of an existing license upon notice from a child support agency that an obligor has failed to pay child support for six months or more. The proposed section addresses the conditions that must be met before an obligor who has failed to pay child support for six months or more may be granted an initial license or renewal of an existing license.

Mr. Glenn Parker, Executive Director, has determined that for each year of the first five-year period the section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering the section. Mr. Parker has also determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be protection of the public health and safety. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted in writing to Nycia Deal, Staff Attorney, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701. Comments may also be submitted electronically to *nycia@tsbde.texas.gov* or faxed to (512) 463-7452. To be considered, all written comments must be received by the State Board of Dental Examiners no later than 30 days from the date that this new section is published in the *Texas Register.*

The new section is proposed under Texas Government Code §2001.021 et seq. and Texas Occupations Code §254.001, which authorize the Board to adopt and enforce rules necessary for it to perform its duties.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§107.2. Effect of Child Support Payment Default on Licensure Application and Renewal.

(a) "License" means a license, certificate, registration, permit, or other authorization issued by the Board.

(b) Initial applications and applications for renewal of licenses issued by the board are subject to the course of action established by the Texas Family Code, §232.0135.

(c) Upon notice from a child support agency that an obligor has failed to pay child support for six months or more, the Board shall refuse to grant initial licensure or renewal of an existing license to an obligor until the Board is notified by the child support agency that the obligor has:

(1) paid all child support arrearages;

(2) established with the child support agency a satisfactory repayment schedule or is in compliance with a court order for payment of the arrearages;

(3) been granted an exemption from this subsection as part of a court-supervised plan to improve the obligor's earnings and child support payments; or

(4) successfully contested the denial before the child support agency in accordance with §232.0135(d), Texas Family 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 September 24, 2012.

TRD-201205043
Glenn Parker
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 475-0977

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22 TAC §107.3

The Texas State Board of Dental Examiners (SBDE) proposes new §107.3, concerning Effect of Student Loan Payment Default on License Renewal.

The section is proposed to address the stipulations of Texas Education Code, §57.491 relating to Loan Default Ground for Nonrenewal of Professional and Occupational License. The proposed section states that the Board shall refuse to grant renewal of an existing license to a licensee who has defaulted on a student loan guaranteed by the Texas Guaranteed Student Loan Corporation (TGSLC), defaulted on a repayment agreement or failed to enter a repayment agreement. The proposed section addresses the conditions that must be met before an obligor who has not complied in one of the enumerated ways may be granted renewal of an existing license.

Mr. Glenn Parker, Executive Director, has determined that for each year of the first five-year period the section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering the rule. Mr. Parker has also determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be protection of the public health and safety through enforcement of state law and regulation. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted in writing to Nycia Deal, Staff Attorney, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701. Comments may also be submitted electronically to *nycia@tsbde.texas.gov* or faxed to (512) 463-7452. To be considered, all written comments must be received by the State Board of Dental Examiners no later than 30 days from the date that this new rule is published in the *Texas Register.*

The new section is proposed under Texas Government Code §2001.021 et seq. and Texas Occupations Code §254.001, which authorize the Board to adopt and enforce rules necessary for it to perform its duties.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§107.3. Effect of Student Loan Payment Default on Licensure Renewal.

(a) "License" means a license, certificate, registration, permit, or other authorization issued by the Board.

(b) Initial applications and applications for renewal of licenses issued by the Board are subject to the course of action established by the Texas Education Code, §57.491.

(c) The Board shall refuse to renew a license due to a default on a student loan guaranteed by Texas Guaranteed Student Loan Corporation (TGSLC), a default on a repayment agreement with TGSLC or a failure to enter a repayment agreement with TGSLC, unless the licensee presents to the Board a certificate issued by the corporation certifying that:

(1) the licensee has entered a repayment agreement on the defaulted loan; or

(2) the licensee is not in default on a loan guaranteed by the corporation.

(d) The Board shall provide its applicants and licensees with written notice of the nonrenewal policies established under §57.491 of the Texas Education Code and an opportunity for a hearing in accordance with the provisions of the Administrative Procedure Act, Texas Government Code, §§2001.001, et seq.

(e) As required by §57.491(c) of the Texas Education Code, the Board, on an annual basis, shall prepare a list of the agency's licensees and submit the list to the corporation in hard copy or electronic form.

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 September 24, 2012.

TRD-201205083
Glenn Parker
Executive Director
State Board of Dental Examiners
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For further information, please call: (512) 475-0977

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CHAPTER 112. VISUAL DENTAL HEALTH INSPECTIONS

22 TAC §112.1, §112.2

The State Board of Dental Examiners (SBDE) proposes amendments to §112.1, Definitions, and §112.2, Visual Dental Health Inspection. The provisions of §112.1 and §112.2 address visual dental health inspections and the parties and purposes by whom and for which visual dental health inspections may be performed.

The proposed amendment to §112.1 clarifies the parties who may perform dental health inspections and introduces a limited oral health evaluation as an additional category of dental assessments. The proposed amendment to §112.2 permits certain dental students and dentist employees of certain public health organizations to perform visual dental health inspections.

Mr. Glenn Parker, Executive Director, has determined that for each year of the first five-year period the amended sections are in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering the sections. Mr. Parker has also determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be increased access to preventive dental care and data relating to dental health in the state. There will be no foreseen effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Comments on the proposal may be submitted in writing to Nycia Deal, Staff Attorney, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701. Comments may also be submitted electronically to *nycia@tsbde.texas.gov* or faxed to (512) 463-7452. To be considered, all written comments must be received by the State Board of Dental Examiners no later than 30 days from the date that these amended sections are published in the *Texas Register.*

The amendments are proposed under Texas Government Code §2001.021 et seq. and Texas Occupations Code §254.001, which authorize the Board to adopt and enforce rules necessary for it to perform its duties.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§112.1. Definitions.

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

(1) Visual Dental Health Inspection--an inspection made by students engagd in a formal education program in dentistry or dental hygiene or by health care workers, other than dentists, dental hygienists, dental assistants, physicians and physician assistants.

(2) Limited Oral Evaluation--a non-comprehensive evaluation of an individual who is not a patient of record made by a licensed dentist for the following limited purposes:

(A) screening for symptoms of oral cancer; and/or

(B) evaluating minors or members of underserved populations for current or potential dental problems.

(3) [~~(2)~~] Dental instruments--any device used by dentists to examine, diagnose or treat patients, or any device used by dental hygienists to treat patients, that may be used in an invasive manner under normal circumstances.

(4) [~~(3)~~] Diagnosis--the translation of data gathered by clinical and radiographic examination into an organized, classified definition of the conditions present.

(5) [~~(4)~~] Health care worker--a person who furnishes health care services in direct patient care situations under a license, certificate, or registration issued by the state.

(6) [~~(5)~~] Invasive manner--a procedure resulting in surgical entry into tissues, cavities, or organs or the manipulation, cutting or removal of any oral or perioral tissue, including tooth structure.

§112.2. Visual Dental Health Inspection.

(a) A visual dental health inspection is performed as a group activity taking place in a school or other institutional setting for the purpose of making a gross assessment of the dental health status of group members, at no cost to the members. It is cursory and does not involve the use of dental instruments, though use of gloves, tongue depressors and intra oral lighting is encouraged. Further, it does not involve making a diagnosis, providing treatment, or treatment planning. Individuals performing visual dental health inspectsions in accordance with this chapter do [~~A healthcare worker does~~] not engage in the practice of dentistry if the inspection process is limited to recognizing when tissue does not appear normal and encouraging the member to appoint with a licensed Texas dentist.

(b) A visual dental health inspection may be performed by a dentist, pre-doctoral student under faculty supervision, or graduate dental student affiliated with a dental school accredited by the Commission on Dental Accreditation of the American Dental Association to conduct research or for educational purposes in the field of dentistry, or by dental personnel employed by the State of Texas Department of State Health Services (DSHS), Department of Aging and Disability (DADS), or by any public health dentist employed by any other state, county, of city health department for the purposes of oral health surveillance, oral health program planning, or epidemiological surveys required by state or federal agencies. A visual dental health inspection is performed for the purpose of making a gross assessment of the dental health status of group members, at no cost to the members. It does not involve making a diagnosis, providing treatment, or treatment planning.

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-201205041
Glenn Parker
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 475-0977

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22 TAC §112.3

The State Board of Dental Examiners (SBDE) proposes new §112.3, concerning Limited Oral Evaluation. The section is proposed to permit dentists to perform non-diagnostic, non-comprehensive evaluations of individuals for the purposes of screening for oral cancer and/or evaluating minors or underserved populations.

The proposed new section defines limited oral evaluations, the situations in which a dentist may perform limited oral evaluations, the standard of care expected of the dentist and the recordkeeping requirements of limited oral evaluations.

Mr. Glenn Parker, Executive Director, has determined that for each year of the first five-year period the section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering the section. Mr. Parker has also determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be increased access to preventive oral cancer screenings and dental care for underserved populations and minors. There will be no foreseen effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted in writing to Nycia Deal, Staff Attorney, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701. Comments may also be submitted electronically to *nycia@tsbde.texas.gov* or faxed to (512) 463-7452. To be considered, all written comments must be received by the State Board of Dental Examiners no later than 30 days from the date that this proposed section is published in the *Texas Register.*

The new section is proposed under Texas Government Code §2001.021 et seq. and Texas Occupations Code §254.001, which authorize the Board to adopt and enforce rules necessary for it to perform its duties.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§112.3. Limited Oral Evaluation.

(a) A limited oral evaluation is performed by a licensed dentist in conjunction with a federal, state, county, or city government healthcare program, a non-profit organization, or an educational institution. It is a non-diagnostic, non-comprehensive evaluation of an individual who is not a patient of record made for the limited purpose of screening for symptoms of oral cancer and/or evaluating minors or underserved populations for current or potential dental problems.

(b) A limited oral evaluation must be provided at no cost to the patient or any third party. The evaluation must result in a written assessment of findings that is retained by the dentist and provided to the patient.

(c) A limited oral evaluation is exempt from the requirements of the minimum standard of care for a comprehensive examination in §108.7 of this title (relating to Minimum Standard of Care, General) and §108.8 of this title (relating to Records of the Dentist), except as required by this section. The dentist must obtain written, informed consent as to the limited nature and non-diagnostic results of the evaluation from the patient or his/her parent or guardian. The dentist must provide a copy of the written informed consent and the results of the evaluation to the patient or his/her parent or guardian. The written informed consent must clearly evidence the name of the evaluating dentist, the patient's name, and the date of evaluation.

(d) A limited oral evaluation shall not be performed for business promotion or patient solicitation purposes. A dentist performing a limited oral evaluation must comply with all rules and laws governing professional conduct and business promotion. Following the evaluation, the dentist may recommend or refer the patient to a dentist for follow-up examination.

(e) Either the dentist or the entity qualifying under subsection (a) of this section shall retain a copy of the written informed consent and the results of the evaluation for five years from the date of the evaluation.

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 September 24, 2012.

TRD-201205042
Glenn Parker
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 475-0977

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PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 465. RULES OF PRACTICE

22 TAC §465.38

The Texas State Board of Examiners of Psychologists proposes an amendment to §465.38, Psychological Services for Public Schools. The proposed amendment clarifies that Licensed Specialists in School Psychology may only provide psychological services in the public schools and may not practice independently in any setting outside of the public schools.

Darrel D. Spinks, Executive Director, has determined that for the first five-year period the proposed amendment will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

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

Comments on the proposed amendment may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700 or email brenda@tsbep.state.tx.us within 14 days of publication of this proposal in the *Texas Register.*

The amendment is proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§465.38. Psychological Services for Public Schools.

This rule acknowledges the unique difference in the delivery of school psychological services in the public schools from psychological services in the private sector. The Board recognizes the purview of the State Board of Education and the Texas Education Agency in safeguarding the rights of public school children in Texas. The mandated multidisciplinary team decision making, hierarchy of supervision, regulatory provisions, and past traditions of school psychological service delivery both nationally and in Texas, among other factors, allow for rules of practice in the public schools which reflect these occupational distinctions from the private practice of psychology.

(1) Definition.

(A) The specialist in school psychology license permits the licensee to provide school psychological services only in Texas public schools. A person utilizing this license may not provide psychological services in any context or capacity outside of their employment or contract with the public schools.

(B) A licensed specialist in school psychology (LSSP) means a person who is trained to address psychological and behavioral problems manifested in and associated with educational systems by utilizing psychological concepts and methods in programs or actions which attempt to improve the learning, adjustment and behavior of students. Such activities include, but are not limited to, addressing special education eligibility, conducting manifestation determinations, and assisting with the development and implementation of individual educational programs.

(C) The assessment of emotional or behavioral disturbance, for educational purposes, using psychological techniques and procedures is considered the practice of psychology.

(2) Titles. The correct title for persons holding this license is Licensed Specialist in School Psychology or LSSP. Only individuals who meet the requirements of Board rule §465.6 of this title (relating to Listings, Public Statements and Advertisements, Solicitations, and Specialty Titles) may refer to themselves as School Psychologists. No individual may use the title Licensed School Psychologist. An LSSP who has achieved certification as a Nationally Certified School Psychologist (NCSP) may use this credential along with the license title of LSSP.

(3) Providers of School Psychological Services. School psychological services may be provided in Texas public schools only by individuals authorized by this Board to provide such services. Individuals who may provide such school psychological services include LSSPs and interns or trainees as defined in Board rule §463.9 of this title (relating to Licensed Specialist in School Psychology) and persons seeking to fulfill the licensing requirements of Board rule §463.8 of this title (relating to Licensed Psychological Associate), Board rule §463.10 of this title (relating to Provisionally Licensed Psychologists), and Board rule §463.11 of this title (relating to Licensed Psychologist). Nothing in this rule prohibits public schools from contracting with licensed psychologists and licensed psychological associates who are not

LSSPs to provide psychological services, other than school psychology, in their areas of competency. School districts may contract for specific types of psychological services, such as clinical psychology, counseling psychology, neuropsychology, and family therapy, which are not readily available from the licensed specialist in school psychology employed by the school district. Such contracting must be on a short term or part time basis and cannot involve the broad range of school psychological services listed in paragraph (1)(B) of this section. An LSSP who contracts with a school district to provide school psychological services may not permit an individual who does not hold a valid LSSP license to perform any of the contracted school psychological services.

(4) Supervision.

(A) Direct, systematic, face-to-face supervision must be provided to:

(i) Interns as defined in Board rule §463.9 of this title.

(ii) Individuals who meet the training requirements of Board rule §463.9 of this title and who have passed the National School Psychology Examination at the Texas cutoff score or above and who have been notified in writing of this status by the Board. These individuals may practice under supervision in a Texas public school district for no more than one calendar year. They must be designated as trainees.

(iii) LSSPs for a period of one academic year following licensure unless the individual also holds licensure as a psychologist in Texas. This supervision may be waived for individuals who legally provided full-time, unsupervised school psychological services in another state for a minimum of three academic years immediately preceding application for licensure in Texas as documented by the public schools where services were provided and who graduated from a training program approved by NASP or accredited in school psychology by APA or who hold NCSP certification.

(iv) LSSPs when the individual is providing psychological services outside his or her area of training and supervised experience.

(B) Nothing in this rule applies to administrative supervision of psychology personnel within Texas public schools, performed by non-psychologists, in job functions involving, but not limited to, attendance, time management, completion of assignments, or adherence to school policies and procedures.

(5) Supervisor Qualifications. Supervision may only be provided by a LSSP, who has a minimum of three years of experience providing psychological services in the public schools of this or another state. To meet supervisor qualifications, a licensee must be able to document the required experience by providing documentation from the authority that regulates the provision of psychological services in the public schools of that state and proof that the licensee provided such services, documented by the public schools in the state in which the services were provided. Any licensed specialist in school psychology may count one full year as an intern or trainee as one of the three years of experience required to perform supervision.

(6) Conflict Between Laws and Board Rules. In the event of a conflict between state or federal statutes and Board rules, state or federal statutes control.

(7) Compliance with Applicable Education Laws. LSSPs shall comply with all applicable state and federal laws affecting the practice of school psychology, including, but not limited to:

(A) Texas Education Code;

(B) Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232q;

(C) Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq;

(D) Texas Public Information Act ("Open Records Act"), Texas Government Code, Chapter 552;

(E) Section 504 of the Rehabilitation Act of 1973.

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 September 24, 2012.

TRD-201205039
Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 305-7706

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CHAPTER 469. COMPLAINTS AND ENFORCEMENT

22 TAC §469.1

The Texas State Board of Examiners of Psychologists proposes an amendment to §469.1, Timeliness of Complaints. The proposed amendment would ensure that the time period for alleging a violation of a Board rules does not exceed the records retention period.

Darrel D. Spinks, Executive Director, has determined that for the first five-year period the proposed amendment will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

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

Comments on the proposed amendment may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700 or email brenda@tsbep.state.tx.us within 14 days of publication of this proposal in the *Texas Register.*

The amendment is proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§469.1. Timeliness of Complaints.

(a) A complaint is timely filed if it is received by the Board, in proper form, within five years of the date of the termination of professional services and does not allege sexual misconduct or a violation of

Board rule §465.22(d) of this title (relating to Psychological Records, Test Data and Test Protocols).

(b) A complaint alleging sexual misconduct by a licensee is timely filed if received within seven years after termination of services or within three years of a client or subject of evaluation reaching the age of majority, whichever is greater. [~~A complaint alleging sexual misconduct by a licensee is timely filed if received within ten years of the termination of services or the patient's reaching the age of majority.~~]

(c) A complaint alleging a violation of Board rule §465.22(d) of this title is timely filed if received within seven years after termination of services with the client or subject of evaluation, or three years after a client or subject of evaluation reaches the age of majority, whichever is greater. [~~A complaint alleging a violation of Board rule §465.22(d) of this title is timely filed if received within ten years after the last contact with the client or subject of forensic evaluation or, if the client or subject is a minor, until ten years after the minor reaches the age of majority.~~]

(d) Any statute of limitations applying to a complaint filed against a licensee by a health licensing board in another jurisdiction, or filed by another health licensing board in Texas, begins after that jurisdiction's or authority's investigation is complete.

(e) A complaint based on discipline in another jurisdiction is timely filed within five years of the date that the board receives notice of the disciplinary 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.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Psychologists
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PART 34. TEXAS STATE BOARD OF SOCIAL WORKER EXAMINERS

CHAPTER 781. SOCIAL WORKER LICENSURE

The Texas State Board of Social Worker Examiners (board) proposes amendments to §§781.102, 781.201, 781.203, 781.204, 781.209, 781.210, 781.304, 781.312, 781.316, 781.401, 781.404, 781.411, 781.412, 781.502, 781.505, 781.506, 781.508, 781.511, 781.514 and 781.603 and new 781.419, concerning the licensure and regulation of social workers.

BACKGROUND AND PURPOSE

The proposed new §781.419 results from statutory changes made during the 82nd Legislative Session (2011), by the passage of Senate Bill (SB) 1733, codified in the Texas Occupations Code, Chapter 55, requiring the board, by rule, to set alternative licensure requirement procedures for military spouses. Specific amended sections in this proposal update licensure requirements and standards of practice in the regulation of social workers, and revisions are outlined in the section-by-section summary of this preamble.

SECTION-BY-SECTION SUMMARY

This summary considers only those sections which were substantially changed in language, meaning, or intent. A number of non-substantive modifications are proposed for the chapter in order to meet the objectives of improving draftsmanship and ensuring clarity.

The amendment to §781.102 recognizes and defines Independent Non-clinical Practice and Independent Practice Recognition as "unsupervised practice."

The amendment to §781.201 adds to the Code of Conduct a new population group to whom social workers shall not refuse to perform any act or service for which the social worker is licensed under this chapter.

The amendment to §781.203 specifies the requirements a social worker must ensure are met prior to providing services to a minor client named in a Suit Affecting Parent Child Relationships (SAPCR).

Section 781.204 prohibits a social worker from accepting remuneration to or from any person or entity for securing or soliciting social work clients or patronage for or from any health care professional and also provides warnings that such actions will subject the violator to disciplinary action. In addition, the amendment to §781.204 recognizes certain exceptions to record keeping requirements.

The amendment to §781.209 recognizes the certain exceptions to client records and record keeping requirements enumerated in §781.204.

The amendment to §781.210 prohibits a social worker from accepting remuneration to or from any person or entity for securing or soliciting social work clients or patronage for or from any health care professional in billing and financial relationships.

The amendment to §781.304 limits the circumstances that allow board or staff members to provide guidance to social workers.

The amendment to §781.312 reflects that a social worker's impartiality and non-discrimination must include gender identity and expression to whom social workers shall not refuse to perform any act or service for which the social worker is licensed under this chapter.

Section 781.316 reflects the current board licensure fees.

The amendment to §781.401 specifies the current acronym for "Licensed Social Worker-Advanced Practitioner" and extends the maximum timeframe for supervision and supervised experience.

The amendment to §781.404 modifies the board's recognition of board-approved supervisors and the supervision process; limits the number of supervised hours which may be counted toward licensure or specialty recognition; and specifies the process for approval of applicable supervision plans.

The amendment to §781.411 limits an applicant's temporary license by the board to one per lifetime, per licensing category.

The amendment to §781.412 clarifies board policy regarding the number of times an unsuccessful applicant may take the licensing examination before he or she must formally request and receive permission from the board to retake the examination, as well as under what circumstances an unsuccessful

applicant may retake the exam if he or she has failed the exam the maximum allowable attempt times.

The amendment to §781.502 specifies licensure renewal dates.

Section 781.505 specifies requirements related to converting active licensure to inactive status, payment of appropriate, related fees and consequences for failure to follow these requirements. Additionally, the proposed amendments limit the time period for inactive status and set forth the process a licensee on inactive status must follow in order to reactivate the license.

The amendment to §781.506 sets forth limitations on a licensee's emeritus status as well as the process a licensee on emeritus status must follow in order to reactivate the license, obtain board-approved supervisor status and consequences for an emeritus licensee who fails to reactive his or her license within 48 months of conversion. Additionally, this amended section limits the ability of an eligible licensee to convert from emeritus status to active status once per lifetime.

The amendment to §781.508 specifies that a licensee must complete the required hours of continuing education, even for the first renewal of the license.

The amendment to §781.511 specifies that individuals or entities who receive automatic approval as continuing education providers under this chapter will not receive board documentation of the automatic approval and will not be included in the board's rosters of supervisors. Additionally, the amendment states additional mandatory information a continuing education provider must include on the certificate of attendance issued to each program participant upon program conclusion.

The amendment to §781.514 deletes the limitation of the number of continuing education hours which may be approved by the board in one renewal cycle for successful completion of an independent study provider.

The amendment to §781.603 authorizes the board executive director to request client records from a licensee in complaint procedures and to close certain complaints as non-jurisdictional before presenting them to the Ethics Committee at that committee's next scheduled meeting. In addition, the amendment allows the board's Ethics Committee to resolve certain pending complaints without a formal disciplinary action or formal hearing.

FISCAL NOTE

Carol Miller, LMSW-AP, Executive Director, has determined that for each of the first five years the sections are in effect, there will be fiscal implications to the state government as a result of enforcing or administering the sections as proposed.

It is estimated that 25% of persons on inactive and emeritus status will reactivate their licenses annually. This number translates to approximately 134 persons. Under the proposed rules, reactivation requires completion of the jurisprudence examination at a cost of $40 per person. The state will receive 12.5% of the $40 fee, or $5; therefore, it is estimated that state revenues will increase by $670 each fiscal year of the first five fiscal years the sections are in effect.

Ms. Miller has determined that there will be no fiscal implications to local governments.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Miller has determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

Under the proposed amendments, persons who choose to place their licenses on inactive or emeritus status and later choose to return their license to regular status will be required to complete the jurisprudence examination as a condition of license reactivation. Currently, the jurisprudence examination is a cost of $40 per person. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Miller has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the effective licensing and regulation of social workers.

REGULATORY ANALYSIS

The board has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The board has determined that the proposed rules do 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, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Carol Miller, LMSW-AP, Executive Director, Texas State Board of Social Worker Examiners, Mail Code 1982, P.O. Box 149347, Austin, Texas 78714-9347 or by email to lsw@dshs.state.tx.us. When emailing comments, please indicate "Comments on Proposed Rules" in the subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §781.102

STATUTORY AUTHORITY

The amendment is proposed under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The amendment affects Texas Occupations Code, Chapter 505.

§781.102. Definitions.

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

(1) - (36) (No change.)

(37) Independent non-clinical practice--The unsupervised practice of non-clinical social work outside the jurisdiction of an organizational setting, in which the social worker, after having completed all requirements for independent non-clinical practice recognition, assumes responsibility and accountability for the nature and quality of client services, pro bono or in exchange for direct payment or third party reimbursement.

(38) Independent Practice Recognition--A specialty recognition related to unsupervised non-clinical social work at the LBSW or LMSW category of licensure, which denotes that the licensee has earned the specialty recognition, commonly called IPR, by successfully completing additional supervision which enhances skills in providing independent non-clinical social work.

(39) - (62) (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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Timothy M. Brown, LCSW
Chair
Texas State Board of Social Worker Examiners
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For further information, please call: (512) 776-6972

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SUBCHAPTER B. CODE OF CONDUCT AND PROFESSIONAL STANDARDS OF PRACTICE

22 TAC §§781.201, 781.203, 781.204, 781.209, 781.210

STATUTORY AUTHORITY

The amendments are proposed under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The amendments affect Texas Occupations Code, Chapter 505.

§781.201. Code of Conduct.

(a) A social worker must observe and comply with the code of conduct and standards of practice set forth in this subchapter. Any violation of the code of conduct or standards of practice will constitute unethical conduct or conduct that discredits or tends to discredit the profession of social work and is grounds for disciplinary action.

(1) A social worker shall not refuse to perform any act or service for which the person is licensed solely on the basis of a client's age;[,] gender;[,] race;[,] color;[,] religion;[,] national origin;[,] disability;[,] sexual orientation; gender identity and expression;[,] or political affiliation.

(2) - (13) (No change.)

(b) (No change.)

§781.203. General Standards of Practice.

This section establishes standards of professional conduct required of a social worker. The licensee, following applicable statutes:

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

(9) shall ensure that the client or a legally authorized person representing the client has signed a consent for services, when appropriate. Prior to commencement of social work services with a minor client who is named in a Suit Affecting Parent Child Relationship (SAPCR), the licensee shall ensure that all legally authorized persons representing the client have signed a consent for services, if applicable. A licensee shall maintain these documents in the client's record.

§781.204. Relationships with Clients.

(a) (No change.)

(b) The social worker shall not give or receive a commission, rebate, or any other form of remuneration for referring clients. A licensee shall not intentionally or knowingly offer to pay or agree to accept any remuneration directly or indirectly, overtly or covertly, in cash or in kind, to or from any person, firm, association of persons, partnership, corporation, or entity for securing or soliciting clients or patronage for or from any health care professional. In accordance with the provisions of the Act, §505.451, a licensee is subject to disciplinary action if the licensee directly or indirectly offers to pay or agrees to accept remuneration to or from any person for securing or soliciting a client or patronage. Payment of credentialing or other fees to insurance companies or other third party payers to be part of an approved provider list shall not be considered as a violation of this chapter.

(c) - (e) (No change.)

(f) A social worker shall keep accurate records of services to include, but not be limited to, dates of services, types of services, progress or case notes and billing information for a minimum of five years for an adult client and five years beyond the age of 18 years of age for a minor, or in compliance with applicable laws or professional standards. If the foregoing provision conflicts with the standards, requirements, or procedures for records generated in the course and scope of rendering services as a social worker, either directly or indirectly, for an educational institution, or a federal, state, or local governmental entity or political subdivision, the foregoing provision does not apply.

(g) (No change.)

(h) A licensee shall not make any false, misleading, deceptive, fraudulent or exaggerated claim or statement about the effectiveness of the licensee's services; the licensee's qualifications, capabilities, background, training, experience, education, professional affiliations, fees, products, or publications; the type, effectiveness, qualifications, and products or [~~of~~] services offered by an organization or agency; or the practice or field of social work.

(i) - (q) (No change.)

§781.209. Client Records and Record Keeping.

Following applicable statutes, the licensee shall:

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

(4) keep client records for five years for adult clients and five years beyond the age of 18 for minor clients unless the record keeping provision of §781.204(f) of this title (relating to Relationships with Clients) conflicts with the standards, requirements, or procedures for records generated in the course and scope of rendering services as a social worker, either directly or indirectly, for an educational institution, or a federal, state, or local governmental entity or political subdivision, the foregoing provision in §781.204(f) of this title does not apply;

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

§781.210. Billing and Financial Relationships.

(a) A licensee shall not intentionally or knowingly offer to pay or agree to accept any remuneration directly or indirectly, overtly or covertly, in cash or in kind, to or from any person, firm, association of persons, partnership, corporation, or entity for securing or soliciting

clients or patronage for or from any health care professional. In accordance with the provisions of the Act, §505.451, a licensee is subject to disciplinary action if the licensee directly or indirectly offers to pay or agrees to accept remuneration to or from any person for securing or soliciting a client or patronage. [~~In accordance with the provisions of the Act, §505.451, a licensee is subject to disciplinary action if the licensee directly or indirectly, overtly or covertly, in cash or in kind, offers to pay or agrees to accept remuneration to or from any person or entity for securing or soliciting a client or patronage.~~] Payment of credentialing or other fees to insurance companies or other third party payers to be part of an approved provider list shall not be considered as a violation of this chapter.

(b) - (e) (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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Timothy M. Brown, LCSW
Chair
Texas State Board of Social Worker Examiners
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SUBCHAPTER C. THE BOARD

22 TAC §§781.304, 781.312, 781.316

STATUTORY AUTHORITY

The amendments are proposed under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The amendments affect Texas Occupations Code, Chapter 505.

§781.304. Transaction of Official Board Business.

(a) (No change.)

(b) The board shall not be bound by any board member's or staff member's statement or action except when such statement or action results from the board's specific instructions. Board member or staff member opinions, except when a statement or action is in pursuance of specific instructions of the board, about ethical dilemmas or practice issues should never be substituted for appropriate professional consultation.

(c) (No change.)

§781.312. Impartiality and Non-discrimination.

(a) The board shall make all decisions in the discharge of its statutory authority without regard to any person's age;[,] gender;[,] race;[,] color;[,] religion;[,] national origin;[,] disability;[,] sexual orientation; gender identity and expression;[,] or political affiliation.

(b) (No change.)

§781.316. Fees.

(a) The following are the board's fees:

(1) (No change.)

(2) license fee for LBSW, or LMSW--$60 [~~biennially~~];

(3) (No change.)

(4) license fee for LCSW--$100 [~~biennially~~];

(5) - (21) (No change.)

(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.

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SUBCHAPTER D. LICENSES AND LICENSING PROCESS

22 TAC §§781.401, 781.404, 781.411, 781.412, 781.419

STATUTORY AUTHORITY

The amendments and new rule are proposed under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The amendments and new rule affect Texas Occupations Code, Chapter 505.

§781.401. Qualifications for Licensure.

(a) (No change.)

(b) Specialty Recognition. The following education and experience is required for specialty recognitions.

(1) Licensed Master Social Worker-Advanced Practitioner (LMSW-AP).

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

(C) Has had a minimum of 100 hours of board-approved supervision, over the course of the 3000 hours of experience, with a board-approved supervisor. Supervised experience must have occurred within the five calendar years immediately preceding the date of LMSW-AP [~~LCSW~~] application. If supervision was completed in another jurisdiction, the social worker must have the supervision verified by the regulatory authority in the other jurisdiction. If such verification is impossible, the social worker may request that the board accept alternate verification of supervision.

(D) (No change.)

(2) Independent Non-clinical Practice.

(A) (No change.)

(B) While fully licensed as a social worker has had 3000 hours of board-approved supervised full-time social work experience over a minimum two-year period, but within a maximum five-year [~~four-year~~] period or its equivalent if the experience was completed in another state. Board-approved supervised professional experience must comply with §781.404 of this title and all other applicable laws and rules.

(C) (No change.)

(c) (No change.)

§781.404. Recognition as a Board-approved Supervisor and the Supervision Process.

(a) (No change.)

(b) A person who wishes to be a board-approved supervisor must file an application and pay the applicable fee.

(1) A board-approved supervisor must be actively licensed in good standing by the board as an LBSW, an LMSW, an LCSW, or be recognized as an Advanced Practitioner (LMSW-AP), or hold the equivalent social work license in another jurisdiction. An individual whose licensure status is emeritus may not serve as a board-approved supervisor. The person applying for board-approved status must have practiced at his/her category of licensure for two years. The board-approved supervisor shall supervise only those supervisees who provide services that fall within the supervisor's own competency.

(2) - (11) (No change.)

(12) A board-approved supervisor who wishes to provide supervision towards licensure as an LCSW or towards specialty recognition in Independent Practice (IPR) or Advanced Practitioner (LMSW-AP), which is supervision for professional growth, must comply with the following.

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

(C) Supervision shall occur in proportion to the number of actual hours worked, with a base line of one hour of supervision for every 40 hours worked. If the supervisee works full-time, supervision shall occur on average at least twice a month and for no less than four hours per month; if the supervisee works part-time (at least 20 hours per week), supervision shall occur on average at least once a month and no less than two hours per month. Supervisory sessions shall last at least one hour and no more than two hours per session. No more than 10 hours of supervision may be counted in any one month, or 30-day period, as appropriate, towards satisfying minimum requirements for licensure or specialty recognition.

(D) (No change.)

(E) Supervision toward licensure or specialty recognition must extend over a full 3000 hours over a period of not less than 24 full months and a period of not more than [~~to~~] 48 full months for LCSW or LMSW-AP or not more than 60 full months for Independent Practice Recognition (IPR). Even if the individual completes the minimum of 3000 hours of supervised experience and minimum of 100 hours of supervision prior to 24 months from the start date of supervision, supervision which meets the board's minimum requirements shall extend to a minimum of 24 full months. A month is a 30-day period or the length of the actual calendar month, whichever is longer.

(F) - (H) (No change.)

(13) (No change.)

(c) A licensee who submits one of the following: a Clinical Supervision Plan, a Non-Clinical Supervision Plan, or a Board-Ordered Supervision Plan, to the board for approval, shall receive a written response from the board of either approval or deficiency related to the plan. If no written response is received by the licensee within four weeks of submission of the plan, it is the responsibility of the licensee who has submitted the plan to follow-up with the board office related to receipt and/or status of the plan within 60 days of submission. If written approval or deficiency is sent to the last known address of the licensee, a board response related to acceptance of the plan shall be considered to have been sent. Supervision and supervised experience hours are not acceptable to meet minimum requirements towards licensure or specialty recognition or to satisfy the terms of a board order if not accrued under a board-approved plan without explicit authorization from the board.

§781.411. Temporary License.

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

(h) A temporary license will not be granted to an applicant who has held a temporary license for the same license category previously within his/her lifetime [~~within the previous five years~~].

(i) - (j) (No change.)

§781.412. Examination Requirement.

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

(c) If an applicant fails the [~~first~~] examination on the first attempt of his/her lifetime, the individual may retake the examination no more than two additional times. An applicant who has failed the examination on the first, second, and third attempts [~~three times~~] must request in writing to the board to retake the examination a fourth time. The board may order the applicant to complete one or more social work educational courses as a prerequisite to retaking the examination.

(d) (No change.)

(e) If an applicant fails the examination on the fourth attempt, the person's application will be voided. The applicant will not be permitted to reapply for licensure for one year. Each subsequent attempt must be approved by the appropriate committee of the board.

(f) - (g) (No change.)

§781.419. Military Spouse.

(a) This section sets out the alternative license procedure for military spouse required under Occupations Code, Chapter 55 (relating to License While on Military Duty and for Military Spouse).

(b) The spouse of a person serving on active duty as a member of the armed forces of the United States who holds a current license issued by another state that has substantially equivalent licensing requirements shall complete and submit an application form and fee. In accordance with Occupations Code, §55.004(c), the executive director may waive any prerequisite to obtaining a license after reviewing the applicant's credentials and determining that the applicant holds a license issued by another jurisdiction that has licensing requirements substantially equivalent to those of this state.

(c) The spouse of a person serving on active duty as a member of the armed forces of the United States who 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 is qualified for licensure based on the previously held license, if there are no unresolved complaints against the applicant and if there is no other bar to licensure, such as criminal background or non-compliance with a board 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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Timothy M. Brown, LCSW
Chair
Texas State Board of Social Worker Examiners
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SUBCHAPTER E. LICENSE RENEWAL AND CONTINUING EDUCATION

22 TAC §§781.502, 781.505, 781.506, 781.508, 781.511, 781.514

STATUTORY AUTHORITY

The amendments are proposed under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The amendments affect Texas Occupations Code, Chapter 505.

§781.502. Renewal Cycles.

The license renewal date is the last day of the month of the licensee's birth month. The first renewal of licensure following issuance of the license will be valid for a period of 13 to 24 months, depending on the licensee's birth month. Subsequent to the first renewal period, licenses [~~Licenses~~] must be renewed every two years, and the renewal extends for two years. [~~The license renewal date is the last day of the licensee's birth month.~~]

§781.505. Inactive Status.

(a) A licensee who does not wish to practice social work in the State of Texas and whose license has not expired may request the board to grant inactive status anytime before the license expires. If a licensee requests conversion to inactive status within 45 days of the expiration date for the license, the individual must provide verification of completion of all continuing education requirements for the renewal.

(b) (No change.)

(c) The inactive status conversion fee and any applicable renewal fee and penalty fee for late renewal must be paid prior to the date the license expires.

(d) A licensee on inactive status must renew the inactive license and pay all applicable inactive renewal fees throughout the duration of the inactive status. A licensee on inactive status who fails to remit the biennial inactive status renewal fee or who otherwise fails to renew the inactive license timely ceases to be licensed and must reapply for licensure and meet all current minimum requirements for licensure in place at the time of submission of the new application for licensure.

(e) A license, if appropriately converted and renewed as inactive, may be on inactive status for no more than 48 consecutive months or for no more than 96 months total in a lifetime. There must be a minimum of 48 months of active licensure before subsequent inactive status may be requested and granted.

(f) [~~(d)~~] A licensee on inactive status must notify the board in writing to reactivate the license, provide proof of completion of the Jurisprudence Exam completed within six months of the date of requesting reactivation of the license, and pay the conversion fee for inactive to active status. The reactivated license status shall begin seven days after the board receives the licensee's reactivation fee.

§781.506. Emeritus Status.

(a) (No change.)

(b) The emeritus licensee may only use his or her emeritus title while providing social work services as a volunteer without compensation. The emeritus licensee who volunteers social worker services is under the board's jurisdiction and must comply with the Code of Conduct and Professional Standards of Practice, as well as the Act and the rule requirements in this chapter.

(c) An emeritus licensee whose license is in good standing [~~license~~] can be reinstated to an active license within 48 months of conversion to emeritus status [~~without being subject to the additional penalty for late renewal~~]. To be eligible for an active [~~a new~~] license through reinstatement of an emeritus license, the emeritus licensee shall submit an [~~updated~~] application for licensure at the appropriate category, as well as proof of completion of the Jurisprudence Exam within six months prior to requesting reactivation, and payment of the licensing [~~and license~~] fee. Verification of education, supervision, and examination score is not required. Verification of completion of the Jurisprudence Exam is required.

(d) An emeritus licensee who reactivates his/her license within 48 months of conversion to emeritus status may not regain board-approved supervisor status upon activation without verification of completion of minimum requirements as a board-approved supervisor in place at the time of reactivation. An emeritus licensee who reactivates his/her license within 48 months may regain other specialty recognition(s) without demonstration of meeting current minimum requirements for that specialty recognition.

(e) An emeritus licensee who does not reactivate his/her license within 48 months of conversion to emeritus status may not ever convert the license to active status. An emeritus licensee who did not reactive his/her license within 48 months of conversion must reapply for active licensure and meet all current minimum requirements for licensure, specialty recognition, and board-approved supervisor status in place at the time of application. If all current minimum requirements for licensure are met, upon issuance of a new license and license number, the emeritus license will be null and void.

(f) A licensee who converts to emeritus status may only reactivate the license to active status once per lifetime.

§781.508. Hour Requirements for Continuing Education.

(a) A licensee must complete a total of 30 clock-hours biennially of continuing education obtained from board-approved continuing education providers. A licensee must complete a total of 30 clock-hours of continuing education obtained from a board-approved continuing education provider even for the first renewal of the licensure following issuance of the license, which is valid for a period of 13 to 24 months, depending on the licensee's birth month.

(b) - (e) (No change.)

§781.511. Requirements for Continuing Education Providers.

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

(c) Entities that receive automatic status as approved providers without applying or paying fees include accredited colleges and universities; a national or statewide association, board or organization representing members of the social work profession; nationally accredited health or mental health facilities; or a person or agency approved by any state or national organization in a related field such as medicine, law, psychiatry, psychology, sociology, marriage and family therapy, professional counseling, and similar fields of human service practice. Regarding entities that receive automatic status as approved providers under this section, the board will not provide documentation of board-approved status nor will the board include such entities in its roster of board-approved providers.

(d) - (j) (No change.)

(k) It is the provider's responsibility to provide each program participant with a legible certificate of attendance after the program ends. The certificate shall include the provider's name, approval number, and expiration date of the provider's approved status; the participant's name; the program title, date, and place; the credit hours earned, including the ethics hours credited; the provider's signature or that of the provider's representative; and the board contact information, which shall at a minimum, include the board's name and web address.

(l) - (p) (No change.)

§781.514. Credit Hours Granted.

The board will grant the following credit hours toward the continuing education requirements for license renewal.

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

~~[(6) Credit hours may be earned by successful completion of an independent study program directly related to social work offered or approved by an approved provider. With the exception of persons residing outside the United States, a maximum of 20 credit hours for independent study programs will be accepted per renewal period.]~~

(6) [~~(7)~~] A licensee may carry over to the next renewal period up to 10 credit hours earned in excess of the continuing education renewal requirements. Continuing education earned during the licensee's birth month may be used for the current renewal or for the following year.

(7) [~~(8)~~] Completing the jurisprudence examination shall count as three hours of the continuing education requirement in ethics and social work values, as referenced in §781.508(b) of this title.

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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SUBCHAPTER F. COMPLAINTS AND VIOLATIONS

22 TAC §781.603

STATUTORY AUTHORITY

The amendment is proposed under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The amendment affects Texas Occupations Code, Chapter 505.

§781.603. Complaint Procedures.

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

(g) The executive director initially reviews the complaint to determine jurisdiction. If a complaint appears to be within the board's jurisdiction, the executive director shall decide whether to authorize sending a copy of the complaint to the respondent and requesting a response, which may include but not be limited to requesting that a copy of the client's records be attached to the response. If the executive director does not authorize written notification of the respondent, the complaint will be referred for an investigation and the assigned investigator will determine whether the respondent will be notified by letter, phone call, site visit, or some other appropriate means. If the complaint is against a person licensed by another board, the department staff will forward the complaint to that board not later than the 15th day after the date the agency determines that the information shall be referred to the appropriate agency as provided in Government Code, Chapter 774, relating to exchange of information between regulatory agencies.

(h) If the allegations clearly do not fall within the board's jurisdiction, the executive director may consult with both the attorney for the board as well as the board chair or his/her designee, and if all agree, the executive director may close the complaint and will present the case to the Ethics Committee at the committee's next meeting. The Ethics Committee retains the right to request full disclosure of any case closed and order a comprehensive hearing of the complaint.

(i) - (n) (No change.)

(o) The Ethics Committee may resolve pending complaints in which no violation is found or substantiated, or in which a violation is found, but the violation does not seriously affect the health and safety of clients or other persons, with actions which are not considered formal disciplinary actions. These include: issuance of an advisory notice, warning letter; or informal reminder; issuance of a "Conditional Letter of Agreement;" and/or other actions as deemed appropriate by the Ethics Committee. The licensee is not entitled to a hearing on the matters set forth in the notice, letter, reminder, "Conditional Letter of Agreement," or other action but may submit a written response to be included in the complaint record. Such actions by the Ethics Committee may be introduced as evidence in any subsequent disciplinary action involving acts or omissions after receipt of the notice, letter, reminder, "Conditional Letter of Agreement," a cease and desist letter, or other action which does not involve a formal disciplinary action.

(1) An advisory notice, warning letter or informal reminder. The Ethics Committee may resolve pending complaints by issuance of a formal advisory notice, warning letter, or informal reminder informing licensees of their duties under the Act or this chapter, whether the conduct or omission complained of appears to violate such duties, and whether the board has a concern about the circumstances surrounding the complaint.

(2) A "Conditional Letter of Agreement." The Ethics Committee may resolve pending complaints by issuance of a "Conditional Letter of Agreement" informing licensees of their duties under the Act or this chapter, whether the conduct or omission complained of appears to violate such duties, and creating board-ordered conditions for the long-term resolution of the issues in the complaint. This "Conditional Letter of Agreement" specifies the immediate disposition of the complaint. The licensee is issued the "Conditional Letter of Agreement" by the Ethics Committee, executive director, or designee; a signature of agreement by the licensee is not required. If the licensee fails to comply with all the board-ordered conditions in the specified time frame outlined in the "Conditional Letter of Agreement," the licensee will not have a right to a subsequent review of the issues in the original complaint by the Ethics Committee, but rather, a new complaint will be opened for the original violation(s), and notice of the violation(s) will be issued to the licensee, proposing to impose a formal disciplinary action as the resolution. The disciplinary action proposed for failure to comply with a "Conditional Letter of Agreement" will be a reprimand, unless otherwise specified by the Ethics Committee. "Procedures for Revoking, Suspending, Probating or Denying a License, or Reprimanding a Licensee" shall apply when a formal disciplinary action is proposed.

(3) Other actions. The Ethics Committee may resolve pending complaints with other actions, including issuance of a cease and desist letter, which are not considered formal disciplinary actions.

~~[(o) If a violation is found but it does not seriously affect the health and safety of clients or other persons, the committee may resolve the complaint by informal methods such as a cease and desist letter or an informal agreement with the violator to correct the violation.]~~

(p) - (s) (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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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING AND ENFORCEMENT RULES

SUBCHAPTER B. P.G. LICENSING, FIRM REGISTRATION, AND GIT CERTIFICATION

22 TAC §§851.25, 851.30, 851.45

The Texas Board of Professional Geoscientists (Board) proposes amendments to 22 TAC §§851.25, 851.30, and 851.45, concerning the licensure and regulation of Professional Geoscientists.

BACKGROUND AND PURPOSE

The Board proposes amendments to enhance the section on Education requirements; to clarify the registration requirements for Geoscience Firms; and to specify and clarify the requirements and application process for Geoscientist-in-Training certificate holders who apply for P.G. licensure.

SECTION BY SECTION SUMMARY

An amendment to §851.25 is proposed to add language to provide that a commercial evaluation of a degree shall be accepted in lieu of an official transcript only if the credential evaluation service has indicated that the credential evaluation was based on a verified official academic record or transcript.

Amendments to §851.30 are proposed regarding firms that offer or perform geoscience services on a part-time basis to eliminate the requirement that a P.G. in responsible charge must have a physical presence at the relevant firm location and be a regular full-time employee of the firm; and to clarify that a firm's registration cannot be renewed once the registration has been expired for one year. A firm must re-apply to become registered again.

Amendments to §851.45 are proposed to clarify the requirements regarding the P.G. application process for an individual who is certified as a Geoscientist-in-Training.

FISCAL NOTE

Charles Horton, Executive Director, has determined that for the first five-year period the sections are in effect there will be no fiscal impact for state or local government as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS ECONOMIC IMPACT ANALYSIS

Mr. Horton has determined that there may be little to no anticipated economic costs to small businesses or micro-businesses required to comply with proposed §§851.25, 851.30, and 851.45. There will be no anticipated economic cost to persons who are required to comply with the proposed sections. Consequently, an economic impact statement or regulatory flexibility analysis is not required.

There is no anticipated negative impact on local government.

PUBLIC BENEFIT

Mr. Horton has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is that Texas Board of Professional Geoscientists (TBPG) application rules are clarified, firm registration guidelines are clarified, and the Board will be able to more effectively regulate the public practice of geoscience in Texas, which will protect and promote public health, safety, and welfare.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

The Board has determined that these proposals are not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. Although Professional Geoscientists and Registered Geoscience Firms play a key role in environmental protection for the state of Texas, this proposal is not specifically intended to protect the environment nor reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

Mr. Horton has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted in writing either in person or by courier to Charles Horton, Executive Director, Texas Board of Professional Geoscientists, 333 Guadalupe Street, Tower I-530, Austin, Texas 78701 or by mail to P.O. Box 13225, Austin, Texas 78711 or by e-mail to chorton@tbpg.state.tx.us. When e-mailing comments, please indicate "Comments on Proposed Rules" in the e-mail subject line. Please submit comments within 30 days following publication of the proposal in the *Texas Register*.

The proposed amendments are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); by Occupations Code §1002.154 which provides that Board shall enforce the Act; by Occupations Code §1002.255 which provides for license eligibility requirements regarding education and work experience; and by Occupation Code §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation.

The proposed amendments affect Occupations Code, Chapter 1002.

§851.25. Education.

(a) An applicant must have graduated from a course of study from an accredited university or program in one of the following disciplines of geoscience satisfactory to the Board that consists of at least four years of study and includes at least 30 semester hours or 45 quarter hours of credit in geoscience, of which at least 20 semester hours or 30 quarter hours of credit must be in upper-level college courses in that discipline; or satisfactorily completed other equivalent educational requirements as determined by the Board.

(1) Geology or sub-discipline of geology including but not limited to engineering geology, petroleum geology, hydrogeology, and environmental geology.

(2) Geophysics.

(3) Soil science.

(b) An official transcript (including either grades or mark sheets and proof that the degree was conferred) shall be provided for the degree(s) utilized to meet the educational requirements for licensure. Official or notarized copies of transcripts shall be submitted to the Board. Official transcripts shall be forwarded directly to the Board office by the respective registrars. The applicant is responsible for ordering and paying for all such transcripts. Additional academic information including but not limited to grades and transfer credit shall be submitted to the Board at the request of the Executive Director.

(c) If transcripts cannot be transmitted directly to the Board from the issuing institution, the Executive Director may recommend alternatives to the Board for its approval. Such alternatives may include validating transcripts in the applicant's possession through a Board-approved commercial evaluation service.

(d) Degrees and coursework earned at foreign universities shall be acceptable if the degree conferred and coursework has been determined by a member of the National Association of Credential Evaluation Services (NACES) to be equivalent to a degree conferred by or coursework completed in an accredited institution or program. It is the applicant's responsibility to have degrees and coursework so evaluated. The commercial evaluation of a degree shall [~~will not~~] be accepted in lieu of an official transcript only if the credential evaluation service has indicated that the credential evaluation was based on a verified official academic record or transcript.

(e) The relevance to the licensing requirements of academic courses, the titles of which are not self-explanatory, must be substantiated through course descriptions in official school catalogs, bulletins, syllabi, or by other means.

(f) The Board shall accept no coursework which an applicant's transcript indicates was not completed with a passing grade or for credit.

(g) In evaluating two or more sets of transcripts from a single applicant, the Board shall consider a quarter hour of academic credit as two-thirds of a semester hour.

§851.30. Firm Registration.

(a) Registration required: Unless an exemption applies, as outlined in Texas Occupations Code §1002.351(b), a firm or corporation may engage in the public practice of geoscience only if the firm is currently registered with the Board; and

(1) The geoscientific work is performed by, or under the supervision of, a Professional Geoscientist who is in responsible charge of the work and who signs and seals all geoscientific reports, documents, and other records as required by this chapter; or

(2) The business of the firm or corporation includes the public practice of geoscience as determined by Board rule and a principal of the firm or an officer or director of the corporation is a Professional Geoscientist and has overall supervision and control of the geoscientific work performed in this state. As provided in §851.10(21) of this chapter, the term firm includes corporations, sole-proprietorships, partnerships and/or joint stock associations. For the purposes of this section, the term public includes but is not limited to political subdivisions of the state, business entities, and individuals. The Board has the authority under the Act to issue an annual certificate of registration to applicants that, subsequent to review and evaluation, are found to have met all requirements of the Act and Board rules. The Board has the authority under the Act to deny a certificate of registration to any applicant found not to have met all requirements of the Act and Board rules. This section does not apply to an engineering firm that performs service or work that is both engineering and geoscience. For the purpose of fees, Geoscience Firms are categorized as either:

(A) An unincorporated sole-proprietorship (a single owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner) registered by the Board to engage in the public practice of geoscience; or

(B) Any other type of firm, corporation, partnership (whether or not the partnership is an incorporated entity) or other business entity registered by the Board to engage in the public practice of geoscience.

(b) Unless registered by the Board or exempt from registration under Texas Occupations Code §1002.351, an individual, firm, or corporation may not represent to the public that the individual, firm, or corporation is a Professional Geoscientist or able to perform geoscientific services or prepare a geoscientific report, document, or other record that requires the signature and seal of a license holder under Texas Occupations Code §1002.263(b).

(c) Registration requirements: In order to be eligible to register as a Geoscience Firm with the Board, the firm must:

(1) Affirm and demonstrate that the firm is an unincorporated sole-proprietorship or another business entity that offers or performs work that includes the public practice of geoscience;

(2) Identify an Authorized Official of a Firm who shall be responsible for: the process of submitting the application for the initial registration of the firm with the Board; ensuring that the firm maintains compliance with the requirements of registration with the Board; ensuring that the firm complies with all laws, codes, rules, and standards applicable to the public practice of geoscience; ensuring that the firm renews its registration status as long as the firm offers or provides public geoscientific services; and communicating with the Board regarding any matter;

(3) Operate under a business model such that:

(A) The geoscientific work is performed by, or under the supervision of, a licensed Professional Geoscientist who is in responsible charge of the work and who signs and seals all geoscientific reports, documents, and other records as required by this chapter; or

(B) The principal business of the firm or corporation is the public practice of geoscience as determined by Board rule and a principal of the firm or an officer or director of the corporation is a licensed Professional Geoscientist and has overall supervision and control of the geoscientific work performed in this state;

(4) Identify the business model and the Professional Geoscientist who fulfills the role of the licensed Professional Geoscientist in paragraph (3) of this subsection;

(5) Unless the firm is an unincorporated sole-proprietorship or an unincorporated partnership, a firm seeking registration with the Board must register the firm with the Office of the Secretary of State (SOS) and obtain a certificate of authority. If the firm operates under a name other than that which is filed with the SOS, an Assumed Name Certificate must be filed with the County Clerk. A firm's SOS certificate of authority number and all Assumed Name Certificate instrument numbers must be provided to the Board upon initial application. If the firm is a sole-proprietorship and the firm operates under a name that does not include the last name of the individual sole proprietor, the firm shall file an Assumed Name Certificate with the County Clerk;

(6) Submit an application for registration of a firm (form C), in accordance to the procedures outlined in subsection (d) of this section;

[~~(7) A firm that offers or performs professional geoscience services only on a part-time basis must ensure that the Professional Geoscientist who performs the geoscientific work or who directly supervises the geoscientific work while the firm is in operation has physical presence and is a regular full-time employee of the firm. An active licensee who is a sole proprietor shall satisfy the requirement of the regular full-time employee;~~]

(7) [~~(8)~~] Upon initial application, a firm shall affirm that the licensed Professional Geoscientist performing or supervising the geoscientific work for a Geoscience Firm is a regular full-time employee. A Geoscience Firm shall provide evidence of the full-time employment status upon request of the Board. This subsection does not prohibit a licensed Professional Geoscientist from performing consulting geoscience services on a part-time basis as an individual. A Geoscience Firm shall provide that at least one regular full-time Professional Geoscientist employee directly supervise all geoscience work performed in branch, remote, or project offices. If such a branch, remote or project office is normally staffed full-time while performing geoscience work or is represented by the firm as a permanent full-time office, then at least one regular full-time Professional Geoscientist must be physically present in each such office.

(d) Firm Registration Application Process.

(1) The Authorized Official of a Firm shall complete and submit, along with the required application fee, the form furnished by the Board which includes but is not limited to the following information listed in subparagraphs (A) - (E) of this paragraph:

(A) The name, address, and communication number of the firm offering to engage or engaging in the practice of professional geoscience for the public in Texas;

(B) The name, position, address, and communication numbers of each officer or director;

(C) The name, address and current active Texas Professional Geoscientist license number of each regular, full-time geoscience employee performing geoscientific work for the public in Texas on behalf of the firm;

(D) The name, location, and communication numbers of each subsidiary or branch office offering to engage or engaging in the practice of professional geoscience for the public in Texas, if any; and

(E) A signed statement attesting to the correctness and completeness of the application.

(2) Upon receipt of all required materials and fees and having satisfied requirements in this section, the firm shall be registered and a unique Geoscience Firm registration number shall be assigned to the firm registration. The new firm registration shall be set to expire at the end of the calendar month occurring one year after the firm registration is issued.

(3) An application is active for one year including the date that it is filed with the Board. After one year an application expires.

(4) Obtaining or attempting to obtain a firm registration by fraud or false misrepresentation is grounds for an administrative sanction and/or penalty.

(5) Applications are not reviewed until the application and fee have been received in the TBPG office. Applicants are initially notified of any deficiencies in the application.

(6) Applicants should respond to a deficiency notice within forty-five (45) days from the date of notification for applicants to correct deficiencies. If an applicant does not respond to a deficiency notice or does not ensure that necessary documents are provided to the TBPG office, the application will expire as scheduled one year after the date it became active.

(e) The application fee will not be refunded.

(f) The initial certificate of registration shall be valid for a period of one year from the date it is issued, plus any days remaining through the end of that month. A renewed firm registration is valid for a period of one year from the expiration date of the firm registration being renewed.

(g) A Geoscience Firm's completed and approved registration is the legal authority granted the holder to actively offer or practice geoscience upon meeting the requirements as set out in the Act and these rules. When a firm registration is issued, a firm registration certificate, the first firm registration certificate expiration card, and the first portable firm registration card is provided to the new Geoscience Firm. The firm registration certificate shall bear the name of the firm, the firm's unique Geoscience Firm registration number, and the date the firm registration was originally issued. The firm registration certificate is not valid proof of current registration as a firm, unless the firm registration certificate expiration card is accompanying the firm registration certificate and the date on the firm registration certificate card is not expired. The firm registration certificate expiration card shall bear the name of the firm, the firm's unique firm registration license number, and the date the firm registration will expire, unless it is renewed. The portable firm registration card shall bear the name of the firm, the firm's unique Geoscience Firm registration number, the date the registration was originally issued, and the date the registration will expire, unless it is renewed.

(h) At least sixty (60) days in advance of the date of the expiration, the Board shall notify each firm holding a certificate of registration of the date of the expiration and the amount of the fee that shall be required for its renewal for one year. The certificate of registration may be renewed by completing the renewal application and paying the annual registration renewal fee set by the Board. It is the sole responsi-

bility of the firm to pay the required renewal fee prior to the expiration date, regardless of whether the renewal notice is received.

(i) A certificate of registration which has been expired for less than one (1) year may be renewed by completing a firm registration renewal application; an affirmation signed by the Authorized Official of a Firm and the licensed Professional Geoscientist who performs or supervises the geoscience work for the firm indicating whether geoscientific services were offered, pending, or performed for the public in Texas when the firm's registration was expired and payment of a $50 late renewal penalty. If a firm under application for late firm registration renewal has met the requirements for renewal and has indicated that the geoscience services were offered, pending, or performed for the public in Texas while the firm's registration was expired, unless certain allegations of misconduct are present, the firm's registration shall be renewed. Information regarding unregistered geoscience practice received under this section shall be referred to the enforcement division for appropriate action that could include the initiation of a complaint by the Board. A firm registration that has been expired for more than one year is permanently expired and may not be renewed; a new application is required.

(j) The application fee is non-refundable.

§851.45. Relationship of Geoscientist-in-Training Certification to Licensure of Professional Geoscientists.

The Geoscientist-in-Training (GIT) Certification is intended as a stepping stone toward licensure as individuals are gaining acceptable geoscience experience. Upon accruing five years of post graduate geoscience work experience, individuals [~~Individuals~~] who are GIT certified and in good standing with the Board will [~~only~~] need to:

(1) submit TBPG's Initial P.G. License Application;

(2) submit the application fee as detailed in §851.80 of this chapter;

(3) supply letters of reference as detailed in §851.24 of this chapter;[~~,~~]

(4) provide evidence of experience as described in §851.23 of this chapter;[~~,~~] and

(5) successfully pass the appropriate practice exam of ASBOG or CSSE. The degree program, coursework and transcripts are evaluated during the application phase for GIT Certification, and shall not be re-evaluated upon application for licensure as a Professional Geoscientist.

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 28 INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 1. GENERAL ADMINISTRATION

SUBCHAPTER D. EFFECT OF CRIMINAL CONDUCT

DIVISION 2. PROCEDURES GOVERNING PERSONS SUBJECT TO 18 U.S.C. §1033 AND §1034

28 TAC §§1.520 - 1.530

The Texas Department of Insurance (TDI) proposes new Division 2, entitled Procedures Governing Persons Subject to 18 U.S.C. §1033 and §1034, to include new proposed 28 TAC §§1.520 - 1.530, concerning standard procedures for persons convicted of certain felony offenses to obtain written consent to engage in the business of insurance. The department is adding "Division 1, Fitness and Licensing" to existing §§1.501 - 1.509 which outlines TDI's procedures in determining whether persons applying for a license or authorization are honest, trustworthy, reliable, and fit to hold those positions. No amendments are proposed to existing §§1.501 - 1.509. TDI will not consider any comments, including requests for amendments, regarding existing §§1.501 - 1.509.

Sections 1.520 - 1.530 are necessary to: (i) implement the Violent Crime Control and Law Enforcement Act of 1994, Public Law 103 - 322, H.R. 3355, Title 18 United States Code §1033 and §1034, effective September 13, 1994, which prohibits any individual convicted of a criminal felony of dishonesty, a breach of trust, or an offense under 18 U.S.C. §1033, from engaging or participating in the business of insurance without written consent from an insurance regulatory official authorized to regulate the insurer; and (ii) sets forth the procedures by which the commissioner will determine whether individuals convicted of a criminal felony involving dishonesty or a breach of trust, or an offense under 18 U.S.C. Section 1033, should be granted, denied, or revoked written consent to engage or participate in the business of insurance in Texas.

The Violent Crime Control and Law Enforcement Act of 1994, effective September 13, 1994, H.R. 4092 (103rd), provides that the legislative intent of the Act is to control and prevent crime. The Act creates criminal penalties and authorizes the U.S. Attorney General to bring civil or criminal actions against offenders. The Act makes it a federal crime for certain individuals convicted of a state or federal felony involving dishonesty or a breach of trust from engaging in the business of insurance unless the individual is specifically authorized by written consent from an insurance regulatory official authorized to regulate the insurer. The commissioner is TDI's chief executive and administrative officer with the authority to enforce laws applicable to TDI, and therefore, the regulatory official at TDI authorized to regulate the insurer. The commissioner has the discretion to determine the method of inquiry regarding the determination of whether to grant or deny an individual's request for written consent because the Act does not specify the method.

Sections 1.520 - 1.530 set forth the scope of the convicted person's consent process, clarify the procedure for consent application submission, outline the criteria that the commissioner will review in determining whether to grant written consent, and address denials and administrative appeals of such denials. The

proposal is necessary to maintain effective regulation of the business of insurance in Texas by establishing requirements and procedures to further ensure that persons granted written consent are honest, trustworthy, reliable, and fit. This proposal does not impose additional requirements or costs on persons with current licenses or authorizations, nor should it affect the status of that current license or authorization, to the extent the person has made full disclosure to TDI of all criminal conduct. An individual that maintains a current license or authorization may incur additional costs under this proposal as a result of a subsequent criminal conviction.

The use of criminal history information is necessary to confirm that an applicant is subject to the Act and TDI's rules, as well as to assist the commissioner in determining whether to grant or deny written consent under 18 U.S.C. §1033. The proposal utilizes TDI's standard requirement for obtaining an individual's criminal history information by using the individual's fingerprints. Generally, the proposal does not require any individual who has previously provided TDI fingerprints as part of an earlier submission that was granted or approved to resubmit fingerprints. However, TDI has the authority to request additional information from applicants under §1.525 and an applicant has a duty to disclose to TDI certain information under §1.527. Any fingerprints submitted as part of a request for written consent that is granted may also be used for subsequent license or authorization application submissions.

The Act specifies that any individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under 18 U.S.C §1033, may engage in the business of insurance or participate in the business if the person has the written consent of any insurance regulatory official authorized to regulate the insurer, which consent specifically refers to 18 U.S.C §1033(e). The prohibition under the Act applies to individuals who willfully engage or participate in the writing of insurance, or the reinsuring of risks, by an insurer, including all acts necessary or incidental to writing or reinsuring, and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers, or other persons authorized to act on their behalf, whose activities affect interstate commerce. Under the proposal, TDI has the discretion to determine whether Texas is the appropriate state from which an applicant should request written consent.

Section-By-Section Overview of the Proposal.

Section 1.520 addresses Purpose and Scope. Section 1.520(a) provides that the purpose of Division 2 is to implement 18 U.S.C. §1033 by establishing procedures for TDI and the commissioner to (i) obtain criminal history information; (ii) obtain background information; and (iii) determine the fitness of applicants. Section 1.520(b) mirrors the broad application of the Act by specifying that the rules reach to any individual who engages or participates in the business of insurance whose activities affect interstate commerce and who has been convicted of any criminal felony involving dishonesty or a breach of trust, or an offense under the Act. The Act covers all acts necessary or incidental to the writing of insurance or reinsurance and the activities of persons who act as or are officers, directors, producers, or employees and the activities of persons who act as or are officers, directors, producers, or employees and includes those authorized to act on their behalf. These subsections are necessary to describe the applicability of Division 2.

Section 1.520(c) tracks §1.501(b) and identifies the persons to whom these sections apply. Section 1.520(d) clarifies that the laws and regulations regarding the fitness of individuals to apply for a license or authorization with TDI and other states are not preempted by these rules. These proposed rules are separate and in addition to state statutory and regulatory licensing qualifications. This section is necessary to explain that even though a person may obtain written consent from the commissioner under these rules, the person may still be barred from the insurance industry by state law. The Act does not provide for automatic letters of consent for individuals who possess a state insurance license, does not contain grandfather provisions for individuals already transacting the business of insurance, and does not provide a time limit on how far back the felony conviction triggering the requirement to request written consent must have occurred. Section 1.520(d) further provides that an individual could violate state statutory and regulatory licensing requirements, as well as Division 2, by failing to inform TDI of a prior criminal conviction on a license application.

Section 1.520(e) incorporates severability clause language to conform to current agency style.

Section §1.521 addresses Definitions. The §1.521(1) definition of "Act" means the Violent Crime Control and Law Enforcement Act of 1994, Title 18 United States Code §1033 and §1034. In §1.521(2) the term "applicant" clarifies that the term includes any person subject to the Act requesting written consent from TDI, as opposed to an applicant for a license, and refers to the definitions in §1.521(10) and (11).

The §1.521(3) definition of "business of insurance" is as defined in 18 U.S.C. §1033(f)(1), which provides that "business of insurance" means (i) the writing of insurance; (ii) the reinsuring of risks; (iii) all acts necessary or incidental to such writing or reinsuring; and (iv) the activities of persons who act as, or are, officers, directors, agents, or employees of insurers, or other persons authorized to act on their behalf. The term also includes acts provided in Insurance Code §101.051.

The §1.521(4) definition of "commissioner" clarifies that the term means the commissioner of insurance or her or his designee. This definition is necessary to define the term as used in Division 2.

The §1.521(5) definition of "control" is as defined in Insurance Code §823.005, which provides in §823.005(a), that for purposes of Insurance Code Chapter 823, control is the power to direct, or cause the direction of, the management and policies of a person, other than power deriving from an official position with or corporate office held by the person. The power may be possessed directly or indirectly by any means, including through the ownership of voting securities or by contract, other than a commercial contract for goods or nonmanagement services. Insurance Code §823.005(b) provides that, for purposes of this chapter, a person controls another if the person possesses the power described by Subsection (a) with regard to the other person. Insurance Code §823.005(c) provides that, after providing notice and opportunity for hearing to each person in interest, the commissioner may determine that, notwithstanding the absence of a presumption under §823.151, a person controls an authorized insurer if the person, directly or indirectly and alone or under an agreement with one or more other persons, exercises such a controlling influence over the management or policies of the insurer that it is necessary or appropriate in the public interest or for the protection of the insurer's policyholders that the person be considered to control the insurer. The commissioner will make specific findings of fact to support a determination under this subsection. This definition is necessary to define the term as

used in the definition of "person subject to the Act" in §1.521(11) of this title.

The §1.521(6) definition of "criminal felony involving dishonesty or a breach of trust" incorporates the list of crimes that may contain an element of dishonesty or breach of trust, as outlined in the Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994: United States Code Sections 1033 and 1034, adopted by the NAIC in 2011. The list of crimes is not exhaustive and there is no time limit on how long ago the felony conviction may have occurred.

In §1.521(7), the term "domestic" means an entity organized under the laws of Texas or a commercially domiciled insurer as defined in Insurance Code §823.004. This definition is necessary to define the term as used in the definition of "person subject to the Act" in §1.521(11) of this title.

In §1.521(8), the term "insurer" is as defined in 18 U.S.C. §1033(f)(2). Title 18 U.S.C. §1033(f)(2) provides that the term "insurer" means any entity, the business activity of which is the writing of insurance or the reinsuring of risks, and includes any person who acts as, or is, an officer, director, agent, or employee of that business.

The §1.521(9) definition of "interstate commerce" is as defined in 18 U.S.C. §1033(f)(3), which provides that the term means commerce within the District of Columbia, or any territory or possession of the United States; all commerce between any point in the State, territory, possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; or all other commerce over which the United States has jurisdiction.

The §1.521(10) definition of "offense under the Act" means the enumerated offenses in 18 U.S.C. §1033.

In §1.521(11) the term "person subject to the Act" includes any individual who has been convicted of a criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under the Act, who intends to engage or participate in the business of insurance in Texas, whose activities affect interstate commerce. This definition is necessary to incorporate the broad scope of individuals to whom the Act applies. Title 18 U.S.C. §1033(f)(1) provides that the "business of insurance" includes, in relevant part, all acts necessary or incidental to the writing or reinsuring of risks and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons. The group of "other persons" authorized to act on behalf of officers, directors, agents, or employees of insurers would include any subcontractors, third-party administrators, consultants, professionals, and those who receive compensation or remuneration from such business.

The §1.521(12) definition of "request for written consent" clarifies that only a completed request for written consent form submitted to TDI by a person subject to the Act, as defined in §1.521(11), constitutes a request for written consent that may be considered the commissioner.

Section 1.521(13) defines the term "TDI" as the Texas Department of Insurance.

Section 1.521(14) defines "written consent" as the commissioner's granting of authorization for a person subject to the Act to engage or participate in the business of insurance in Texas to implement 18 U.S.C. §1033(e)(1)(A).

Section 1.522 addresses Written Consent Required. Section 1.522(a) explains that any person subject to the Act is required to obtain written consent from the commissioner to participate or engage in the business of insurance in Texas. TDI considered the NAIC Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994, adopted to be effective 2011, that stated, in part, that it could not have been the intent of Congress to allow one state to extend its statutory power into other jurisdictions. Therefore, Texas requires individuals participating or engaging in the business of insurance in Texas to request written consent from the commissioner. If the commissioner determines that another state is the appropriate state from which an individual must request written consent, or TDI does not regulate the insurer, the request for written consent will be denied and a notice explaining the reasons for denial will be sent to the applicant as provided under §1.529 of this title.

Section 1.522(b) is necessary to explain that the current regulations regarding licensing individuals with criminal backgrounds in Chapter I, Subchapter D, (relating to effect of criminal conduct) are in addition to the requirements under Division 2. A person subject to the Act must be granted written consent to retain a license or authorization, and before any new or renewal license or authorization will be issued. Title 18 U.S.C. §1033 does not provide for any grandfather provisions by which an individual already licensed may be exempt from the requirements under the Act. A person currently licensed is still required to obtain written consent from the commissioner to engage or participate in the business of insurance in Texas.

Section 1.522 (c) explains that a person subject to the Act must be granted written consent from the commissioner, as opposed to merely submitting a request for written consent, before engaging or participating in the business of insurance in Texas.

Section 1.522(d) provides that TDI may share information with other states regarding an individual's request for written consent. The NAIC guidelines provide for the exchange of data regarding applicants for written consent under 18 U.S.C. §1033. Participating state insurance departments established the National Special Activities Database which can be used to securely share data on applicants requesting written consent. This section is necessary to ensure that accurate information is exchanged among states where the person subject to the Act engages in the business of insurance in multiple jurisdictions.

Section 1.523 addresses Insurer Responsibility under the Act. The Act provides that it is a federal crime for any individual who is engaged in the business of insurance whose activities affect interstate commerce to willfully permit a person subject to the Act to willfully engage or participate in the business of insurance without written consent. This section is necessary to clarify that under the Act, insurers have an obligation not to willfully permit a person convicted of a felony crime of dishonesty or a breach of trust to engage or participate in the business of insurance without written consent.

Section 1.524 addresses Request for Written Consent. Section 1.524(a) and (b) are necessary to address the availability of the request for written consent form and the process by which the request for written consent form may be submitted to TDI. The request for written consent form is necessary because, under 18 U.S.C. §1033, the commissioner developed guidelines relating to the matters that TDI will consider in determining whether to grant, deny, or revoke written consent. These matters include criminal background checks for each applicant. Section 1.524(c)

is necessary to inform applicants that assistance with submitting a request for written consent is available by calling TDI.

Section 1.524(d) - (f) provide the screening criteria and factors by which the commissioner will evaluate whether to grant or deny written consent. Section 1.502 provides the guidelines used by TDI to determine a person's fitness for holding a license, authorization, certification, permit, or registration, and the person's fitness to have the ability to control licensed, registered, permitted, certificate holding, and authorized entities, when that person has committed a criminal offense or has engaged in fraudulent or dishonest activity. The commissioner employs the same principles as are set forth in §1.502 to determine whether the mitigating or extenuating factors provided to TDI in the screening criteria outweigh the serious nature of the criminal offense when viewed in light of the applicant's occupation. The commissioner determined that, in addition to other factors, the screening criteria for applicants for licensure and authorization under §1.502 should be utilized in determining whether a person subject to the Act should be granted written consent under Division 2. Although the Act also applies to other persons without a license or authorization from TDI, the commissioner determined that the same principles set forth in §1.502 are the best means to determine whether a person subject to the Act is fit to be granted written consent and worthy of public confidence.

Occupations Code Chapter 53 states the general procedure a licensing authority must employ when considering the consequences of a criminal record on granting or continuing a person's license, registration, or authorization. Occupations Code §53.025 authorizes a licensing authority to issue guidelines relating to its practice under Chapter 53. Insurance Code §§801.101, 801.102, and 801.151 - 801.155 authorize the commissioner to review the fitness and reputation of officers, directors, and persons in control of insurance companies and to refuse or revoke a certificate of authority to any company based on a determination that such officer, director, or controlling person is not worthy of public confidence.

Section 1.524(g) clarifies that it is the responsibility of the person subject to the Act to secure and provide to TDI the information and documentation required by this section.

Section 1.525 addresses Requirement to Provide Fingerprints and Documents. Section 1.525(a) requires an applicant to submit all additional requested information to TDI within 30 days of the date the request is mailed to the applicant by TDI. This 30-day provision allows the applicant adequate time to submit the additional information and specifies a uniform minimum time period for all applicants. TDI will send the applicant a notice of deficiency if the requested information is not submitted to TDI. If TDI does not receive the information within 180 days of the date the notice of deficiency was mailed by TDI, the request for written consent may be denied or deemed incomplete. This section is consistent with 28 TAC §1.806 regarding a deficient application for an agent's license and provides uniform procedures by which TDI will notify applicants of deficiencies in the request for written consent.

Section 1.525(b) requires an applicant to submit to TDI a complete set of the applicant's fingerprints, full payment for all processing fees charged by the Texas Department of Public Safety and the Federal Bureau of Investigation, and all additional identifying information required by the Texas Department of Public Safety and the Federal Bureau of Investigation for processing fingerprints. The individual's fingerprints will either be submitted directly to DPS, if captured by the DPS electronic vendor, or to TDI and then to DPS if captured on paper. The fingerprint processing fee charged by DPS is set by Government Code §411.088(a)(2). The associated fingerprint processing fee charged by the FBI is set by federal authority and is made known to TDI by DPS. This section is necessary because fingerprints are the only method the FBI will accept to produce identity and criminal history information. The proposed section utilizes the secure and uniform procedures by which TDI already obtains a complete criminal history from individuals applying for a license or authorization and from individuals who are seeking to be associated with a regulated entity. These same procedures will be utilized for other persons not seeking a license from TDI, but who are engaged or participating in the business of insurance in Texas.

Section 1.525(c) clarifies that the procedures and requirements for fingerprint application, format, use, and confidentiality in Division 1 of this subchapter (relating to Fitness for Licensing) apply to persons subject to the Act requesting written consent.

Section 1.526 addresses Effect of False or Misleading Statements. The truth and veracity of documents and information submitted by or on behalf of the person subject to the Act are essential in identifying the fitness of the applicant to engage or participate in the business of insurance in Texas. If TDI determines that the person subject to the Act, or her or his representative, has made false or misleading statements, or has failed to disclose information, the commissioner may deny the request for written consent or revoke the written consent. Section 1.526 further provides that TDI's Fraud Section will make an independent determination whether TDI should pursue an investigation of fraudulent insurance acts under the Insurance Code or these rules, or whether referral to another law enforcement agency or federal prosecutor should be made. This section is necessary because ultimately, only a federal prosecutor or court will determine how restrictive or broadly to apply the statute. Additionally, these rules do not and cannot establish a crime under federal law. However, TDI has the authority to provide for the financial soundness and the economic safety of insurers and consumers by ensuring that insurers regulated by TDI are not in violation of federal criminal law.

Section 1.527 addresses Disclosure. Section 1.527 requires a person subject to the Act granted written consent under Division 2 to notify TDI within 30 days of certain information, including (i) a felony conviction; (ii) an administrative action taken against the person subject to the Act by a financial or insurance regulator of a state or the United States; (iii) increased job duties; (iv) administrative or other legal proceedings filed regarding her or his authorized or unauthorized insurance activities; (v) revocations and suspensions of any license or authorization, receivership, and administrative sanctions; and (vi) if written consent is revoked, suspended, terminated, granted, or altered by another regulatory official. This section is necessary because written consent granted by the commissioner is conditioned upon the person remaining in the same or similar job position with the same duties. The occurrence of the events required to be disclosed to TDI in §1.527 requires the person subject to the Act to request a new written consent from the commissioner. This section is necessary because the commissioner considers it important that persons subject to the Act granted written consent are honest, trustworthy, and reliable.

Section 1.528 addresses Burden of Proof. Section 1.528 provides that the burden of proof is on the person subject to the Act to show that, although he or she has been convicted of a criminal felony involving dishonesty or a breach of trust, or an offense un-

der the Act, circumstances, facts, and conditions are present that allow the commissioner to grant written consent. This section is necessary because the person subject to the Act is seeking affirmative relief. The person subject to the Act also has relative access to and control over information pertinent to the merits of her or his case.

Section 1.529 addresses Revocation or Denial of Written Consent. In §1.529(a) and (b) the commissioner developed guidelines relating to the matters that the commissioner will consider in determining whether to deny or revoke any written consent under the commissioner or TDI's jurisdiction. These matters include if the applicant moves insurance activities to another state; has a license or authorization denied, suspended, revoked, surrendered, forfeited, cancelled, terminated, or altered in Texas or another state, or by any association; is convicted of a criminal felony involving dishonesty or a breach of trust or an offense under the Act after written consent was granted; or violates the terms, conditions, or restrictions of the written consent. In addition to the factors and screening criteria considered in §1.524, the commissioner may deny a request for written consent if the individual is not a person subject to the Act as defined in §1.521 of this title; the applicant violates Division 2; Texas is not the appropriate state to grant written consent; or the applicant's request for written consent was denied or revoked by another state. TDI may utilize the NAIC National Special Activities Database as provided under §1.522(d) of this title to share information regarding a request for written consent from a person that is not subject to Division 2, or if Texas is not the appropriate state due to a lack of regulatory interest over the applicant's proposed insurance activities, as reflected in her or his request for written consent.

Section 1.529(c) provides that if written consent is denied or revoked, TDI will send the applicant a notice setting forth a statement of legal authority and a short, plain statement of the factors pertinent to the denial or revocation. Section 1.529(d) provides that if written consent is denied or revoked, TDI will not grant a license or authorization to any person subject to the Act or permit a person subject to the Act to retain a license or authorization. This provision does not alter the statutes and rules regulating denial and revocation of a license. Section 1.529(e) provides that a person subject to the Act will have 30 days from the date of notice to make a written request for a hearing. Section 1.529(f) explains that if a written request for hearing is not made, the notice of denial or revocation will constitute a final agency decision. This section is necessary to explain that the commissioner has the discretion to determine whether to grant or deny an individual's request for written consent. It also clarifies that written consent from the commissioner is a prerequisite to retain or obtain an insurance license. The laws and regulations regarding the fitness of individuals to apply for or retain a license or authorization issued by TDI are not preempted by these rules.

Section 1.530 addresses Hearing. If a person subject to the Act requests a hearing, the hearing will be conducted by the State Office of Administrative Hearings. The hearing is subject to the procedures for contested cases under Government Code Chapter 2001 and Insurance Code Chapter 40.

FISCAL NOTE. Chris Bean, director, Agent and Adjuster Licensing, has determined that for each year of the first five years the proposed sections 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. TDI estimates that there will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Bean also has determined that for each year of the first five years the new proposed §§1.520 - 1.530 are in effect, there are several public benefits anticipated because of the enforcement and administration of the proposal, as well as potential costs for persons required to comply with the proposal.

ANTICIPATED PUBLIC BENEFITS

The public benefits anticipated as a result of the proposal include: (i) providing a concise procedural overview to prohibited persons requesting written consent from the commissioner, including their rights to administrative review and responsibilities in providing documentation as requested in a timely manner; (ii) the opportunity for the reintroduction of rehabilitated convicted offenders into employment in the business of insurance; and (iii) providing for the exchange of information by states regarding requests for written consent to promote efficient application processes and prevent applicants forum shopping among states.

ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL

TDI anticipates that there will be probable costs to persons required to comply with several of the proposed new sections during each year of the first five years that the rules will be in effect. The total probable economic costs to individuals required to comply with the fingerprint requirement in §1.525 is approximately $41.45 for an electronic fingerprint submission and $51.45 for a paper fingerprint card submission for an individual fingerprinted at a law enforcement agency in Texas. An individual is required to use TDI's form for electronic fingerprint submission to TDI, available at: https://www.tdi.state.tx.us/forms/finagentlicense/FAST_form_final.pdf. There is an electronic fingerprinting processing and collection fee of $41.45 payable to the participating vendor. The fee includes consolidated DPS and FBI records electronically processed and collected at a participating vendor and submitted to TDI on behalf of the applicant.

While TDI anticipates that most individuals in Texas will utilize the convenience and reliability offered by authorized electronic fingerprint services, an individual may choose to submit a paper fingerprint card instead of an electronic submission. Human Resources Code §80.001(b) authorizes a criminal law enforcement agency to charge an amount not to exceed $10 for capturing fingerprints on a paper fingerprint card. Based on this information, TDI anticipates that an individual choosing to submit her or his fingerprints on a paper fingerprint card may be subject to a fingerprint collection fee of $0.00 to $10 charged by a criminal law enforcement agency in Texas. An individual in a state other than Texas will be subject to the fees in the state in which they have their fingerprints captured on a paper fingerprint card, which may vary from state to state. In addition to a fee of $41.45 charged by an authorized company processing the fingerprints on behalf of DPS, an individual must pay the fee associated with the local law enforcement agency capturing their fingerprints on a paper fingerprint card, for a total estimated cost of $51.45 for a paper fingerprint card submission. TDI's form for paper fingerprint card submission is available at: https://www.tdi.state.tx.us/forms/finagentlicense/FAST_CARD.pdf.

According to http://www.traviscountyclerk.org/eclerk/Content.do?code=M.18, certified copies in Travis County may be requested by phone, email, or in person with a $5.00 per document charge for the certification service plus an additional cost of $5.00 per document search. This cost will vary depending on

the county in which the individual requests certified copies and the total number of pages per record.

Any additional information that must be supplied by an individual at the time of fingerprinting is minimal and TDI does not anticipate an associated cost with providing the required information. TDI anticipates that an individual should only have to submit a complete set of fingerprints under the proposed rules one time, so long as the applicant maintains a continuous authorization with TDI.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The costs to comply will not vary between the smallest and largest businesses because individual prohibited persons are required to submit and provide all required documentation for consideration by TDI in the granting or denying of a letter of consent. Different business models or personnel benefits offered may result in cost differences between entities. These differences, however, are a matter of choice and are not a result of the proposed rules. Although TDI does not believe that the proposed amendments will have an adverse effect on small and micro businesses, TDI considered the purpose of the applicable statutes, which is to prevent and control crime, and has determined that it is neither legal nor feasible to waive the provisions of the proposed amendments for small or micro businesses. To waive or modify the requirements of the proposed amendments for small and micro businesses would result in a disparate effect on policyholders and other persons affected by the amendments.

TAKINGS IMPACT ASSESSMENT. TDI 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 and, therefore, does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on November 5, 2012 to Sara Waitt, General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Chris Bean, Director, Agent and Adjuster Licensing, Financial Regulation Division, MC 107-1A, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The new sections are proposed under Title 18 U.S.C. §1033(e) (Crimes by or Affecting Persons Engaged in the Business of Insurance whose Activities Affect Interstate Commerce), Occupations Code Chapter 53 (Consequences Of Criminal Conviction), Government Code Chapter 411 (Department of Public Safety of The State Of Texas), including §411.106 (Access to Criminal History Record Information: Texas Department of Insurance); §411.083 (Dissemination of Criminal History Record Information); and §411.087 (Access to Criminal History Record Information Maintained by Federal Bureau of Investigation or Local Criminal Justice Agency).

Additionally, the new sections are proposed under Insurance Code §36.001 (General Rulemaking Authority), §82.051(Cancellation or Revocation of Authorization), §801.056 (Failure to Provide Complete Set of Fingerprints: Ground for Denial of Application), §801.101(Department Inquiry), §4001.005 (Rules), §4001.103 (Failure to Provide Complete Set of Fingerprints: Ground for Denial of Application), and §4005.101 (Grounds for License Denial or Disciplinary Action).

Title 18 U.S.C. §1033(e)(1)(A) provides that any individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under this section, and who willfully engages in the business of insurance whose activities affect interstate commerce or participates in the business, will be fined as provided in this title or imprisoned not more than five years, or both. Title 18 U.S.C. §1033(e)(1)(B) states any individual who is engaged in the business of insurance whose activities affect interstate commerce and who willfully permits the participation described in subparagraph (A) will be fined as provided in this title or imprisoned not more than five years, or both. Title 18 U.S.C. §1033(e)(2) provides that a person described in paragraph (1)(A) may engage in the business of insurance or participate in the business if the person has the written consent of any insurance regulatory official authorized to regulate the insurer, which consent specifically refers to this subsection.

Occupations Code Chapter 53 states the general procedure a licensing authority must employ when considering the consequences of a criminal record on granting or continuing a person's license, authorization, certificate, permit, or registration.

Government Code §411.106 authorizes TDI to receive criminal history information from the DPS regarding insurance company principals and officers and applicants for any entity holding or seeking a license, certificate, permit, registration, or other authorization issued by TDI to engage in a regulated activity under the Insurance Code. Government Code §411.083 and §411.087 authorize TDI to obtain, through DPS, criminal history information from the FBI on those individuals described in Government Code §411.106.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

Insurance Code §82.051 provides that after notice and opportunity for a hearing, the commissioner may cancel or revoke an authorization if the holder of the authorization is found to be in violation of, or to have failed to comply with, this code or a rule of the commissioner. Insurance Code §801.056 authorizes TDI to request a complete set of fingerprints from individuals controlling an insurance company, an insurance company's corporate officers, and individual applicants for any license, permit, registration, certification, or other authorization issued by TDI to engage in a regulated activity under the Insurance Code.

Insurance Code §§801.101, 801.102, and 801.151 - 801.155 authorize the commissioner to review the fitness and reputation of officers, directors, and persons in control of insurance companies and to refuse or revoke a certificate of authority to any company based on a determination that such officer, director, or controlling person is not worthy of public confidence.

Insurance Code §4001.005 authorizes the commissioner to adopt rules necessary to implement Insurance Code Title 13.

Insurance Code §4001.103 also authorizes TDI to request a complete set of fingerprints from individual applicants for any license, permit, or other authorization issued by TDI to engage in a regulated activity under Insurance Code Title 13.

Insurance Code §4005.101 provides that TDI may deny or revoke a license to an individual licensed under Insurance Code Title 13, if that individual has been convicted of a felony or has engaged in fraudulent or dishonest activities.

CROSS REFERENCE TO STATUTE. Division 2 rules affect the following statutes: 18 U.S.C. §1033; Insurance Code §§82.051 - 82.053, 101.051, 823.005, 4005.101 - 4005.103, Chapter 40, Chapter 701, and Article 21.47; Occupations Code Chapter 53; and Government Code Chapter 2001.

§1.520. Purpose and Scope.

(a) Purpose. The purpose of this division is to implement 18 United States Code §1033 and §1034 that authorize any individual who has been convicted of a criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under 18 U.S.C. §1033, to request written consent from the commissioner to engage or participate in the business of insurance in Texas. This division establishes the procedures by which TDI may obtain criminal history information and any additional documentation on applicants. To effect this implementation, TDI developed guidelines to determine the fitness of applicants. TDI considers it important that authorization holders be honest, trustworthy, and reliable.

(b) Scope. This division applies to any individual who engages or participates in the business of insurance whose activities affect interstate commerce and who has been convicted of any criminal felony involving dishonesty or a breach of trust, or an offense under 18 U.S.C. §1033.

(c) Use of terms. As used in this division:

(1) the terms "license holder," "licensee," and "authorization holder" include all persons listed in §1.501(b) of this title (relating to Purpose and Application); and

(2) the terms "license" and "authorization" include all types of licenses, registrations, certificates, permits, or authorizations listed in §1.501(b) of this title.

(d) Applicability of other laws. State statutory and regulatory licensing qualifications and requirements are separate from requirements under the Act and this division. Failure to inform TDI of a prior criminal conviction on a license application could result in a violation of this division, as well as constitute grounds for denial or revocation of an insurance license. State laws limiting the ability of certain persons with criminal records to engage in the business of insurance operate independently from the Act, and are not preempted or modified by the Act.

(e) Severability. If a court of competent jurisdiction holds that any provision of this subchapter or its application to any person or circumstance is invalid for any reason, the invalidity does not affect other provisions or applications of this subchapter that can be given effect without the invalid provision or application, and to this end the provisions of this subchapter are severable.

§1.521. Definitions.

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

(1) Act--The Violent Crime Control and Law Enforcement Act of 1994, Title 18 United States Code (U.S.C.) §1033 and §1034.

(2) Applicant--Any person subject to the Act requesting written consent.

(3) Business of insurance--

(A) as defined in 18 U.S.C. §1033, means:

(i) the writing of insurance;

(ii) the reinsuring of risks;

(iii) all acts necessary or incidental to such writing or reinsuring; and

(iv) the activities of persons who act as, or are, officers, directors, agents, or employees of insurers, or who are other persons authorized to act on behalf of such persons; and

(B) acts provided in Insurance Code §101.051.

(4) Commissioner--The commissioner of insurance or her or his designee.

(5) Control--As defined in Insurance Code §823.005.

(6) Criminal felony involving dishonesty or a breach of trust--A felony offense with elements of:

(A) any type of fraud, including insurance fraud, mail fraud, mortgage fraud, Medicare fraud, land fraud, tax fraud, securities fraud, and criminal fraud;

(B) counterfeiting or passing counterfeit money;

(C) bribery and bribe receipt;

(D) any crime involving false pretenses;

(E) money laundering;

(F) extortion;

(G) forgery or any crime involving the falsification of documents;

(H) embezzlement;

(I) criminal impersonation;

(J) fraudulent conveyance of property;

(K) fraudulent use of credit or debit card;

(L) knowingly issuing a bad check;

(M) any crime involving the making or utterance of a false statement;

(N) perjury and subornation of perjury;

(O) knowingly possessing a forged instrument;

(P) knowingly receiving or possessing stolen property;

(Q) theft by deception;

(R) witness or evidence tampering; or

(S) crimes of financial exploitation.

(7) Domestic--A commercially domiciled insurer as defined in Insurance Code §823.004 or an entity organized under the laws of Texas.

(8) Insurer--As defined in 18 U.S.C. §1033(f)(2).

(9) Interstate commerce--As defined in 18 U.S.C. §1033(f)(3).

(10) Offense under the Act--As defined in 18 U.S.C. §1033, including:

(A) knowingly, with the intent to deceive, making any false material statement or report or willfully and materially overvaluing any land, property, or security in connection with any financial reports or documents presented to any regulatory official or agency for

the purposes of influencing the actions of that official, agency, or appointed agent or examiner;

(B) willfully embezzling, abstracting, purloining, or misappropriating any of the money, funds, premiums, credits, or other property of any person engaged in the business of insurance;

(C) knowingly making any false entry of material fact in any book, report, or statement with intent to deceive any person about the financial condition or solvency of a business;

(D) corruptly influencing, obstructing, or impeding, or endeavoring corruptly to influence, obstruct, or impede the due and proper administration of the law, by threats or force or by any threatening letter or communication under which any proceeding is pending before any insurance regulatory official or agency.

(11) Person subject to the Act--Any individual who has been convicted of a criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under the Act, who intends to engage or participate in the business of insurance in Texas, whose activities affect interstate commerce. This includes an individual who is engaged or participating in the business of insurance in Texas and who:

(A) is, becomes, or has responsibilities similar to a principal, partner, officer, owner, director, or controlling shareholder of a domestic insurer;

(B) is a person in control of a domestic entity;

(C) is a domestic limited liability company member, manager, or consultant;

(D) is an employee, solicitor, broker, consultant, subcontractor, independent contractor, actuary, reinsurer, or underwriter for a domestic insurer or resident licensee;

(E) is an applicant for, or holder of, any type of license, registration, certification, permit, or authorization that TDI may deny or revoke; or

(F) does not have written consent from any regulatory official authorized to regulate the insurer.

(12) Request for written consent--A completed request for written consent form submitted to TDI by a person subject to the Act.

(13) TDI--The Texas Department of Insurance

(14) Written consent--The commissioner's granting of authorization for a person subject to the Act to engage or participate in the business of insurance in Texas.

§1.522. Written Consent Required.

(a) Written consent required. A person subject to the Act must not engage or participate in the business of insurance in Texas without written consent from the commissioner. Any person subject to the Act who intends to engage or participate in the business of insurance in Texas must submit to TDI a request for written consent. TDI has the sole discretion to determine whether Texas is the appropriate state for a person subject to the Act to request written consent.

(b) Licensees subject to the Act. A person subject to the Act must be granted written consent from the commissioner to retain a license or authorization, and before any new or renewal license or authorization will be issued.

(c) Restriction of action. Nothing in this division may be construed to permit a person subject to the Act to engage or participate in the business of insurance while that individual is applying for written consent from the commissioner.

(d) Sharing of information with other states. TDI may share information and materials with other states and agencies in accord with procedures established by the NAIC National Special Activities Database for the sharing of information pertaining to requests for written consent under the Act.

§1.523. Insurer Responsibility Under the Act.

Title 18 U.S.C. §1033(e)(1)(B) provides that any individual who is engaged in the business of insurance whose activities affect interstate commerce and who willfully permits a person subject to the Act to engage or participate in the business of insurance without written consent may be in violation of the Act. It is the responsibility of persons authorizing anyone to conduct the business of insurance not to willfully permit a person subject to the Act to engage or participate in the business of insurance without written consent.

§1.524. Request for Written Consent.

(a) Request for written consent form. A request for written consent form is available online at http://www.tdi.texas.gov/forms/ and by mail from the Texas Department of Insurance, Agent and Adjuster Licensing, Financial Regulation Division, MC 107-1A, P.O. Box 149104, Austin, Texas 78714-9104 or 333 Guadalupe, Austin, Texas 78701.

(b) Submission of request. A person subject to the Act may request written consent by completing and submitting a request for written consent form as provided in paragraphs (1) and (2) of this subsection.

(1) The request for written consent form may be submitted by mail to the Texas Department of Insurance, Agent and Adjuster Licensing, Financial Regulation Division, MC 107-1A, P.O. Box 149104, Austin, Texas, 78714-9104.

(2) Upon TDI's making available the Request for Written Consent Form in a format that may be completed and submitted online, an applicant may submit the request in this manner.

(c) Assistance. Assistance with submitting a request for written consent form is available by calling Agent and Adjuster Licensing at 512-322-3503.

(d) Screening criteria. A person subject to the Act requesting written consent from the commissioner under this section must submit to TDI a signed and notarized application on a form prescribed and provided by TDI, and include, as part of or in connection with the application, the following information:

(1) name, official and business mailing addresses, and social security number of the applicant and any other names and social security numbers used by the applicant and dates of such use;

(2) place and date of birth. If the applicant was not born in the United States, the date of first entry and port of entry, whether he or she is a citizen of the United States, and if naturalized, when, where, and how he or she became naturalized. The number of the Certificate of Naturalization must be provided;

(3) names of any relatives by blood or marriage who are currently serving in any capacity in the same business of insurance or with any sponsoring insurer;

(4) history of employment and business associations, including any military service, in chronological order;

(5) professional licenses or authorizations presently held or held at any date in the past relating to the business of insurance, including as a producer, agent, broker, solicitor, or third-party administrator;

(6) whether the applicant has ever had a consumer complaint, administrative, or other legal proceeding filed regarding her or

his authorized or unauthorized insurance activities. This includes a list of all revocations and suspensions of any license or authorization, receivership, and administrative sanctions;

(7) the applicant's current or proposed job description and insurance activities, as well as the name and address of the current or proposed sponsoring insurer, agency officer, or employer, to which the request for written consent will apply, supported by an affidavit from the insurer's or agency president (or her or his lawfully delegated designee) stating that: the applicant will only perform those insurance activities as fully described in the application, the application is to the best of her or his knowledge true and correct, and the applicant will not be placed in a position in which the person's activities will constitute a risk or threat to insurance consumers or the insurer;

(8) a life-long listing by date and place of all arrests together with a statement of the circumstances of each violation which led to each arrest. Also list by date and place all convictions for felonies, misdemeanors, or offenses and all imprisonment or jail terms, together with a statement of the circumstances of each violation which led to each conviction;

(9) whether the applicant has received a full pardon or other type of pardon from any conviction;

(10) a statement of the details of any conviction for a criminal felony involving dishonesty or a breach of trust, or any offense under the Act. This includes the date of each offense, applicant's age at the date of each offense, and the time that has since elapsed;

(11) names and location of all insurers, together with a description of the activities performed for each insurer, for which the person subject to the Act has:

(A) been appointed to act as an agent, advised, represented, or in any manner worked for;

(B) engaged or participated in an act necessary or incidental to the business of insurance, including any activity or act as an officer, director, agent, or employee of an insurer, or as a person authorized to act on behalf of such persons;

(12) whether the applicant has ever applied for written consent from any other state, and if so, the outcome of that preceding, the state's determination, and all supporting documentation;

(13) a full explanation of the reasons or grounds the applicant's insurance activities for which written consent is sought will not be contrary to the intent and purpose of 18 U.S.C. §1033, and thus will not pose a risk or threat to insurance consumers or the insurer;

(14) the bearing, if any, the criminal offense or offenses will have on the applicant's fitness or ability to perform one or more of the duties, activities, or responsibilities presented on the application;

(15) whether the applicant has made full payment of outstanding court costs, supervision fees, fines, and restitution concerning the offense or offenses;

(16) whether there exists any evidence of mitigating or extenuating circumstances surrounding the applicant's commission of the offense or offenses;

(17) what evidence exists of the applicant's rehabilitation;

(18) character endorsements, letters, or other forms of statement addressed to the commissioner, attesting to the character and reputation of the applicant. The statements as to character should indicate the length of time the writer has known the applicant and should describe the applicant's character traits as they relate to the employment, position, or activities for which written consent is sought and the duties and responsibilities thereof. The statement as to reputation should attest to the applicant's reputation in her or his community, circle of business, or social acquaintances. The statement must state that the reference is being provided in connection with a request for written consent to engage or participate in the business of insurance despite the existence of a conviction of a criminal felony involving dishonesty or a breach of trust, or an offense under the Act; and

(19) any other information the applicant believes will assist the commissioner in determining whether to grant written consent.

(e) Serious nature of criminal offense. The commissioner will not grant a request for written consent if the applicant has been convicted of a criminal felony involving dishonesty or a breach of trust, or an offense under the Act unless the commissioner finds that the matters set out in subsection (f) of this section outweigh the serious nature of the criminal offense when viewed in light of the applicant's occupation.

(f) Factors considered.

(1) The commissioner will consider the factors specified in 18 U.S.C. §1033, Occupations Code §53.022 and §53.023, §1.502 of this title (relating to Licensing Persons with Criminal Backgrounds), and mitigating and aggravating circumstances, in determining whether to grant a request for written consent to a person subject to the Act listed in §1.501(b) of this title (relating to Purpose and Application).

(2) For persons who are not applicants for, or holders of, a license or authorization issued by TDI, or a person listed in §1.501(b) of this title, the commissioner will consider the following factors in determining whether the applicant's conviction of a criminal felony involving dishonesty or a breach of trust directly relates to the duties and responsibilities of the applicant's occupation:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the purposes for requesting written consent to engage in the occupation;

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

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the occupation.

(3) In addition to the factors listed in paragraph (1) and (2) of this subsection, the commissioner will consider the following evidence in determining the fitness to perform the duties and discharge the responsibilities of the occupation of a person who has been convicted of a criminal felony involving dishonesty or a breach of trust, or an offense under the Act:

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

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

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

(D) the conduct and work activity of the person prior to and following the criminal activity;

(E) evidence of the person's rehabilitation or rehabilitative efforts while incarcerated or following release; and

(F) other evidence of the person's present fitness, including letters of recommendation from:

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

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

(iii) any other persons in contact with the person.

(G) In addition to the factors and evidence listed in subparagraphs (A) through (F) of this subsection, an applicant must also furnish proof that the applicant has:

(i) maintained of a record of steady employment;

(ii) supported the applicant's dependents where applicable;

(iii) otherwise maintained a record of good conduct; and

(iv) paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which the applicant or holder has been convicted.

(4) In addition to the factors listed in paragraphs (1), (2), and (3) of this subsection, the commissioner will consider the following factors in determining whether the applicant poses a risk or threat to insurance consumers or the insurer:

(A) whether and to what extent the person has made a material false statement in an application, renewal, or other documents filed with the commissioner; and

(B) whether and to what extent the person has made material false statements in applications or other documents filed with other state or federal agencies.

(g) Requirement to provide information. It will be the responsibility of the person subject to the Act to secure and provide to TDI the information and documentation required by subsection (d) of this section.

§1.525. Requirement to Provide Fingerprints and Documents.

(a) Submission of documents. An applicant must submit all requested information to TDI within 30 days of the date TDI mails a request for additional information, including any requested additional documents, certified copies of all court documents, and fingerprints.

(1) If an applicant fails to submit all requested information as provided in this section, TDI will submit a written notice of deficiency to the applicant which sets out the specific additional information required for completion. After one written notice of deficiency has been issued, another is not required.

(2) TDI may deny or deem incomplete any request for written consent that is not complete within 180 days of the date TDI mails the written notice of deficiency, and TDI may:

(A) close a pending request for written consent and application files for a license or authorization; and

(B) take actions available under Insurance Code §§82.051 - 82.053 and §§4005.101 - 4005.103.

(b) Fingerprint requirement. In the manner described in §1.509 of this title (relating to Fingerprint Format and Complete Application), an applicant must, at or near the same time that he or she sends her or his request for written consent, also send:

(1) a complete set of the individual's fingerprints;

(2) full payment for all processing fees charged by the Texas Department of Public Safety and the Federal Bureau of Investigation; and

(3) all additional identifying information required by the Texas Department of Public Safety and the Federal Bureau of Investigation for processing fingerprints.

(c) Confidentiality, format, use, and application of fingerprint requirement. Except as otherwise provided, the procedures and requirements for fingerprint application, format, use, and confidentiality in Division 1 of this subchapter (relating to Fitness for Licensing) apply to persons subject to the Act requesting written consent.

§1.526. Effect of False or Misleading Statements.

Any written consent granted by the commissioner will be conditioned upon the truth and veracity of the documents and information submitted by or on behalf of the person subject to the Act. If TDI determines that the person subject to the Act, or her or his representative, has made false or misleading statements, or has failed to disclose information, the commissioner may deny the request for written consent or revoke the written consent. TDI's Fraud Section will make an independent determination whether TDI should pursue an investigation of fraudulent insurance acts under the Insurance Code or these rules, or whether referral to another law enforcement agency or federal prosecutor should be made.

§1.527. Disclosure.

A person subject to the Act granted written consent under this division must notify TDI within 30 days of a felony conviction, an administrative action taken against the person subject to the Act by a financial or insurance regulator of a state or the United States, increased job duties, and administrative or other legal proceedings filed regarding her or his authorized or unauthorized insurance activities. This includes revocations and suspensions of any license or authorization, receivership, and administrative sanctions. If written consent is revoked, suspended, terminated, granted, or altered by another regulatory official, the person subject to the Act is required to submit written notification and all supporting documentation to TDI immediately.

§1.528. Burden of Proof.

The burden of proof is on the person subject to the Act to show that, although he or she has been convicted of a criminal felony involving dishonesty or a breach of trust, or an offense under the Act, circumstances, facts, and conditions are present that allow the commissioner to grant the request for written consent. The person subject to the Act is not entitled as a matter of right to be granted written consent.

§1.529. Revocation or Denial of Consent.

(a) Revocation. TDI may revoke any written consent that it has issued and may notify the Fraud Section of TDI if the applicant:

(1) moves insurance activities to another state;

(2) has a license or authorization denied, suspended, revoked, surrendered, forfeited, cancelled, terminated, or altered in Texas or another state, or by any association;

(3) is convicted of a criminal felony involving dishonesty or a breach of trust or an offense under the Act after written consent was granted;

(4) violates the terms, conditions, or restrictions of the written consent; or

(5) violates this division.

(b) Denial. In addition to the factors and screening criteria considered in §1.524 of this title (relating to Request for Written Con-

sent), the commissioner may deny a request for written consent for the following reasons, including if:

(1) the applicant is not a person subject to the Act as defined in §1.521 of this title (relating to Definitions);

(2) the applicant violates this division;

(3) TDI determines that Texas is not the appropriate state for the applicant to request written consent; or

(4) the applicant's request for written consent was denied or revoked by another state.

(c) Written notice. If the commissioner determines that the request for written consent should be denied or the written consent should be revoked, TDI will issue a notice setting forth a statement of legal authority and a short, plain statement of the factors pertinent to the denial or revocation.

(d) Effect of denial or revocation. TDI will not grant a license or authorization to any person subject to the Act or permit a person subject to the Act to retain a license or authorization if the commissioner has denied a request for written consent or revoked the written consent.

(e) Request for hearing. The person subject to the Act will have 30 days from the date of notice to make a written request for a hearing.

(f) Final agency decision. If a written request for hearing is not made, the notice of denial or revocation will constitute a final agency decision.

§1.530. Hearing.

If a person subject to the Act requests a hearing, the hearing shall be conducted by the State Office of Administrative Hearings. The hearing is subject to the procedures for contested cases under Government Code Chapter 2001 and Insurance Code Chapter 40.

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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Sara Waitt
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 126. GENERAL PROVISIONS APPLICABLE TO ALL BENEFITS

28 TAC §126.17

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes new §126.17, concerning Guidelines for Examination by a Treating Doctor or Referral Doctor After a Designated Doctor Examination to Address Issues Other Than Certification of Maximum Medical Improvement and the Evaluation of Permanent Impairment.

Statutory Background

This new section is proposed due to statutory amendments in House Bill 2605, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2605) which codify into the Texas Workers' Compensation Act (Act) the ability of the injured employee who is required to be examined by a designated doctor to request an examination by the injured employee's treating or a referral doctor to determine the issue(s) decided by the designated doctor.

Specifically, HB 2605 amended Labor Code §408.0041 by adding subsections (f-2) and (f-4). Under Labor Code §408.0041(f-2), an injured employee required to be examined by a designated doctor may request a medical examination to determine maximum medical improvement and the injured employee's impairment rating from the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor if the designated doctor's opinion is the injured employee's first evaluation of maximum medical improvement and impairment rating and the injured employee is not satisfied with the designated doctor's report. Labor Code §408.0041(f-4) requires the Commissioner of Workers' Compensation (Commissioner) by rule to adopt guidelines prescribing the circumstances under which an examination by the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor to determine any issue under Labor Code §408.0041(a), other than an examination under Labor Code §408.0041(f-2), may be appropriate. The purpose behind these legislative amendments was to provide the injured employee the ability to obtain from his or her treating doctor or a referral doctor a second opinion on the issue(s) determined by the designated doctor and, if the injured employee seeks dispute resolution on the issue, evidence the injured employee can use in the dispute resolution process in an attempt to overcome the presumptive weight of the designated doctor's opinion on the issue(s).

Whereas Labor Code §408.0041(f-2) governs post-designated doctor examinations on maximum medical improvement and impairment rating, the rules required by Labor Code §408.0041(f-4) are to govern post-designated doctor examinations on issues in Labor Code §408.004(a)(3) - (6). This proposed new section implements the requirements of Labor Code §408.0041(f-4).

The Division published an informal draft of the proposed new section on the Division's website from August 2, 2012 until August 23, 2012, and received seven informal comments on the proposed section. The Division made several changes to the rule text as a result of the informal comments.

Description of the Proposed New Section

Proposed New §126.17.

Proposed new §126.17 sets forth guidelines prescribing the circumstances under which an examination by a treating doctor or referral doctor to determine any issue under Labor Code §408.0041(a), other than maximum medical impairment and impairment rating, may be appropriate. This new rule is necessary in order to implement Labor Code §408.0041(f-4) which requires the Commissioner by rule to adopt such guidelines.

Proposed New §126.17(a)

This proposed subsection prescribes the circumstances under which the treating doctor or referral doctor examination may be appropriate as required by Labor Code §408.0041(f-4). Proposed new §126.17(a) provides an examination by the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor to determine any issue under Labor Code §408.0041(a)(3) - (6) may be appropriate after a designated doctor examination if: (1) the designated doctor issued an opinion on the issue; (2) the injured employee is not satisfied with the designated doctor's opinion; and (3) the treating doctor or a referral doctor has not already provided the injured employee with a written report that meets the standard described by subsection (b) of this new section on the issue addressed by the designated doctor. These prescribed circumstances are necessary in order to allow the injured employee to seek a second opinion of the designated doctor's report only when a legitimate dispute with the designated doctor report exists. The prescribed circumstances therefore are designed to allow a treating doctor or referral doctor examination after a designated doctor examination only when the injured employee is not satisfied with the designated doctor's decision on the issue and the treating doctor or a referral doctor has not already provided the injured employee with a written report that can be used to dispute the designated doctor report. Additionally, the prescribed circumstances are necessary in order to prevent duplicative examinations by the treating doctor or a referral doctor on the issue(s) decided by the designated doctor which could impose unnecessary costs on the workers' compensation system. The prescribed circumstances therefore provide that the examination would not be appropriate if the treating doctor or a referral doctor has already prepared a requisite written report on the issue determined by the designated doctor.

Proposed New §126.17(b).

Proposed new §126.17(b) provides that the treating or the referral doctor shall complete a narrative report. The report should include objective findings of the examination and an analysis that explains how the objective findings lead to the conclusion reached by the doctor. This report must be filed with the insurance carrier, the injured employee, and the injured employee's representative. Notwithstanding §129.5 of this title (relating to Work Status Reports), if the treating doctor or the referral doctor examines the injured employee to address an issue relating to return to work, the doctor must also file a Work Status Report. A narrative report is necessary because it documents the doctor's findings. The direction of what this report should contain is necessary in order to ensure that the report is of sufficient quality to be useful in the dispute resolution process if the injured employee is not satisfied with the designated doctor's opinion, which, by statute, has presumptive weight. The quality of the report provides something of value to assist in a prompt and fair dispute resolution process, one of the basic goals of the workers' compensation system under Labor Code §402.021. Additionally, this subsection is necessary in order to ensure that all parties have notice of the treating or referral doctor's opinion on the issue(s) that were the subject of the examination.

Proposed New §126.17(c)

Proposed new §126.17(c) provides that the insurance carrier shall reimburse the injured employee reasonable travel expenses as specified in Chapter 134, Subchapter B of this title (relating to Miscellaneous Reimbursement incurred in attending an appropriate medical examination). This proposed subsection is necessary to clarify that existing Division rules in Chapter 134, Subchapter B of this title that govern reimbursement of travel expenses will apply as specified in those rules when an injured employee attends an examination that is appropriate under this proposed new section.

Proposed New §126.17(d)

Proposed new §126.17(d) provides that nothing in §126.17 is construed to limit or prohibit the injured employee from obtaining reasonable and necessary medical care for the compensable injury or from obtaining a written report from a treating doctor or a referral doctor on any issue under Labor Code §408.0041(a)(3) - (6) prior to a designated doctor examination. This proposed subsection is necessary in order to provide clarity and to prevent anyone from construing this section in a manner that would prevent an injured employee from obtaining any medical benefit the injured employee is entitled to under Labor Code Title 5 and Division rules. This proposed subsection also clarifies that §126.17 does not limit an injured employee's ability to obtain a written report from a treating or referral doctor prior to a designated doctor examination since proposed new §126.17 provides guidelines for the appropriateness of these examinations after the designated doctor examination.

Erika Copeland, Director, Designated Doctor Outreach and Oversight has determined that for each year of the first five years the proposed new section will be in effect there will be minimal new fiscal implications to state or local government as a result of enforcing or administering the proposed new section. There will be no measurable fiscal effect on local employment or the local economy as a result of the proposed new section.

The proposed new section may minimally increase administrative costs to the Division in terms of communications and outreach to system participants. However, Ms. Copeland has determined that all duties and responsibilities associated with implementing the proposed new section can be accomplished by utilizing existing agency resources.

Local and state government entities, when acting in the capacity of an insurance carrier, will be impacted in the same manner as other insurance carriers that are required to comply with the proposed new section, as described later in this preamble.

There will be no measurable effect on local employment or the local economy as a result of this proposal.

Ms. Copeland has determined that for each year of the first five years the proposed new section will be in effect the public benefit anticipated as a result of enforcing the new section will be clarity in the circumstances under which an examination by a treating doctor or referral doctor after a designated doctor examination pursuant to Labor Code §408.0041(f-4) may be appropriate. Additionally, the proposed new section will provide direction to treating or referral doctors regarding reporting requirements for these examinations, which will enhance the usability of these written reports by injured employees who want to dispute the designated doctor's opinion. Furthermore, insurance carriers are given guidance regarding the injured employee's reimbursement of reasonable travel expenses in attending an appropriate medical examination under the proposed new section.

Ms. Copeland has determined that for each year of the first five years the proposed new section will be in effect there will be no cost to injured employees under the proposed new section. Should an injured employee incur travel expenses in attending an appropriate medical examination under the proposed new section, the injured employee will be reimbursed by the insur-

ance carrier when such examination is not reasonably available within 30 miles from where the injured employee lives and the distance travelled to attend the examination is greater than 30 miles one way.

Ms. Copeland has determined that for each year of the first five years the proposed new section will be in effect there will be some costs to insurance carriers in the workers' compensation system associated with this proposed section. However, it is not possible for the Division to calculate a system-wide cost for this proposed new section because the Division cannot estimate how often these examinations will occur. The Division anticipates treating and referral doctors who conduct these examinations under this proposed new section will bill for these examinations using existing evaluation and management codes indicating that an office visit occurred, which is consistent with the manner that health care providers currently use to bill for these examinations. Assuming the use of the mid to upper level of established patient office visit Current Procedural Terminology (CPT) Codes, the estimated cost per appropriate examination under this proposed new section would be from $114 to $225 depending on the type of issue being reviewed by the treating or referral doctor, the detail of the examination, and the complexity of the medical decision. The Division has determined that the total estimated cost for an insurance carrier to comply with this proposed section will vary based upon the total number of bills received for an appropriate examination and the level of evaluation and management codes billed by the treating doctor or referral doctor. The proposed rule does not expand the circumstances where an insurance carrier reimburses the treating doctor or referral doctor. The Division notes that if the treating doctor or referral doctor examination involves an issue relating return to work, then the doctor must file a Work Status Report and the amount of reimbursement currently allowed for these reports is $15 pursuant to §129.5.

As required by the Government Code §2006.002(c), the Division has determined that the proposal may have an adverse economic effect on the small and micro-businesses that may be required to comply with the proposed new section. The Division estimates that 30 insurance carriers required to comply with the proposed new section may qualify as small or micro-businesses for the purposes of Government Code §2006.001. The cost of compliance with the proposal will not vary between large businesses and small or micro-businesses, and the Division's cost analysis and resulting estimated costs in the Public Benefit/Cost Note portion of this proposal is equally applicable to small or micro-businesses. Since the Division has determined that the proposed new section may have an adverse economic effect on small or micro-businesses, this proposal contains the required economic impact statement and a regulatory flexibility analysis, as detailed under Government Code §2006.002.

Even if the proposed new section would have an adverse impact on small or micro-businesses, it is neither legal nor feasible to waive the provisions to all affected entities and individuals.

The Division also considered not adopting the proposed new section, implementing different requirements or standards for the affected small and micro-businesses, and exempting small and micro-businesses from the requirements of the proposed new section.

Not adopting the proposed new section. The Division rejected this approach because it would not comply with the requirements of Labor Code §408.0041(f-4), which requires the Commissioner by rule to adopt guidelines prescribing the circumstances under which an examination by the treating doctor or referral doctor to determine any issue under Labor Code §408.0041(a), other than maximum medical improvement and impairment rating, after a designated doctor examination, may be appropriate.

Implementing different requirements or standards for the affected small or micro-businesses. The Division rejected this option because implementing different requirements or standards would cause confusion amongst injured employees and treating doctors since they would likely not be able to identify the affected small or micro-businesses amongst the insurance carriers and their affiliates in the state.

Exempting small and micro-businesses from the requirements of the new section. The Division rejected this approach because it would not comply with the legislative requirement under §408.0041(f-4) as described above.

Therefore, it is neither legal nor feasible to waive the requirements of the proposed new section for small or micro-businesses.

The Division 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 and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on November 5, 2012. Comments may be submitted via the internet through the Division's internet website at http://www.tdi.texas.gov/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

A public hearing on this proposal will be held on October 15, 2012 at 1:30 CST in the Tippy Foster Conference Room of the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Austin, Texas 78744-1645. The Division provides reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require accommodations in order to attend the hearing please contact Idalia Salazar at (512) 804-4403 at least two business days prior to the confirmed hearing date.

The hearing will also be audio streamed; to listen to the audio stream access the Public Outreach Events /Training Calendar website at http://www.tdi.texas.gov/wc/events/index.html and then click on the "Broadcast" link for the hearing. Media Player 7 (or new version) or RealPlayer 10 (or newer version) are required to hear the audio stream. Audio streaming will begin approximately five minutes before the scheduled time of the hearing.

The public hearing date, time, and location should be confirmed by those interested in attending or listening via audio stream; the hearing may be confirmed by visiting the Division's Public Outreach Events/Training Calendar website at http://www.tdi.texas.gov/wc/events/index.html. Written and oral comments presented at the hearing will be considered.

This new rule is proposed under the Labor Code §408.0041, and under the general authority of §§402.00111, 402.0128 and

402.061. In relevant part, Labor Code §408.0041 sets forth that the Commissioner by rule shall adopt guidelines prescribing the circumstances under which an examination by the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor to determine any issue under Labor Code §408.0041(a), other than an examination under Labor Code §408.0041(f-2), may be appropriate.

Labor Code §402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under Title 5, Labor Code.

Labor Code §402.00128 lists the general powers of the Commissioner including the power to hold hearings and the authority to assess and enforce penalties as authorized by Title 5, Labor Code.

Labor Code §402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Workers' Compensation Act.

The following statute is affected by this proposal: Labor Code §408.0041.

§126.17. Guidelines for Examination by a Treating Doctor or Referral Doctor After a Designated Doctor Examination to Address Issues Other Than Certification of Maximum Medical Improvement and the Evaluation of Permanent Impairment.

(a) An examination by the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor to determine any issue under Labor Code §408.0041(a)(3) - (6) may be appropriate after a designated doctor examination if:

(1) the designated doctor issued an opinion on the issue;

(2) the injured employee is not satisfied with the designated doctor's opinion; and

(3) the treating doctor or the referral doctor has not already provided the injured employee with a written report that meets the standard described by subsection (b) of this section on the issue addressed by the designated doctor.

(b) The treating doctor or the referral doctor shall complete a narrative report. The report should include objective findings of the examination and an analysis that explains how the objective findings lead to the conclusion reached by the doctor. This report shall be filed with the insurance carrier, the injured employee and the injured employee's representative. Notwithstanding §129.5 of this title (relating to Work Status Reports), if the treating doctor or the referral doctor examines the injured employee to address an issue relating to return to work, the doctor must also file a Work Status Report.

(c) The insurance carrier shall reimburse the injured employee for all reasonable travel expenses as specified in Chapter 134, Subchapter B of this title (relating to Miscellaneous Reimbursement) for attending an appropriate medical examination.

(d) Nothing in this section is construed to limit or prohibit the injured employee from obtaining reasonable and necessary medical care for the compensable injury or from obtaining a written report from a treating doctor or a referral doctor on any issue under Labor Code §408.0041(a)(3) - (6) prior to a designated doctor examination.

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 September 24, 2012.

TRD-201205084
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 804-4703

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 305. CONSOLIDATED PERMITS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§305.50, 305.64, 305.69, 305.122; and new §305.176.

These amendments were originally published for proposal in the April 27, 2012, issue of the *Texas Register* (37 TexReg 2988), withdrawn on September 19, 2012, and are re-proposed herein.

Background and Summary of the Factual Basis for the Proposed Rules

The federal hazardous waste program is authorized under the Resource Conservation and Recovery Act of 1976 (RCRA), §3006. States may obtain authorization from the United States Environmental Protection Agency (EPA) to administer the hazardous waste program at the state level. State authorization is a rulemaking process through which EPA delegates the primary responsibility of implementing the RCRA hazardous waste program to individual states in lieu of EPA. This process ensures national consistency and minimum standards while providing flexibility to states in implementing rules. State RCRA programs must always be at least as stringent as the federal requirements.

Since the beginning of the federal hazardous waste program, the State of Texas has continuously participated in the EPA's authorization program. To maintain RCRA authorization, the commission must adopt regulations to meet the minimum standards of federal programs administered by EPA. Because the federal regulations undergo regular revision, the commission adopts new regulations periodically to meet the changing federal regulations.

Texas received authorization of its hazardous waste "base program" under the RCRA on December 26, 1984. Texas received authorization for revisions to its base hazardous waste program on February 17, 1987 (Clusters I and II). Texas submitted further revisions to its hazardous waste program and received final authorization of those revisions on March 15, 1990, July 23, 1990, October 21, 1991, December 4, 1992, June 27, 1994, November 26, 1997, October 18, 1999, September 11, 2000, June 14, 2005 (Clusters III - X), March 5, 2009 (Clusters XI - XV), and May 7, 2012 (Clusters IX and XV - XVIII).

The commission proposes in this rulemaking parts of RCRA Rule Clusters XIX, XX, and XXI that implement revisions to the federal hazardous waste program, which were made by EPA between July 1, 2008 and June 30, 2011. Both mandatory and optional federal rule changes in these clusters are proposed to be adopted. Adoption of one of the federal rule changes is mandatory in order to maintain RCRA authorization. Although not necessary in order to maintain authorization, EPA also recommends

that the optional federal rule changes be incorporated into the state rules. In addition, the commission proposes revisions to parts of previously adopted Clusters XIV, XV, XVI, and XVII that implement revisions requested by EPA to maintain authorization. Establishing equivalency with federal regulations will enable the State of Texas to operate all aspects of the federal hazardous waste program in lieu of the EPA.

The commission also proposes revisions to Chapter 305 to clarify requirements for financial capability reviews in conjunction with permit issuances, amendments, transfers, extensions, and renewals for hazardous waste management facilities and also to revise the timing of financial assurance submittals by new owners in conjunction with permit transfers for hazardous waste management facilities.

All proposed rule changes are discussed further in the Section by Section Discussion portion of this preamble. Two corresponding rulemakings are published in this issue of the *Texas Register* and include changes to 30 TAC Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste and 30 TAC Chapter 324, Used Oil Standards.

Section by Section Discussion

The commission proposes administrative changes throughout the proposed rulemaking to reflect the agency's current practices and to conform to *Texas Register* and agency guidelines. These proposed changes include correcting typographical, spelling, and grammatical errors.

§305.50, Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order

The commission proposes to amend §305.50, by reorganizing existing requirements for financial assurance in subsection (a)(4)(B) - (D) into subsection (a)(4)(B). The reorganization of information would make it easier to understand the information requirements for financial capability reviews. Existing subparagraphs (E) - (G) are proposed to be relettered to reflect the elimination of subparagraphs (C) and (D).

§305.64, Transfer of Permits

The commission proposes to amend §305.64(g), to require new owners and operators of hazardous waste management facilities to provide acceptable financial assurance before the date that a permit modification is issued authorizing the transfer of the permit to the new owner or operator. This change is proposed to reduce the potential for the State of Texas to have to take on the obligation to pay for proper closure, post-closure or corrective action for a site lacking financial assurance. Existing rules require a new permittee to provide financial assurance within six months of a change in ownership or operational control with the previous owner maintaining financial assurance until the new permittee does so. This requirement does not change. An additional requirement is added that the new owner or operator must provide acceptable financial assurance before the modification transferring the permit will be issued. Collectability under certain financial assurance mechanisms is not assured once a permit has been transferred. For example, insurance companies have claimed that a transferor has no insurable interest once a facility has been sold and the permit transferred. In addition, prior owners of hazardous waste management facilities sometimes rely on TCEQ to aggressively pursue recalcitrant new owners to provide financial assurance in order to obtain release of the old owner's financial assurance mechanism rather than establishing a remedy in the sales contract.

This proposed change would make the timing requirements regarding new financial assurance for hazardous waste management facilities more consistent with other programs at TCEQ. For instance, financial assurance for underground injection control (UIC) wells must be provided by the date of the permit transfer. Since many underground injection control wells are owned in combination with hazardous waste management facilities, transfer of a portion of the financial assurance is already provided by the date of the permit transfer. In addition, language is being revised to clarify that the previous owner or operator must submit a request to the executive director in order for the executive director to allow termination of the financial assurance mechanism.

§305.69, Solid Waste Permit Modification at the Request of the Permittee

The commission proposes to amend §305.69(d)(2) to correct the reference to the title of 30 TAC §39.11 to *Text of Public Notice.*

The commission proposes to add §305.69(d)(7) to clarify that the notice requirements of §305.69 do not apply to industrial or hazardous waste facility permits that are declared administratively complete on or after September 1, 1999.

The commission also proposes to amend §305.69(k), Appendix I (C)(6) to correct a reference from §335.164(10) to §335.164(8). Due to renumbering of §335.164 in a previous rulemaking, the correct citation is §335.164(8).

The commission also proposes to amend §305.69(k), Appendix I (C)(7)(b) to correct a reference from §335.165(11) to §335.165(13). Due to renumbering of §335.165 in a previous rulemaking, the correct citation is §335.165(13).

The commission also proposes to amend §305.69(k), Appendix I (C)(8)(a) to correct a reference to §335.165(9)(B). Due to renumbering of §335.165 in a previous rulemaking, the correct citation should be §335.165(11)(B).

The commission proposes to amend §305.69(k), Appendix I (G)(5)(c) to correct a typographical error.

§305.122, Characteristics of Permits

The commission proposes to amend §305.122(b) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). The amendment would reinstate a missing sentence which was inadvertently omitted by EPA. The proposed rule would allow certain changes to permits for cause, such as, modification, revocation and reissuance, or termination. It would also allow modification to a permit upon request of a permittee. Such changes must be consistent with applicable federal regulations. The paragraph and subparagraphs in the subsection have been renumbered and relettered accordingly. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain RCRA authorization.

§305.176, Integration with Maximum Achievable Control Technology (MACT) Standards

The commission proposes new §305.176 to increase the options to integrate air quality standards into a RCRA hazardous waste permit. The new language would conform to federal regulations previously promulgated in the October 12, 2005, issue of the *Federal Register* (70 FR 59402). The proposed new section does not set or impose new air quality standards. The Haz-

ardous Waste Combustion MACT regulations are multi-media regulations at the federal and state level, affecting both air quality and hazardous waste management. The TCEQ has already adopted certain parts of 40 Code of Federal Regulations (CFR) Part 63, Subpart EEE (i.e., the Hazardous Waste Combustion MACT rules) prior to this rulemaking under Chapter 305 and air quality regulations at 30 TAC Chapter 113, Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants. This proposed rulemaking would incorporate integration options with MACT standards for hazardous waste incinerators in Chapter 305, Subchapter I. In a previous rulemaking, an amendment regarding the integration options with MACT standards was adopted into §305.572 for boilers and industrial furnaces. Conforming language is proposed in §305.176 to adopt by reference 40 CFR §270.235, Options for Incinerators, Cement Kilns, Lightweight Aggregate Kilns, Solid Fuel Boilers, Liquid Fuel Boilers and Hydrochloric Acid Production Furnaces to Minimize Emissions from Startup, Shutdown, and Malfunction Events. The proposed addition of §305.176 would provide greater flexibility by allowing operators of incinerators the same integration options with MACT standards as operators of boilers and industrial furnaces in §305.572.

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 are not expected to have a significant fiscal impact on state agencies or units of local government since they do not typically own or operate hazardous waste facilities.

The proposed rules are part of a comprehensive rule package implementing RCRA requirements involving proposed changes to several chapters of 30 TAC. This fiscal note applies only to the proposed changes to Chapter 305 which includes adoption by reference of federal rule changes to the RCRA hazardous waste program that were adopted by EPA from July 2008 through July 2011. One of the proposed rule changes to Chapter 305 is to incorporate final National Emission Standards for Hazardous Air Pollutants (NESHAP) for hazardous waste combustors into Chapter 305. These standards were adopted into Chapter 335 in the last RCRA rule project, and therefore, are currently in place. These standards implemented Clean Air Act, §112(d) by requiring hazardous waste combustors to meet hazardous air pollutants emission standards reflecting the performance of the MACT. Section 305.176 is proposed to be added to include this incorporation by reference; and make corrections and/or updates to several sections in Chapter 305 that do not change the content of the rule.

Separate from EPA amendments, the proposed rules also include a specific revision to the financial assurance requirements for industrial and hazardous waste permits. The proposed amendment to §305.64(g) would require that financial assurance be provided by a new permittee prior to a permit modification for transfer being issued rather than allowing the new permittee up to six months to provide the financial assurance. This financial assurance change is needed to ensure that a permitted hazardous waste facility will have financial assurance at all times after a permit modification transferring the permit to a new owner or operator is issued. It is not certain that all financial assurance mechanisms would provide coverage for a seller after the facility is sold and the permit transferred under the existing regulations. In addition, failure of the buyer and seller to agree upon this detail in sales agreements sometimes results in demands of the seller for the agency to pursue the buyer for failure to provide its own financial assurance and allow the seller's financial assurance to be released. The rule package also includes a reorganization of existing requirements for financial assurance in §305.50. The reorganization of information would make it easier to understand the information requirements for financial capability reviews.

In general, the proposed rules are not expected to have a significant fiscal impact on governmental entities. State agencies or units of local government do not typically own or operate hazardous waste facilities.

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 protection of the environment and public safety through greater clarity and continued consistency with federal regulations concerning NESHAP provisions.

In general, the proposed rules are not expected to have a significant fiscal impact on individuals. Individuals do not typically own or operate hazardous waste facilities.

The proposed rules are not expected to have a significant fiscal impact on large businesses that own or operate hazardous waste facilities. There are approximately 180 permitted hazardous waste treatment, storage, or disposal facilities statewide. The proposed rules incorporate final NESHAP for hazardous waste combustors into Chapter 305. These standards were adopted into Chapter 335 in the last RCRA rulemaking project, and therefore, are currently in place. The proposed rules maintain consistency regarding emissions standards. The proposed rules would also require that financial assurance be provided by a new permittee prior to a permit modification for transfer being issued rather than allowing the new permittee up to six months to provide the financial assurance. The cost of financial assurance is based on estimated facility closure costs, and the cost of most financial assurance mechanisms range from 2% to 5% of facility closure costs per year. Currently, the lowest amount of financial assurance is $30,000 per year and the highest amount is $120 million per year. Sellers of hazardous waste facilities would save money since they would not be required to provide financial assurance for the six-month period after the sale of their facility. The amount of any savings would vary widely and depend on the characteristics of the expiring financial assurance. Purchasers of hazardous waste facilities, on the other hand, could incur increased costs similar in amount to the savings by the sellers.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Very few small or micro-businesses generate hazardous waste in large enough quantities to be affected by the rulemaking.

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 protect the environment, to comply with federal regulations, and because the rulemaking does not materially affect a small business for the first five years 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 Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of the rulemaking is to protect the environment and reduce the risk to human health from environmental exposure, the rulemaking is not a major environmental rule because it will 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. There is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state from those revisions under 42 United States Code (USC), §6926(g), which already imposes the more stringent federal requirements on the regulated community under the Hazardous and Solid Waste Amendments of 1984. Likewise, there is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state from those revisions outside 42 USC, §6926(g), because either the changes are not substantive, the changes move forward compliance with financial assurance requirements without changing those requirements, or the regulated community benefits from the greater flexibility and reduced compliance burden. The regulated community must comply with the more stringent federal requirements beginning on the effective date of the federal regulations. Because the regulated community is already required to comply with the more stringent federal rules, equivalent state rules would not cause any adverse effects. There is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state because the rulemaking is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Because the rulemaking does not have an adverse material impact on the economy, the rulemaking does not meet the definition of a major environmental rule. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). First, the rulemaking does not exceed a standard set by federal law. The commission must meet the minimum standards and mandatory requirements of the federal program to maintain authorization of the state hazardous waste program. The other changes do not alter substantive requirements although various changes may increase flexibility for the regulated community and move forward compliance deadlines. Second, although the rulemaking contains some requirements that are more stringent than existing state rules, federal law requires the commission to promulgate rules that are as stringent as federal law for the commission to maintain authorization of the state hazardous waste program. Third, the rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government, where the delegation agreement or contract is to implement a state and federal program. On the contrary, the commission must undertake the waste program. And fourth, the rulemaking does not seek to adopt a rule solely under the general powers of the agency instead of under a specific state law. The commission proposes this rulemaking under Texas Water Code, §5.103 and §5.105 and under Texas Health and Safety Code, §361.017 and §361.024.

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

Takings Impact Assessment

The commission evaluated the rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007 applies. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to the rulemaking because this action is reasonably taken to fulfill an obligation mandated by federal law; therefore, this action is exempt under Texas Government Code, §2007.003(b)(4). The specific purpose of the rulemaking is to maintain state RCRA authorization by adopting state hazardous waste rules that are equivalent to the federal regulations. The rulemaking substantially advances this purpose by adopting rules that incorporate and refer to the federal regulations. Promulgation and enforcement of the rules is not a statutory or constitutional taking of private real property. Specifically, the rulemaking does not affect a landowner's rights in private real property because this rulemaking does not constitutionally burden the owner's right to property, does not restrict or limit the owner's right to property, and does not reduce the value of property by 25% or more beyond that which would otherwise exist in the absence of the regulations. The rulemaking seeks to meet the minimum standards of federal RCRA regulations that are already in place. 42 USC, §6926(g) imposes on the regulated community any federal requirements that are more stringent than current state rules. The regulated community must already have complied with the more stringent federal requirements as of the effective date of the federal regulations. Because the regulated community is already required to comply with the more stringent federal regulations, promulgating equivalent state rules does not burden, restrict, or limit the owner's right to property and does not reduce the value of property by 25% or more. Likewise, the regulated community is not unduly burdened by those revisions providing greater flexibility, reduced recordkeeping, reporting, inspection, and sampling requirements.

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 CMP goal applicable to the rulemaking is to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42

USC, §§6901 *et seq.* Promulgation and enforcement of these rules are consistent with the applicable CMP goals and policies because the proposed rulemaking would update and enhance the commission's rules concerning hazardous waste facilities. In addition, the rules would not violate any applicable provisions of the CMP's stated 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.

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 2012-038-335-WS. The comment period closes November 5, 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 Cynthia Palomares, P.G., P.E., Industrial and Hazardous Waste Permits Section, (512) 239-6079, MC-130, P.O. Box 13087, Austin, Texas 78711-3087.

SUBCHAPTER C. APPLICATION FOR PERMIT OR POST-CLOSURE ORDER

30 TAC §305.50

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste), THSC, §361.085 (relating to Financial Assurance and Disclosure by Permit Applicant), and THSC, §361.024 (relating to Rules and Standards) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendment implements THSC, Chapter 361.

§305.50. Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order.

(a) Unless otherwise stated, an application for a permit to store, process, or dispose of solid waste must meet the following requirements.

(1) One original and three copies of the permit application shall be submitted on forms provided by or approved by the executive director and shall be accompanied by a like number of originals and copies of all required exhibits.

(2) Plans and specifications for the construction and operation of the facility and the staffing pattern for the facility shall be submitted, including the qualifications of all key operating personnel. Also to be submitted is the closing plan for the solid waste storage, processing, or disposal facility. The information provided must be sufficiently detailed and complete to allow the executive director to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and local air, water, public health, and solid waste statutes. Also to be submitted are listings of sites owned, operated, or controlled by the applicant in the State of Texas. For purposes of this section, the terms "permit holder" and "applicant" include each member of a partnership or association and, with respect to a corporation, each officer and the owner or owners of a majority of the corporate stock, provided such partner or owner controls at least 20% of the permit holder or applicant and at least 20% of another business which operates a solid waste management facility.

(3) Any other information as the executive director may deem necessary to determine whether the facility and the operation thereof will comply with the requirements of the Texas Solid Waste Disposal Act (TSWDA) and Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste), shall be included, including, but not limited to, the information set forth in the TSWDA, §4(e)(13).

(4) An application for a permit, permit amendment, or permit modification to store, process, or dispose of hazardous waste is subject to the following requirements, as applicable.

(A) In the case of an application for a permit to store, process, or dispose of hazardous waste, the application shall also contain any additional information required by 40 Code of Federal Regulations (CFR) §§270.13 - 270.27 (as amended though July 14, 2006 (71 Federal Register 40254)), except that closure cost estimates shall be prepared in accordance with 40 CFR §264.142(a)(1), (3), and (4), as well as §37.131 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates), §37.141 of this title (relating to Increase in Current Cost Estimate), and §335.178 of this title (relating to Cost Estimate for Closure).

(B) An application for a permit to store, process, or dispose of hazardous waste shall also contain financial information sufficient to demonstrate to the satisfaction of the executive director that the applicant has sufficient financial resources to operate and close the facility in a safe manner [~~and~~] in compliance with the permit and all applicable rules as well as[~~, including, but not limited to,~~] how an applicant intends to obtain financing for construction of the facility[~~, and to close the facility properly~~]. Financial information necessary [~~submitted~~] to satisfy this subparagraph shall be as follows: [~~meet the requirements of subparagraph (C) or (D) of this paragraph.~~]

(i) For publicly traded entities:

(I) copies of the most recent two Securities and Exchange Commission Form 10-Ks;

(II) a copy of the Securities and Exchange Commission Form 10-Q for the most recent quarter;

(III) a statement signed by an authorized signatory consistent with §305.44(a) of this title (relating to Signatories to Applications) explaining in detail how the applicant demonstrates sufficient financial resources to construct, safely operate, properly close, and provide adequate liability coverage for the facility. This statement must also address how the applicant intends to comply with the financial assurance requirements for closure, post-closure, corrective action, and liability coverage consistent with Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities); and

(IV) estimates of capital costs for expansion and/or construction if the application encompasses facility expansion, capacity expansion, or new construction; or

(ii) For privately held entities with audited financial statements for either of the most recent two fiscal years:

(I) complete copies of the audited financial statements for each of the most recent two fiscal years if audits have been performed in each year. If an audit has not been completed for one of the previous two years, a complete copy of the fiscal year end financial statement and federal tax return may be substituted in lieu of the audit not performed. The tax return must be certified by original signature of an authorized signatory as being a "true and correct copy of the return filed with the Internal Revenue Service." Financial statements shall be prepared consistent with generally accepted accounting principles and include a balance sheet, income statement, cash flow statement, notes to the financial statement, and accountant's opinion letter;

(II) a complete copy of the most current quarterly financial statement prepared consistent with generally accepted accounting principles;

(III) a written statement detailing the information that would normally be found in Securities and Exchange Commission's Form 10-K including descriptions of the business and its operations; identification of any affiliated relationships; credit agreements and terms; any legal proceedings involving the applicant; contingent liabilities; and significant accounting policies;

(IV) estimates of capital costs for expansion and/or construction if the application encompasses facility expansion, capacity expansion, or new construction; and

(V) a statement signed by an authorized signatory consistent with §305.44(a) of this title explaining in detail how the applicant demonstrates sufficient financial resources to construct, safely operate, properly close, and provide adequate liability coverage for the facility. This statement must also address how the applicant intends to comply with the financial assurance requirements for closure, post-closure, corrective action, and liability coverage in accordance with Chapter 37, Subchapter P of this title; or

(iii) For privately held entities without audited financial statements for either of the two most recent fiscal years, or entities choosing not to provide the information provided in clauses (i), (ii), or (iv) of this subparagraph:

(I) a financial plan sufficiently detailed to clearly demonstrate that the applicant will be in a position to readily secure financing for construction, operation, and closure if the permit is issued. The submitted financial plan must be accompanied by original letters of opinion from two financial experts, not otherwise employed by the applicant, who have the demonstrated ability to either finance the facility or place the required financing. The opinion letters must certify that the financial plan is reasonable; certify that financing is obtainable within 180 days of final administrative and judicial disposition of the permit application; and include the time schedule contingent upon permit finality for securing the financing. Only one opinion letter from a financial expert, not otherwise employed by the applicant, is required if the letter renders a firm commitment to provide all the necessary financing;

(II) a written detail of the annual operating costs of the facility and a projected cash flow statement including the period of construction and first two years of operation. The cash flow statement must demonstrate the financial resources to meet operating costs, debt service, and financial assurance for closure, post-closure care, and liability coverage requirements. A list of the assumptions made to forecast cash flow shall also be provided;

(III) a statement addressing how the applicant intends to comply with the financial assurance requirements for closure, post-closure, corrective action, and liability coverage in accordance with Chapter 37, Subchapter P of this title; and

(IV) estimates of capital costs for expansion and/or construction if the application encompasses facility expansion, capacity expansion, or new construction; or

(iv) For applicants possessing a resolution from a governing body approving or agreeing to approve the issuance of bonds for the purpose of satisfying the financial assurance requirements of this subparagraph:

(I) a statement signed by an authorized signatory consistent with §305.44(a) of this title explaining in detail how the applicant demonstrates sufficient financial resources to construct, safely operate, properly close, and provide adequate liability coverage for the facility. This statement must also address how the applicant intends to comply with the financial assurance requirements for closure, post-closure, corrective action, and liability coverage consistent with Chapter 37, Subchapter P of this title;

(II) a certified copy of the resolution; and

(III) certification by the governing body of passage of the resolution.

~~[(C) For applicants possessing a resolution from a governing body approving or agreeing to approve the issuance of bonds for the purpose of satisfying the financial assurance requirements of subparagraph (B) of this paragraph, submission of the following information will be an adequate demonstration:]~~

~~*[(i)* a statement signed by an authorized signatory in accordance with §305.44(a) of this title (relating to Signatories to Applications) explaining in detail how the applicant demonstrates sufficient financial resources to construct, safely operate, properly close, and provide adequate liability coverage for the facility. This statement must also address how the applicant intends to comply with the financial assurance requirements for closure, post-closure, corrective action, and liability coverage in accordance with Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities);]~~

~~*[(ii)* a certified copy of the resolution; and]~~

~~*[(iii)* certification by the governing body of passage of the resolution.]~~

~~[(D) For all applicants not meeting the requirements of subparagraph (C) of this paragraph, financial information submitted to satisfy the requirements of subparagraph (B) of this paragraph must include the applicable items listed under clauses (i) - (vii) of this subparagraph. Financial statements required under clauses (ii) and (iii) of this subparagraph shall be prepared in accordance with generally accepted accounting principles and include a balance sheet, income statement, cash flow statement, notes to the financial statements, and accountant's opinion letter:]~~

~~*[(i)* a statement signed by an authorized signatory in accordance with §305.44(a) of this title explaining in detail how the applicant demonstrates sufficient financial resources to construct, safely operate, properly close, and provide adequate liability coverage for the facility. This statement must also address how the applicant intends to comply with the financial assurance requirements for closure, post-closure, corrective action, and liability coverage in accordance with Chapter 37, Subchapter P of this title;]~~

~~*[(ii)* for applicants for which audited financial statements have been prepared the previous two or more years, the following financial statements:]~~

~~*[(I)* audited financial statements for the previous two years; and]~~

[(II) the most current quarterly financial statement prepared according to generally accepted accounting principles;]

[(iii) for applicants for which audited financial statements have not been prepared the previous two or more years, the following copies of tax returns and financial statements:]

[(I) copies of tax returns for the previous two years, each certified by original signature of an authorized signatory as being a "true and correct copy of the return filed with the Internal Revenue Service";]

[(II) financial statements for the previous two years; and]

[(III) additionally, an audited financial statement for the most recent fiscal year;]

[(iv) for publicly traded companies, copies of Securities and Exchange Commission Form 10-K for the previous two years and the most current Form 10-Q;]

[(v) for privately-held companies, written disclosure of the information that would normally be found in Securities and Exchange Commission Form 10-K including, but not limited to, the following:]

[(I) descriptions of the business and its operations;]

[(II) identification of any affiliated relationships;]

[(III) credit agreements and terms;]

[(IV) any legal proceedings involving the applicant;]

[(V) contingent liabilities; and]

[(VI) significant accounting policies;]

[(vi) for applications encompassing facility expansion, capacity expansion, or new construction, estimates of capital costs for expansion and/or construction;]

[(vii) if an applicant cannot or chooses not to demonstrate sufficient financial resources through submittal of the financial documentation specified in clauses (i) - (v) of this subparagraph and who must or chooses to obtain additional financing through a new stock offering or new debt issuance for facility expansion, capacity expansion, or new construction; and for safe operation, proper closure, and adequate liability coverage, the following information:]

[(I) a financial plan sufficiently detailed to clearly demonstrate that the applicant will be in a position to readily secure financing for construction, operation, and closure if the permit is issued. The submitted financial plan must be accompanied by original letters of opinion from two financial experts, not otherwise employed by the applicant, who have the demonstrated ability to either finance the facility or place the required financing. The opinion letters must certify that the financial plan is reasonable; certify that financing is obtainable within 180 days of final administrative and judicial disposition of the permit application; and include the time schedule contingent upon permit finality for securing the financing. Only one opinion letter from a financial expert, not otherwise employed by the applicant, is required if the letter renders a firm commitment to provide all the necessary financing; and]

[(II) written detail of the annual operating costs of the facility and a projected cash flow statement including the period of construction and first two years of operation. The cash flow statement must demonstrate the financial resources to meet operating costs, debt service, and financial assurance for closure, post-closure care, and liability coverage requirements. A list of the assumptions made to forecast cash flow shall also be provided.]

(C) [(E)] If any of the information required to be disclosed under subparagraph (B) [(D)] of this paragraph would be considered confidential under applicable law, the information shall be protected accordingly. During hearings on contested applications, disclosure of confidential information may be allowed only under an appropriate protective order.

(D) [(F)] An application for a modification or amendment of a permit that includes a capacity expansion of an existing hazardous waste management facility must also contain information provided by a Texas licensed professional geoscientist or licensed professional engineer delineating all faults within 3,000 feet of the facility, together with a demonstration, unless previously demonstrated to the commission or the United States Environmental Protection Agency [EPA], that:

(i) the fault has not experienced displacement within Holocene time, or if faults have experienced displacement within Holocene time, that no such faults pass within 200 feet of the portion of the surface facility where treatment, storage, or disposal of hazardous wastes will be conducted; and

(ii) the fault will not result in structural instability of the surface facility or provide for groundwater movement to the extent that there is endangerment to human health or the environment.

(E) [(G)] At any time after the effective date of the requirements contained in Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities), the executive director may require the owner or operator of an existing hazardous waste management facility to submit that portion of his application containing the information specified in 40 CFR §§270.14 - 270.27. Any owner or operator shall be allowed a reasonable period of time from the date of the request to submit the information. An application for a new hazardous waste management facility must be submitted at least 180 days before physical construction of the facility is expected to commence.

(5) An application for a new hazardous waste landfill which is filed after January 1, 1986, must include an engineering report which evaluates the benefits, if any, associated with the construction of the landfill above existing grade at the proposed site, the costs associated with the above-grade construction, and the potential adverse effects, if any, which would be associated with the above-grade construction.

(6) An application for a new hazardous waste landfill, land treatment facility, or surface impoundment that is to be located in the apparent recharge zone of a regional aquifer must include a hydrogeologic report prepared by a Texas licensed professional geoscientist or licensed professional engineer documenting the potential effects, if any, on the regional aquifer in the event of a release from the waste containment system.

(7) Engineering plans and specifications submitted as part of the permit application shall be prepared and sealed by a Texas licensed professional engineer who is currently registered as required by the Texas Engineering Practice Act.

(8) After August 8, 1985, any Part B permit application submitted by an owner or operator of a facility that stores, processes, or disposes of hazardous waste in a surface impoundment or a landfill must be accompanied by information, reasonably ascertainable by the owner or operator, on the potential for the public to be exposed to

hazardous wastes or hazardous constituents through releases related to the unit. By August 8, 1985, owners and operators of a landfill or a surface impoundment who have already submitted a Part B application must submit the exposure information required by this paragraph. At a minimum, such information must address:

(A) reasonably foreseeable potential releases from both normal operations and accidents at the unit, including releases associated with transportation to or from the unit;

(B) the potential pathways of human exposure to hazardous wastes or constituents resulting from documented releases; and

(C) the potential magnitude and nature of the human exposure resulting from such releases.

(9) In the case of an application for a permit to store, process, or dispose of hazardous waste at a new hazardous waste management facility, or an application for amendment or modification of a solid waste management facility permit to provide for capacity expansion, the application shall also identify the nature of any known specific and potential sources, types, and volumes of waste to be stored, processed, or disposed of by the facility and shall identify any other related information the executive director may require.

(10) In the case of an application for a permit to store, process, or dispose of hazardous waste at a new hazardous waste management facility, the application must also contain the following:

(A) copies of any relevant land use plans, adopted in accordance with the Texas Local Government Code, Chapter 211, which were in existence before publication of the notice of intent to file a solid waste permit application or, if no notice of intent is filed, at the time the permit application is filed;

(B) identification of the names and locations of industrial and other waste-generating facilities within 1/2 mile of the facility in the case of an application for a permit for a new on-site hazardous waste management facility, and within one mile of the facility in the case of an application for a permit for a new commercial hazardous waste management facility;

(C) the approximate quantity of hazardous waste generated or received annually at those facilities described under subparagraph (B) of this paragraph;

(D) descriptions of the major routes of travel in the vicinity of the facility to be used for the transportation of hazardous waste to and from the facility, together with a map showing the land-use patterns, covering at least a five-mile radius from the boundaries of the facility; and

(E) the information and demonstrations concerning faults described under paragraph (4)(D) [~~(4)(F)~~] of this subsection.

(11) In the case of an application for a permit to store, process, or dispose of hazardous waste, the application shall also contain information sufficient to demonstrate to the satisfaction of the commission that a proposed hazardous waste landfill, areal expansion of such landfill, or new commercial hazardous waste land disposal unit is not subject to inundation as a result of a 100-year flood event. An applicant or any other party may not rely solely on floodplain maps prepared by the Federal Emergency Management Agency or a successor agency to determine whether a hazardous waste landfill, areal expansion of such landfill, or commercial hazardous waste land disposal unit is subject to such an inundation.

(12) In the case of an application for a permit to store, process, or dispose of hazardous waste at a new commercial hazardous management facility, the application shall also contain the following:

(A) information sufficient to demonstrate whether a burden will be imposed on public roadways by vehicles traveling to and from the facility, including, at a minimum:

(i) the average gross weight of the various types and sizes of such vehicles to be used for transportation of hazardous waste;

(ii) the average number of such vehicles which would travel the public roadways; and

(iii) identification of the roads to be used by vehicles traveling to and from the facility within a minimum radius of 2 1/2 miles from the facility. Such identification must include the major highways nearest the facility, even if they are located outside the 2 1/2 mile radius;

(B) in addition to the requirements of subparagraph (A) of this paragraph, an applicant may submit a letter from the relevant agency of the state, county, or municipality which has the authority to regulate and maintain roads which states unequivocally that the roads to and from the facility are adequate for the loads to be placed on them by the proposed facility. Such letter will serve as prima facie evidence that the additional loads placed on the roadways caused by the operation of the facility would not constitute a burden and thus would not require that improvements be made to such roadways. Such letter does not, however, obviate the need to submit the information required under subparagraph (A) of this paragraph;

(C) evidence sufficient to demonstrate that:

(i) emergency response capabilities are available or will be available before the facility first receives waste, in the area in which the facility is located or proposed to be located, that has the ability to manage a reasonable worst-case emergency condition associated with the operation of the facility; such evidence may include, but is not limited to, the following:

(I) in addition to the contingency plan required under 40 CFR §270.14(b)(7), provisions specifying procedures and timing of practice facility evacuation drills, where there is a possibility that evacuation of the facility could be necessary;

(II) contracts with any private corporation, municipality, or county to provide emergency response;

(III) weather data which might tend to affect emergency response;

(IV) a definition of worst-case emergencies, e.g., fires, explosions, the Texas Design Hurricane, or the Standard Project Hurricane;

(V) a training program for personnel for response to such emergencies;

(VI) identification of first-responders;

(VII) identification of local or regional emergency medical services and hospitals which have had hazardous materials training;

(VIII) a pre-disaster plan, including drills;

(IX) a mechanism for notifying all applicable government agencies when an incident occurs (i.e., Texas Commission on Environmental Quality, Texas Parks and Wildlife, General Land Office, Texas Department of State Health Services, and Texas Railroad Commission);

(X) a showing of coordination with the local emergency planning committee and any local comprehensive emergency management plan; and

(XI) any medical response capability which may be available on the facility property; or

(ii) the applicant has secured bonding of sufficient financial assurance to fund the emergency response personnel and equipment determined to be necessary by the executive director to manage a reasonable worst-case emergency condition associated with the facility; such financial assurance may be demonstrated by providing information which may include, but is not limited to, the following:

(I) long-term studies using an environmental model which provide the amount of damages for which the facility is responsible; and

(II) costs involved in supplying any of the information included in or satisfying any of the requirements of clause (i)(I) - (XI) of this subparagraph;

(D) if an applicant does not elect to provide its own facilities or secure bonding to ensure sufficient emergency response capabilities in accordance with §335.183 of this title (relating to Emergency Response Capabilities Required for New Commercial Hazardous Waste Management Facilities), the applicant must provide prior to the time the facility first receives waste:

(i) documentation showing agreements with the county and/or municipality in which the facility is located, or documentation showing agreements with an adjoining county, municipality, mutual aid association, or other appropriate entity such as professional organizations regularly doing business in the area of emergency and/or disaster response; or

(ii) demonstration that a financial assurance mechanism in the form of a negotiable instrument, such as a letter of credit, fully paid in trust fund, or an insurance policy, with the limitation that the funds can only be used for emergency response personnel and equipment and made payable to and for the benefit of the county government and/or municipal government in the county in which the facility is located or proposed to be located; and

(E) a written statement signed by an authorized signatory in accordance with §305.44(a) of this title explaining how the applicant intends to provide emergency response financial assurance to meet the requirements of subparagraph (C) or (D) of this paragraph; and

(F) a summary of the applicant's experience in hazardous waste management and in particular the hazardous waste management technology proposed for the application location, and, for any applicant without experience in the particular hazardous waste management technology, a conspicuous statement of that lack of experience.

(13) An application for a boiler or industrial furnace burning hazardous waste at a facility at which the owner or operator uses direct transfer operations to feed hazardous waste from transport vehicles (containers, as defined in 40 CFR §266.111) directly to the boiler or industrial furnace shall submit information supporting conformance with the standards for direct transfer provided by 40 CFR §266.111 and §335.225 of this title (relating to Additional Standards for Direct Transfer).

(14) The executive director may require a permittee or an applicant to submit information in order to establish permit conditions under §305.127(1)(B)(iii) and (4)(A) [~~§305.127(4)(A) and (1)(B)(iii)~~] of this title (relating to Conditions to be Determined for Individual Permits).

(15) If the executive director concludes, based on one or more of the factors listed in subparagraph (A) of this paragraph that compliance with the standards of 40 CFR Part 63, Subpart EEE alone may not be protective of human health or the environment, the executive director shall require the additional information or assessment(s) necessary to determine whether additional controls are necessary to ensure protection of human health and the environment. This includes information necessary to evaluate the potential risk to human health and/or the environment resulting from both direct and indirect exposure pathways. The executive director may also require a permittee or applicant to provide information necessary to determine whether such an assessment(s) should be required. The executive director shall base the evaluation of whether compliance with the standards of 40 CFR Part 63, Subpart EEE alone is protective of human health or the environment on factors relevant to the potential risk from a hazardous waste combustion unit, including, as appropriate, any of the following factors:

(A) particular site-specific considerations such as proximity to receptors (such as schools, hospitals, nursing homes, day-care centers, parks, community activity centers, or other potentially sensitive receptors), unique dispersion patterns, etc.;

(B) identities and quantities of emissions of persistent, bioaccumulative, or toxic pollutants considering enforceable controls in place to limit those pollutants;

(C) identities and quantities of nondioxin products of incomplete combustion most likely to be emitted and to pose significant risk based on known toxicities (confirmation of which should be made through emissions testing);

(D) identities and quantities of other off-site sources of pollutants in proximity of the facility that significantly influence interpretation of a facility-specific risk assessment;

(E) presence of significant ecological considerations, such as the proximity of a particularly sensitive ecological area;

(F) volume and types of wastes, for example wastes containing highly toxic constituents;

(G) other on-site sources of hazardous air pollutants that significantly influence interpretation of the risk posed by the operation of the source in question;

(H) adequacy of any previously conducted risk assessment, given any subsequent changes in conditions likely to affect risk; and

(I) such other factors as may be appropriate.

(16) If, as the result of an assessment(s) or other information, the executive director determines that conditions are necessary in addition to those required under 40 CFR Part 63, Subpart EEE, Parts 264 or 266 to ensure protection of human health and the environment, including revising emission limits, he/she shall include those terms and conditions in a Resource Conservation and Recovery Act permit for a hazardous waste combustion unit.

(b) An application specifically for a post-closure permit or for a post-closure order for post-closure care must meet the following requirements, as applicable.

(1) An application for a post-closure permit or a post-closure order shall contain information required by 40 CFR §270.14(b)(1), (4) - (6), (11), (13), (14), (18), and (19), (c), and (d), and any additional information that the executive director determines is necessary from 40 CFR §§270.14, 270.16 - 270.18, 270.20, or 270.21, except that closure cost estimates shall be prepared in accordance with 40 CFR

§264.142(a)(1), (3), and (4), as well as §§37.131, 37.141, 335.127, and 335.178 of this title.

(2) An application for a post-closure order shall also contain financial information sufficient to demonstrate to the satisfaction of the executive director that the applicant has sufficient financial resources to operate the facility in a safe manner and in compliance with the post-closure order and all applicable rules. Financial information submitted to satisfy this paragraph shall meet the requirements of Chapter 37, Subchapter P of this title.

(3) An application for a post-closure order or for a post-closure permit must also contain any other information as the executive director may deem necessary to determine whether the facility and the operation thereof will comply with the requirements of the TSWDA and Chapter 335 of this title including, but not limited to, the information set forth in TSWDA, §361.109.

(4) The executive director may require an applicant for a post-closure order to submit information in order to establish conditions under §305.127(4)(A) of this title.

(5) An application for a post-closure order or for a post-closure permit shall also contain the information listed in §305.45(a)(1) of this title (relating to Contents of Application for Permit).

(6) All engineering and geoscientific information submitted to the agency shall be prepared by, or under the supervision of, a licensed professional engineer or licensed professional geoscientist, and shall be signed, sealed, and dated by qualified professionals as required by the Texas Engineering Practice Act and the Texas Geosciences Practice Act and the licensing and registration boards under these acts.

(7) One original and three copies of an application for a post-closure permit or for a post-closure order shall be submitted on forms provided by, or approved by, the executive director and shall be accompanied by a like number of originals and copies of all required exhibits.

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 September 21, 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. AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS, REVOCATION, AND SUSPENSION OF PERMITS

30 TAC §305.64, §305.69

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste), THSC, §361.085 (relating to Financial Assurance and Disclosure by Permit Applicant), and THSC, §361.024 (relating to Rules and Standards) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§305.64. Transfer of Permits.

(a) A permit is issued in personam and may be transferred only upon approval of the commission. No transfer is required for a corporate name change, as long as the secretary of state can verify that a change in name alone has occurred. An attempted transfer is not effective for any purpose until actually approved by the commission.

(b) Except as provided otherwise in subsection (g) of this section, either the transferee or the permittee shall submit to the executive director an application for transfer at least 30 days before the proposed transfer date. The application shall contain the following:

(1) the name and address of the transferee;

(2) date of proposed transfer;

(3) if the permit requires financial responsibility, the method by which the proposed transferee intends to assume or provide financial responsibility, including proof of such financial responsibility to become effective when the transfer becomes effective;

(4) a fee of $100 to be applied toward the processing of the application, as provided in §305.53(a) of this title (relating to Application Fee);

(5) a sworn statement that the application is made with the full knowledge and consent of the permittee if the transferee is filing the application; and

(6) any other information the executive director may reasonably require.

(c) If no agreement regarding transfer of permit responsibility and liability is provided, responsibility for compliance with the terms and conditions of the permit and liability for any violation associated therewith is assumed by the transferee, effective on the date of the approved transfer. This section is not intended to relieve a transfer or of any liability.

(d) The executive director must be satisfied that proof of any required financial responsibility is sufficient before transmitting an application for transfer to the commission for further proceedings.

(e) If a person attempting to acquire a permit causes or allows operation of the facility before approval is given, such person shall be considered to be operating without a permit or other authorization.

(f) The commission may refuse to approve a transfer where conditions of a judicial decree, compliance agreement, or other enforcement order have not been entirely met. The commission shall also consider the prior compliance record of the transferee, if any.

(g) For permits involving hazardous waste under the Texas Solid Waste Disposal Act, Texas Health and Safety Code Annotated, Chapter 361 changes in the ownership or operational control of a facility may be made as Class 1 modifications with prior written approval of the executive director in accordance with §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). The new owner or operator must submit a revised permit application no

later than 90 days prior to the scheduled change. A written agreement containing a specific date for transfer of permit responsibility between the current and new permittees must also be submitted to the executive director. When a transfer of ownership or operational control occurs, the old owner or operator shall comply with the requirements of Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities), until the new owner or operator has demonstrated compliance with the requirements of Chapter 37, Subchapter P of this title. The new owner or operator must demonstrate compliance with the requirements of Chapter 37, Subchapter P of this title within six months of the date of the change of ownership or operational control of the facility. Prior to the executive director issuing the permit modification transferring the permit, the new owner or operator must provide proof of financial assurance in compliance with Chapter 37, Subchapter P of this title. Upon demonstration to the executive director [~~by the new owner or operator~~] of compliance with Chapter 37[~~, Subchapter P~~] of this title, the executive director shall notify the old owner or operator that he no longer needs to comply with Chapter 37, Subchapter P of this title as of the date of demonstration.

(h) The commission may transfer permits to an interim permittee pending an ultimate decision on a permit transfer if it finds one or more of the following:

(1) the permittee no longer owns the permitted facilities;

(2) the permittee is about to abandon or cease operation of the facilities;

(3) the permittee has abandoned or ceased operating the facilities; and

(4) there exists a need for the continued operation of the facility and the proposed interim permittee is capable of assuming responsibility for compliance with the permit.

(i) The commission may transfer a permit involuntarily after notice and an opportunity for hearing, for any of the following reasons:

(1) the permittee no longer owns or controls the permitted facilities;

(2) if the facilities have not been built, and the permittee no longer has sufficient property rights in the site of the proposed facilities;

(3) the permittee has failed or is failing to comply with the terms and conditions of the permit;

(4) the permitted facilities have been or are about to be abandoned;

(5) the permittee has violated commission rules or orders;

(6) the permittee has been or is operating the permitted facilities in a manner which creates an imminent and substantial endangerment to the public health or the environment;

(7) foreclosure, insolvency, bankruptcy, or similar proceedings have rendered the permittee unable to construct the permitted facilities or adequately perform its responsibilities in operating the facilities; or

(8) transfer of the permit would maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state and/or would minimize the damage to the environment; and

(9) the transferee has demonstrated the willingness and ability to comply with the permit and all other applicable requirements.

(j) The commission may initiate proceedings in accordance with the Texas Water Code, Chapter 13, for the appointment of a receiver consistent with this section.

(k) For standard permits, changes in the ownership or operational control of a facility may be made as a Class 1 modification to the standard permit with prior approval from the executive director in accordance with §305.69(k) [~~§305.69(l)(a)(7)~~] of this title.

§305.69. Solid Waste Permit Modification at the Request of the Permittee.

(a) Applicability. This section applies only to modifications to industrial and hazardous solid waste permits. Modifications to municipal solid waste permits are covered in §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications).

(b) Class I modifications of solid waste permits.

(1) Except as provided in paragraph (2) of this subsection, the permittee may put into effect Class 1 modifications listed in Appendix I of subsection (k) of this section under the following conditions:

(A) the permittee must notify the executive director concerning the modification by certified mail or other means that establish proof of delivery within seven calendar days after the change is put into effect. This notification must specify the changes being made to permit conditions or supporting documents referenced by the permit and must explain why they are necessary. Along with the notification, the permittee must provide the applicable information in the form and manner specified in §1.5(d) of this title (relating to Records of the Agency), §§305.41 - 305.45 and 305.47 - 305.53 of this title (relating to Applicability; Application Required; Who Applies; Signatories to Applications; Contents of Application for Permit; Retention of Application Data; Additional Contents of Applications for Wastewater Discharge Permits; Additional Contents of Application for an Injection Well Permit; Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order; Revision of Applications for Hazardous Waste Permits; Waste Containing Radioactive Materials; and Application Fee), Subchapter I of this chapter (relating to Hazardous Waste Incinerator Permits), and Subchapter J of this chapter (relating to Permits for Land Treatment Demonstrations Using Field Tests or Laboratory Analyses);

(B) the permittee must send notice of the modification request by first-class mail to all persons listed in §39.13 of this title (relating to Mailed Notice). This notification must be made within 90 calendar days after the change is put into effect. For the Class 1 modifications that require prior executive director approval, the notification must be made within 90 calendar days after the executive director approves the request; and

(C) any person may request the executive director to review, and the executive director may for cause reject, any Class 1 modification. The executive director must inform the permittee by certified mail that a Class 1 modification has been rejected, explaining the reasons for the rejection. If a Class 1 modification has been rejected, the permittee must comply with the original permit conditions.

(2) Class 1 permit modifications identified in Appendix I of subsection (k) of this section by a superscript 1 may be made only with the prior written approval of the executive director.

(3) For a Class 1 permit modification, the permittee may elect to follow the procedures in subsection (c) of this section for Class 2 modifications instead of the Class 1 procedures. The permittee must inform the executive director of this decision in the notification required in subsection (c)(1) of this section.

(c) Class 2 modifications of solid waste permits.

(1) For Class 2 modifications, which are listed in Appendix I of subsection (k) of this section, the permittee must submit a modification request to the executive director that:

(A) describes the exact change to be made to the permit conditions and supporting documents referenced by the permit;

(B) identifies the modification as a Class 2 modification;

(C) explains why the modification is needed; and

(D) provides the applicable information in the form and manner specified in §1.5(d) of this title and §§305.41 - 305.45 and 305.47 - 305.53 of this title;

(2) The permittee must send a notice of the modification request by first-class mail to all persons listed in §39.13 of this title and must cause this notice to be published in a major local newspaper of general circulation. This notice must be mailed and published within seven days before or after the date of submission of the modification request, and the permittee must provide to the executive director evidence of the mailing and publication. The notice must include:

(A) announcement of a 60-day comment period, in accordance with paragraph (5) of this subsection, and the name and address of an agency contact to whom comments must be sent;

(B) announcement of the date, time, and place for a public meeting to be held in accordance with paragraph (4) of this subsection;

(C) name and telephone number of the permittee's contact person;

(D) name and telephone number of an agency contact person;

(E) location where copies of the modification request and any supporting documents can be viewed and copied; and

(F) the following statement: "The permittee's compliance history during the life of the permit being modified is available from the agency contact person."

(3) The permittee must place a copy of the permit modification request and supporting documents in a location accessible to the public in the vicinity of the permitted facility.

(4) The permittee must hold a public meeting no earlier than 15 days after the publication of the notice required in paragraph (2) of this subsection and no later than 15 days before the close of the 60-day comment period. The meeting must be held to the extent practicable in the vicinity of the permitted facility.

(5) The public shall be provided at least 60 days to comment on the modification request. The comment period will begin on the date the permittee publishes the notice in the local newspaper. Comments should be submitted to the agency contact identified in the public notice.

(6) No later than 90 days after receipt of the modification request, subparagraphs (A), (B), (C), (D), or (E) of this paragraph must be met, subject to §50.33 of this title (relating to Executive Director Action on Application), as follows:

(A) the executive director or the commission must approve the modification request, with or without changes, and modify the permit accordingly;

(B) the commission must deny the request;

(C) the commission or the executive director must determine that the modification request must follow the procedures in subsection (d) of this section for Class 3 modifications for either of the following reasons:

(i) there is significant public concern about the proposed modification; or

(ii) the complex nature of the change requires the more extensive procedures of a Class 3 modification; or

(D) the commission must approve the modification request, with or without changes, as a temporary authorization having a term of up to 180 days, in accordance with the following public notice requirements:

(i) notice of a hearing on the temporary authorization shall be given not later than the 20th day before the hearing on the authorization; and

(ii) this notice of hearing shall provide that an affected person may request an evidentiary hearing on issuance of the temporary authorization; or

(E) the executive director must notify the permittee that the executive director or the commission will decide on the request within the next 30 days.

(7) If the executive director notifies the permittee of a 30-day extension for a decision, then no later than 120 days after receipt of the modification request, subparagraphs (A), (B), (C), or (D) of this paragraph must be met, subject to §50.33 of this title, as follows:

(A) the executive director or the commission must approve the modification request, with or without changes, and modify the permit accordingly;

(B) the commission must deny the request;

(C) the commission or the executive director must determine that the modification request must follow the procedures in subsection (d) of this section for Class 3 modifications for either of the following reasons:

(i) there is significant public concern about the proposed modification; or

(ii) the complex nature of the change requires the more extensive procedures of a Class 3 modification; or

(D) the commission must approve the modification request, with or without changes, as a temporary authorization having a term of up to 180 days, in accordance with the following public notice requirements:

(i) notice of a hearing on the temporary authorization shall be given not later than the 20th day before the hearing on the authorization; and

(ii) this notice of hearing shall provide that an affected person may request an evidentiary hearing on issuance of the temporary authorization.

(8) If the executive director or the commission fails to make one of the decisions specified in paragraph (7) of this subsection by the 120th day after receipt of the modification request, the permittee is automatically authorized to conduct the activities described in the modification request for up to 180 days, without formal agency action. The authorized activities must be conducted as described in the permit modification request and must be in compliance with all appropriate standards of Chapter 335, Subchapter E of this title (relating to Interim

Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities). If the commission approves, with or without changes, or denies any modification request during the term of the temporary authorization issued pursuant to paragraph (6) or (7) of this subsection, such action cancels the temporary authorization. The commission is the sole authority for approving or denying the modification request during the term of the temporary authorization. If the executive director or the commission approves, with or without changes, or if the commission denies the modification request during the term of the automatic authorization provided for in this paragraph, such action cancels the automatic authorization.

(9) In the case of an automatic authorization under paragraph (8) of this subsection, or a temporary authorization under paragraph (6)(D) or (7)(D) of this subsection, if the executive director or the commission has not made a final approval or denial of the modification request by the date 50 days prior to the end of the temporary or automatic authorization, the permittee must within seven days of that time send a notification to all persons listed in §39.13 of this title, and make a reasonable effort to notify other persons who submitted written comments on the modification request, that:

(A) the permittee has been authorized temporarily to conduct the activities described in the permit modification request; and

(B) unless the executive director or the commission acts to give final approval or denial of the request by the end of the authorization period, the permittee will receive authorization to conduct such activities for the life of the permit.

(10) If the owner/operator fails to notify the public by the date specified in paragraph (9) of this subsection, the effective date of the permanent authorization will be deferred until 50 days after the owner/operator notifies the public.

(11) Except as provided in paragraph (13) of this subsection, if the executive director or the commission does not finally approve or deny a modification request before the end of the automatic or temporary authorization period or reclassify the modification as Class 3 modification, the permittee is authorized to conduct the activities described in the permit modification request for the life of the permit unless amended or modified later under §305.62 of this title (relating to Amendments) or this section. The activities authorized under this paragraph must be conducted as described in the permit modification request and must be in compliance with all appropriate standards of Chapter 335, Subchapter E of this title.

(12) In the processing of each Class 2 modification request which is subsequently approved or denied by the executive director or the commission in accordance with paragraph (6) or (7) of this subsection, or each Class 2 modification request for which a temporary authorization is issued in accordance with subsection (f) of this section or a reclassification to a Class 3 modification is made in accordance with paragraph (6)(C) or (7)(C) of this subsection, the executive director must consider all written comments submitted to the agency during the public comment period and must respond in writing to all significant comments.

(13) With the written consent of the permittee, the executive director may extend indefinitely or for a specified period the time periods for final approval or denial of a Class 2 modification request or for reclassifying a modification as Class 3.

(14) The commission or the executive director may change the terms of, and the commission may deny a Class 2 permit modification request under paragraphs (6) - (8) of this subsection for any of the following reasons:

(A) the modification request is incomplete;

(B) the requested modification does not comply with the appropriate requirements of Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) or other applicable requirements; or

(C) the conditions of the modification fail to protect human health and the environment.

(15) The permittee may perform any construction associated with a Class 2 permit modification request beginning 60 days after the submission of the request unless the executive director establishes a later date for commencing construction and informs the permittee in writing before the 60th day.

(d) Class 3 modifications of solid waste permits.

(1) For Class 3 modifications listed in Appendix I of subsection (k) of this section, the permittee must submit a modification request to the executive director that:

(A) describes the exact change to be made to the permit conditions and supporting documents referenced by the permit;

(B) identifies that the modification is a Class 3 modification;

(C) explains why the modification is needed; and

(D) provides the applicable information in the form and manner specified in §1.5(d) of this title and §§305.41 - 305.45 and 305.47 - 305.53 of this title; and Subchapter Q of this chapter (relating to Permits for Boilers and Industrial Furnaces Burning Hazardous Waste).

(2) The permittee must send a notice of the modification request by first-class mail to all persons listed in §39.13 of this title and must cause this notice to be published in a major local newspaper of general circulation. This notice must be mailed and published within seven days before or after the date of submission of the modification request and evidence of the mailing and publication of the notice shall be provided to the executive director. The notice shall include the following:

(A) all information required by §39.11 of this title (relating to Text of Public [~~Mailed~~] Notice);

(B) announcement of a 60-day comment period, and the name and address of an agency contact person to whom comments must be sent;

(C) announcement of the date, time, and place for a public meeting on the modification request, to be held in accordance with paragraph (4) of this subsection;

(D) name and telephone number of the permittee's contact person;

(E) name and telephone number of an agency contact person;

(F) identification of the location where copies of the modification request and any supporting documents can be viewed and copied; and

(G) the following statement: "The permittee's compliance history during the life of the permit being modified is available from the agency contact person."

(3) The permittee must place a copy of the permit modification request and supporting documents in a location accessible to the public in the vicinity of the permitted facility.

(4) The permittee must hold a public meeting no earlier than 15 days after the publication of the notice required in paragraph (2) of this subsection and no later than 15 days before the close of the 60-day comment period. The meeting must be held to the extent practicable in the vicinity of the permitted facility.

(5) The public shall be provided at least 60 days to comment on the modification request. The comment period will begin on the date the permittee publishes the notice in the local newspaper. Comments should be submitted to the agency contact person identified in the public notice.

(6) After the conclusion of the 60-day comment period, the permit modification request shall be granted or denied in accordance with the applicable requirements of Chapter 39 of this title (relating to Public Notice), Chapter 50 of this title (relating to Action on Applications and Other Authorizations), and Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment). When a permit is modified, only the conditions subject to modification are reopened.

(7) Except as otherwise required by Chapter 39 of this title, the notice requirements in this section do not apply to Class 3 modification applications for industrial or hazardous waste facility permits that are declared administratively complete on or after September 1, 1999.

(e) Other modifications.

(1) In the case of modifications not explicitly listed in Appendix I of subsection (k) of this section, the permittee may submit a Class 3 modification request to the agency, or the permittee may request a determination by the executive director that the modification should be reviewed and approved as a Class 1 or Class 2 modification. If the permittee requests that the modification be classified as a Class 1 or Class 2 modification, the permittee must provide the agency with the necessary information to support the requested classification.

(2) The executive director shall make the determination described in paragraph (1) of this subsection as promptly as practicable. In determining the appropriate class for a specific modification, the executive director shall consider the similarity of the modification to other modifications codified in Appendix I of subsection (k) of this section and the following criteria.

(A) Class 1 modifications apply to minor changes that keep the permit current with routine changes to the facility or its operation. These changes do not substantially alter the permit conditions or reduce the capacity of the facility to protect human health or the environment. In the case of Class 1 modifications, the executive director may require prior approval;

(B) Class 2 modifications apply to changes that are necessary to enable a permittee to respond, in a timely manner, to:

(i) common variations in the types and quantities of the wastes managed under the facility permit;

(ii) technological advancements; and

(iii) changes necessary to comply with new regulations, where these changes can be implemented without substantially changing design specifications or management practices in the permit; and

(C) Class 3 modifications reflect a substantial alteration of the facility or its operations.

(f) Temporary authorizations.

(1) Upon request of the permittee, the commission may grant the permittee a temporary authorization having a term of up to 180 days, in accordance with this subsection, and in accordance with the following public notice requirements:

(A) notice of a hearing on the temporary authorization shall be given not later than the 20th day before the hearing on the authorization; and

(B) this notice of hearing shall provide that an affected person may request an evidentiary hearing on issuance of the temporary authorization.

(2) The permittee may request a temporary authorization for:

(A) any Class 2 modification meeting the criteria in paragraph (5)(B) of this subsection; and

(B) any Class 3 modification that meets the criteria in paragraph (5)(B)(i) or (ii) of this subsection, or that meets any of the criteria in paragraph (5)(B)(iii) - (v) of this subsection and provides improved management or treatment of a hazardous waste already listed in the facility permit.

(3) The temporary authorization request must include:

(A) a specific description of the activities to be conducted under the temporary authorization;

(B) an explanation of why the temporary authorization is necessary and reasonably unavoidable; and

(C) sufficient information to ensure compliance with the applicable standards of Chapter 335, Subchapter F of this title and 40 Code of Federal Regulations (CFR) Part 264.

(4) The permittee must send a notice about the temporary authorization request by first-class mail to all persons listed in §39.13 of this title. This notification must be made within seven days of submission of the authorization request.

(5) The commission shall approve or deny the temporary authorization as quickly as practicable. To issue a temporary authorization, the commission must find:

(A) the authorized activities are in compliance with the applicable standards of Chapter 335, Subchapter F of this title and 40 CFR Part 264; and

(B) the temporary authorization is necessary to achieve one of the following objectives before action is likely to be taken on a modification request:

(i) to facilitate timely implementation of closure or corrective action activities;

(ii) to allow treatment or storage in tanks, containers, or containment buildings, of restricted wastes in accordance with Chapter 335, Subchapter O of this title (relating to Land Disposal Restrictions), 40 CFR Part 268, or Section 3004 of the Resource Conservation and Recovery Act (RCRA), 42 United States Code, §6924;

(iii) to prevent disruption of ongoing waste management activities;

(iv) to enable the permittee to respond to sudden changes in the types or quantities of the wastes managed under the facility permit; or

(v) to facilitate other changes to protect human health and the environment.

(6) A temporary authorization may be reissued for one additional term of up to 180 days provided that the permittee has re-

quested a Class 2 or 3 permit modification for the activity covered in the temporary authorization, and:

(A) the reissued temporary authorization constitutes the commission's decision on a Class 2 permit modification in accordance with subsection (c)(6)(D) or (7)(D) of this section; or

(B) the commission determines that the reissued temporary authorization involving a Class 3 permit modification request is warranted to allow the authorized activities to continue while the modification procedures of subsection (d) of this section are conducted.

(g) Public notice and appeals of permit modification decisions.

(1) The commission shall notify all persons listed in §39.13 of this title within ten working days of any decision under this section to grant or deny a Class 2 or 3 permit modification request. The commission shall also notify such persons within ten working days after an automatic authorization for a Class 2 modification goes into effect under subsection (c)(8) or (11) of this section.

(2) The executive director's or the commission's decision to grant or deny a Class 3 permit modification request under this section may be appealed under the appropriate procedures set forth in the commission's rules and in the Administrative Procedure Act, Texas Government Code, Chapter 2001.

(h) Newly regulated wastes and units.

(1) The permittee is authorized to continue to manage wastes listed or identified as hazardous under 40 CFR Part 261, or to continue to manage hazardous waste in units newly regulated as hazardous waste management units if:

(A) the unit was in existence as a hazardous waste facility unit with respect to the newly listed or characteristic waste or newly regulated waste management unit on the effective date of the final rule listing or identifying the waste or regulating the unit;

(B) the permittee submits a Class 1 modification request on or before the date on which the waste or unit becomes subject to the new requirements;

(C) the permittee is in substantial compliance with the applicable standards of Chapter 335, Subchapter E of this title, Chapter 335, Subchapter H, Divisions 1 through 4 of this title (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities), and 40 CFR Part 265 and Part 266;

(D) the permittee also submits a complete Class 2 or 3 modification request within 180 days after the effective date of the final rule listing or identifying the waste or subjecting the unit to Section 6921 of the Resource Conservation and Recovery Act Subtitle C (Subchapter III Hazardous Waste Management, 42 United States Code, §§6921 - 6939e); and

(E) in the case of land disposal units, the permittee certifies that each such unit is in compliance with all applicable 40 CFR Part 265 groundwater monitoring requirements and with Chapter 37 of this title (relating to Financial Assurance) on the date 12 months after the effective date of the final rule identifying or listing the waste as hazardous, or regulating the unit as a hazardous waste management unit. If the owner or operator fails to certify compliance with these requirements, the owner or operator shall lose authority to operate under this section.

(2) New wastes or units added to a facility's permit under this subsection do not constitute expansions for the purpose of the 25% capacity expansion limit for Class 2 modifications.

(i) Combustion facility changes to meet 40 CFR Part 63, Maximum Achievable Control Technology (MACT) standards. The following procedures apply to hazardous waste combustion facility permit modifications requested under L.9. of Appendix I of subsection (k) of this section.

(1) Facility owners or operators must have complied with the Notification of Intent to Comply (NIC) requirements of 40 CFR §63.1210(b) and (c) that were in effect prior to October 11, 2000, as amended in 40 CFR §270.42(j) through October 12, 2005 (70 Federal Register 59402), before a permit modification can be requested under this section.

(2) If the executive director does not approve or deny the request within 90 days of receiving it, the request shall be deemed approved. The executive director may, at his or her discretion, extend this 90-day deadline one time for up to 30 days by notifying the facility owner or operator.

(3) Facility owners or operators may request to have specific RCRA operating and emissions limits waived by submitting a Class 1 permit modification request under L.10. in Appendix I of subsection (k) of this section. The facility owner or operator must:

(A) identify the specific RCRA permit operating and emissions limits which are requested to be waived;

(B) provide an explanation of why the changes are necessary to minimize or eliminate conflicts between the RCRA permit and MACT compliance;

(C) discuss how the revised provisions will be sufficiently protective; and

(D) the executive director shall notify the facility owner or operator whether the Class 1 permit modification has been approved or denied. If denied, the executive director shall provide justification for denial.

(4) To request the modification referenced in paragraph (3) of this subsection in conjunction with MACT performance testing where permit limits may only be waived during actual test events and pretesting, as defined under 40 CFR §63.1207(h)(2)(i) and (ii), for an aggregate time not to exceed 720 hours of operation (renewable at the discretion of the executive director); the owner or operator must:

(A) submit the modification request to the executive director at the same time the test plans are submitted to the executive director; and

(B) the executive director may elect to approve or deny the request contingent upon approval of the test plans.

(j) Military hazardous waste munitions storage, processing, and disposal. The permittee is authorized to continue to accept waste military munitions notwithstanding any permit conditions barring the permittee from accepting off-site wastes, if:

(1) the facility is in existence as a hazardous waste facility, and the facility is already permitted to handle waste military munitions, on the date when waste military munitions become subject to hazardous waste regulatory requirements;

(2) on or before the date when waste military munitions become subject to hazardous waste regulatory requirements, the permittee submits a Class 1 modification request to remove or revise the permit provision restricting the receipt of off-site waste munitions; and

(3) the permittee submits a Class 2 modification request within 180 days of the date when the waste military munitions become subject to hazardous waste regulatory requirements.

(k) Appendix I. The following appendix will be used for the purposes of this subchapter which relates to industrial and hazardous solid waste permit modification at the request of the permittee.
Figure: 30 TAC §305.69(k)

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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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 F. PERMIT CHARACTERISTICS AND CONDITIONS

30 TAC §305.122

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste), THSC, §361.085 (relating to Financial Assurance and Disclosure by Permit Applicant), and THSC, §361.024 (relating to Rules and Standards) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendment implements THSC, Chapter 361.

§305.122. Characteristics of Permits.

(a) Compliance with a Resource Conservation and Recovery Act (RCRA) permit during its term constitutes compliance, for purposes of enforcement, with subtitle C of RCRA except for those requirements not included in the permit which:

(1) become effective by statute;

(2) are promulgated under 40 Code of Federal Regulations (CFR) Part 268, restricting the placement of hazardous wastes in or on the land;

(3) are promulgated under 40 CFR Part 264, regarding leak detection systems for new and replacement surface impoundment, waste pile, and landfill units, and lateral expansions of surface impoundment, waste pile, and landfill units. The leak detection system requirements include double liners, construction quality assurance programs, monitoring, action leakage rates, and response action plans, and will be implemented through the Class 1 permit modifications procedures of §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee); or

(4) are promulgated under 40 CFR Part 265, Subparts AA, BB, or CC limiting air emissions, as adopted by reference under §335.112 of this title (relating to Standards).

(b) A permit may be modified, revoked and reissued, or terminated during its term for cause as set forth in §305.62 of this title (relating to Amendments) and §305.66 of this title (relating to Permit Denial, Suspension, and Revocation), or the permit may be modified upon the request of the permittee as set forth in §305.69 of this title.

(c) [~~(b)~~] A permit issued within the scope of this subchapter does not convey any property rights of any sort, nor any exclusive privilege, and does not become a vested right in the permittee.

(d) [~~(c)~~] The issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights, or any infringement of state or local law or regulations.

(e) [~~(d)~~] Except for any toxic effluent standards and prohibitions imposed under Clean Water Act (CWA), §307, and standards for sewage sludge use or disposal under CWA, §405(d), compliance with a Texas pollutant discharge elimination system (TPDES) permit during its term constitutes compliance, for purposes of enforcement, with the CWA, §§301, 302, 306, 307, 318, 403, and 405; however, a TPDES permit may be amended or revoked during its term for cause as set forth in [§]§305.62 and §305.66 of this title. [~~(relating to Amendment, and Permit Denial, Revocation and Suspension.)~~]

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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Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0779

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SUBCHAPTER I. HAZARDOUS WASTE INCINERATOR PERMITS

30 TAC §305.176

Statutory Authority

The new section is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste), THSC, §361.085 (relating to Financial Assurance and Disclosure by Permit Applicant), and THSC, §361.024 (relating to Rules and Standards) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed new section implements THSC, Chapter 361.

§305.176. Integration with Maximum Achievable Control Technology (MACT) Standards.

The regulations contained in 40 Code of Federal Regulations §270.235, Options for Incinerators, Cement Kilns, Lightweight Aggregate Kilns, Solid Fuel Boilers, Liquid Fuel Boilers, and Hydrochloric Acid Pro-

duction Furnaces to Minimize Emissions from startup, shutdown, and malfunction events, are adopted by reference, as amended and adopted through October 12, 2005 (70 FedReg 59402).

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 324. USED OIL STANDARDS
SUBCHAPTER A. USED OIL RECYCLING

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§324.1 - 324.4, 324.6, 324.7, and 324.11 - 324.16; and repeals §324.5.

These amendments were originally published for proposal in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3011), withdrawn on September 19, 2012, and are re-proposed herein.

Background and Summary for the Factual Basis of the Proposed Rules

The federal used oil recycling program is authorized under the Used Oil Recycling Act of 1980, Resource Conservation and Recovery Act of 1976 (RCRA), §3014. The United States Environmental Protection Agency (EPA) sets standards for used oil destined for recycling to prevent mismanagement by generators, collection centers, transporters, processors and re-refiners, burners, and marketers. Those federal standards are located in 40 Code of Federal Regulations (CFR) Part 279.

States may obtain authorization from the EPA to administer the used oil recycling program at the state level. State authorization is a rulemaking process through which EPA delegates the primary responsibility of implementing the RCRA used oil recycling program to individual states in lieu of EPA. This process ensures national consistency and minimum standards while providing flexibility to states in implementing rules. State RCRA programs must always be at least as stringent as the federal requirements.

Since the beginning of the federal used oil recycling program, the State of Texas has continuously participated in the EPA's authorization program. To maintain RCRA authorization, the commission must adopt regulations to meet the minimum standards of federal programs administered by EPA. Because the federal regulations undergo regular revision, the commission must adopt new regulations periodically to meet the changing federal regulations.

The commission proposes in this rulemaking parts of RCRA Rule Clusters XIX - XXI that implement revisions to the federal used oil recycling program. Establishing equivalency with federal regulations will enable the State of Texas to operate all aspects of the federal used oil recycling program in lieu of the EPA. All proposed rule changes are further discussed in the Section by Section Discussion portion of this preamble.

Two corresponding rulemakings are published in this issue of the *Texas Register* and include changes to 30 TAC Chapter 305, Consolidated Permits, and 30 TAC Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste.

Section by Section Discussion

The commission proposes administrative changes throughout the proposed rulemaking to reflect the agency's current practices and to conform to *Texas Register* and agency guidelines. These proposed changes include correcting typographical, spelling, and grammatical errors throughout the chapter and also incorporating by reference the typographical, spelling, and grammatical corrections in 40 CFR Part 279. In addition, the commission proposes to replace the phrases "shall be as" and "will be as" with the phrase, "The commission incorporates by reference". This change in phrasing would avoid any ambiguity as to the commission's action to incorporate the federal used oil rules. Finally, the commission proposes to adopt substantive changes throughout the chapter such as: removing the requirement to use SW-846 as the testing method to ensure that used oil does not contain significant concentrations of halogenated hazardous constituents, adding clarifying language regarding used oil containing polychlorinated biphenyls (PCBs), and tracking requirements for used oil marketers. The changes would make it easier for recyclers to comply with the RCRA regulations.

§324.1, Federal Rule Adoption by Reference

The commission proposes to amend §324.1 to incorporate by reference the federal regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40280). Specifically, this amendment would update the "amended through" date to "July 14, 2006 at 71 FedReg 40280." An introductory sentence is proposed to be added to make clear that recyclers in Texas must comply with federal used oil regulations and with any additional requirements specified in Chapter 324. The terms "Administrator or Regional Administrator," "Environmental Protection Agency (EPA)," and "Commission" are proposed to be moved to this section from the definition section in §324.2.

§324.2, Definitions

The commission proposes to amend §324.2 to make five changes. First, the commission proposes to amend §324.2 to incorporate by reference the federal regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40280). Specifically, this amendment would correct the spelling of the word "kerosine" to "kerosene" in the definition for "Petroleum refining facility" found in 40 CFR §279.1. Second, the commission proposes to amend §324.2(5) to replace the word "Recycling" with the phrase "Recycling of used oil". This change would clarify that this definition pertains to used oil. Third, the commission proposes to add language to §324.2(7) to revise the definition of "Secondary containment" to add the clause "shall be designed to meet the specifications found in §324.22(d)(3) to retain". This language is integral to the state's program requirements regarding secondary containment for used oil. Fourth, the definitions for "Administrator or Regional Administrator" found in §324.2(2), "Commission" found in §324.2(3), and "Environmental Protection Agency (EPA)" found in §324.2(4) are proposed to be removed. The terms "Administrator or Regional Administrator," "Environmental Protection Agency (EPA)," and "Commission" are proposed to be moved to §324.1 as part of the Federal

Rule Adoption by Reference section. Section 324.2 has been alphabetized and modified accordingly. Fifth, the introductory phrase "Most words are as defined" is proposed to be changed to "The commission incorporates by reference the definitions" to make clear that all definitions in 40 CFR §279.1 are part of the state regulations and enforceable. However, the commission also proposes certain additional definitions as part of §324.2.

§324.3, Applicability

The commission proposes to amend §324.3 to make five changes. First, the commission proposes to amend §324.3 to adopt by reference the regulations promulgated in the July 30, 2003, issue of the *Federal Register* (68 FR 44665). This amendment would add revised language in 40 CFR §279.10(i) relating to Used Oil Containing PCBs. Specifically, this amendment would clarify when used oil contaminated with PCBs is regulated under the RCRA used oil management standards and when it is not. Second, the commission proposes an amendment to §324.3 to adopt by reference the regulations promulgated in the June 14, 2005, issue of the *Federal Register* (70 FR 34591). This amendment would remove the requirement in 40 CFR §279.10(b)(1)(ii), relating to Applicability, to use SW-846 as the testing method. This change would ensure that the used oil does not contain significant concentrations of halogenated hazardous constituents and would make it easier for recyclers to comply with the RCRA regulations by allowing more flexibility in method selection and use. Third, the commission proposes to amend §324.3 to adopt by reference the regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40280). This amendment would make grammatical corrections to 40 CFR §279.10(b)(2) relating to Applicability and would change the language in 40 CFR §279.11 relating to Used Oil Specifications. Fourth, the commission proposes to amend §324.3 by adding the phrases "The commission incorporates by reference" and "In addition, the commission adds the following clarifications and requirements:" and removing the phrases "applicability will be as" and "and as clarified here". These revisions would avoid any ambiguity as to the commission's action to incorporate the federal used oil rules and to clarify that there are additional state requirements. Fifth, the commission proposes language to be added to §324.3(5) which reads "and meet the prohibition requirements found in §324.4 of this title (relating to Prohibitions) to prevent the discharge of hazardous waste into a sanitary sewer." This amendment would clarify that the State of Texas is not allowing the discharge of hazardous waste into a sanitary sewer.

§324.4, Prohibitions

The commission proposes to amend §324.4 by adding the phrases "The commission incorporates by reference the" and "In addition, the commission requires the following:" and removing the phrases "will be as" and "and as specified here." These changes in phrasing would avoid any ambiguity as to the commission's action to incorporate the federal used oil rules and to clarify that there are additional state requirements.

§324.5, Notice by Retail Dealer

The commission proposes the repeal of §324.5 and proposes to add the statement concerning where to obtain a sign to §324.7(1)(A) and (3)(A). The proposed repeal allows the regulated community to find the contact address in the same section where the requirement for signs is placed.

§324.6, Generators

The commission proposes to amend §324.6 to replace the phrase "shall be as" with the phrase "The commission incorporates by reference". This change in phrasing would avoid any ambiguity as to the commission's action to incorporate the federal used oil rules.

§324.7, Collection Centers

The commission proposes to amend §324.7 to make four changes. First, the commission proposes to amend §324.7 to replace the phrases "Rules for" and "shall be as" with the phrase "The commission incorporates by reference rules for owners or operators of all" in front of the phrase "do-it-yourselfer (DIY) used oil collection centers". This change in phrasing would avoid any ambiguity as to the commission's action to incorporate the federal used oil rules, is consistent with the federal rules and clarifies that the section applies to the owners or operators of these facilities. Second, the commission proposes to remove the phrase "and as specified here" and to add the phrase "In addition, the commission requires the following:". This proposed change clarifies that there are additional state requirements that must be followed by collection centers. Third, the commission also proposes to amend §324.7(1)(A) and (3)(A) to add the statement concerning where to obtain a sign. This proposed change would organize all the information on obtaining a sign in one place. The regulated community would no longer have to refer to §324.5 to determine how to obtain a sign that is required to be posted per §324.7(1)(A) and (3)(A). Fourth, the commission also proposes to amend §324.7(1)(B) and (3)(B) to remove the mailing address because it is provided on commission cover letters and forms and to update the agency name from Texas Natural Resource Conservation Commission to Texas Commission on Environmental Quality.

§324.11, Transporters and Transfer Facilities

The commission proposes to amend §324.11 to make four changes. First, the commission proposes to amend §324.11 by adding the phrase "The commission incorporates by reference" and removing the words "are" and ", and in this section" and adding the phrase "In addition, the commission requires the following:". These changes would avoid any ambiguity as to the commission's actions to incorporate the federal used oil rules and clarify that there are additional state requirements. Second, the commission proposes to adopt by reference the federal regulations promulgated in the June 14, 2005, issue of the *Federal Register* (70 FR 34591). This amendment would remove the requirement to use SW-846 as the testing method in 40 CFR §279.44(c) relating to Rebuttable Presumption for Used Oil. This amendment would ensure that the used oil does not contain significant concentrations of halogenated hazardous constituents and would make it easier for recyclers to comply with the RCRA regulations by allowing more flexibility in method selection and use. Third, the commission proposes to amend §324.11 to adopt by reference the regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40280). This amendment would make grammatical corrections in 40 CFR §279.43(c)(3)(i) and (5) relating to Used Oil Transportation, 40 CFR §279.44(a) and (c)(2) relating to Rebuttable Presumption for Used Oil, and 40 CFR §279.45(a) relating to Used Oil Storage at Transfer Facilities. Fourth, the commission proposes to adopt §324.11(2) to update the agency name from Texas Natural Resource Conservation Commission to Texas Commission on Environmental Quality and to remove the mailing address because it is provided on commission cover letters and forms.

§324.12, Processors and Re-refiners

The commission proposes to amend §324.12. First, the commission proposes to amend §324.12 by adding the phrases "The commission incorporates by reference", "owners and operators of" and "In addition, the commission requires the following:". These additions would require changing the tense of the words "processors" and "re-refiners" to "processing" and "re-refining" and removing the words "are" and "and in this section". These changes would avoid any ambiguity as to the commission's actions to incorporate the federal used oil rules, clarify that the section applies to the owners and operators of these facilities and clarify that there are additional state requirements. Second, the commission proposes to amend §324.12(2) and (4) to remove the mailing address because it is provided on commission instruction letters and forms. Third, the commission proposes to amend §324.12 to update the agency name from Texas Natural Resource Conservation Commission to Texas Commission on Environmental Quality. Fourth, the commission proposes to adopt by reference the federal regulations promulgated in the June 14, 2005, issue of the *Federal Register* (70 FR 34591). This amendment would remove the requirement to use SW-846 as the testing method in 40 CFR §279.53(c) relating to Rebuttable Presumption for Used Oil. This amendment would ensure that the used oil does not contain significant concentrations of halogenated hazardous constituents and makes it easier for recyclers to comply with the RCRA regulations by allowing more flexibility in method selection and use. Fifth, the commission proposes to amend §324.12 to adopt by reference the federal regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40280). This amendment would make grammatical corrections in 40 CFR §279.52(a) - (b), (b)(1)(ii), (6)(ii) and (iii) relating to General Facility Standards; 40 CFR §279.54(g) relating to Used Oil Management; 40 CFR §279.55(a) and (b)(2)(i)(B) relating to Analysis plan; 40 CFR §279.56(a)(2) relating to Tracking; 40 CFR §279.57(a)(2)(ii) relating to Operating record and reporting; and 40 CFR §279.59 relating to the Management of Residues.

Additionally, the commission proposes to amend the title of §324.12 from "Processors and Rerefiners" to "Processors and Re-refiners".

§324.13, Burners of Off-Specification Used Oil for Energy Recovery

The commission proposes to amend §324.13 to make five changes. First, the commission proposes to amend §324.13 by adding the phrase "The commission incorporates by reference" and removing the word "are". This change in phrasing would avoid any ambiguity as to the commission's action to incorporate the federal used oil rules. Second, the commission proposes to add the phrase "In addition, the commission requires the following:" and remove the phrase ", and in this section". This change would clarify that there are additional state requirements. Third, the commission proposes to amend §324.13(2) to remove the mailing address for the agency because it is provided on commission cover letters and forms and update the agency name from Texas Natural Resource Conservation Commission to Texas Commission on Environmental Quality. Fourth, the commission proposes to adopt by reference the federal regulations promulgated in the June 14, 2005, issue of the *Federal Register* (70 FR 34591). This amendment would remove the requirement to use SW-846 as the testing method in 40 CFR §279.63(c) relating to Rebuttable Presumption for Used Oil. This amendment would ensure that the used oil does not contain significant concentrations of halogenated hazardous constituents and makes it easier for recyclers to comply with the RCRA regulations by allowing more flexibility in method selection and use. Fifth, the commission proposes to amend §324.13 to adopt by reference the regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40280). This proposed amendment would make grammatical corrections in 40 CFR §279.63(b)(3) relating to Rebuttable Presumption for Used Oil and 40 CFR §279.64(e) relating to Used Oil Storage.

§324.14, Marketers of Used Oil Fuel

The commission proposes to amend §324.14 to make five changes. First, the commission proposes to amend §324.14 by adding the phrases "The commission incorporates by reference", "These rules", "In addition" and the word "found" and remove the phrase "and this section". These changes would avoid any ambiguity as to the commission's action to incorporate the federal used oil rules and make the sentence more readable. Second, the commission proposes to amend §324.14 to remove the mailing address because it is provided on commission cover letters and forms. Third, the commission proposes to amend §324.14 to update the agency name from Texas Natural Resource Conservation Commission to Texas Commission on Environmental Quality. Fourth, the commission proposes to adopt by reference the federal regulations promulgated in the July 30, 2003, issue of the *Federal Register* (68 FR 44665). This amendment would revise the language in 40 CFR §279.74(b) relating to Tracking. Specifically, the amendment would allow the initial marketer of used oil that meets the used oil fuel specifications in 40 CFR §279.11 to only keep a record of a shipment of used oil to the facility to which the initial marketer delivers the used oil. Fifth, the commission proposes to amend §324.14 to adopt by reference the regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40280). This amendment would make grammatical corrections in 40 CFR §279.70(b)(1) relating to Applicability.

§324.15, Spills

The commission proposes to amend §324.15 by adding the phrase "The commission incorporates by reference" and removing the word "See". This revision would avoid any ambiguity as to the commission's action to incorporate the federal used oil rules. The commission also proposes additional language which would require recyclers to immediately clean up spills that meet the reportable quantity limit. Specifically, the amendment would incorporate federal requirements found in 40 CFR §§279.22(d), 279.43(c), 279.45(h), 279.54(g), and 279.64 regarding Reporting and Managing Spills. The section would continue to require used oil recyclers to comply with 30 TAC Chapter 327 relating to Spill Prevention and Control.

§324.16, Polychlorinated Biphenyls (PCBs)

The commission proposes to amend §324.16 by adding the phrase "The commission incorporates by reference" and removing the phrase "shall be as" and restructuring the sentence to make it easier to read. These changes would avoid any ambiguity as to the commission's action to incorporate the federal used oil rules.

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 are not expected to have a significant fiscal impact on state agencies or units of

local government since the rules impose no additional requirements, clarify ambiguities for the regulated community, and allow for more flexible testing methods of used oil.

The proposed rules are part of a comprehensive rule package implementing RCRA requirements involving proposed changes to several chapters of 30 TAC. This fiscal note applies only to the proposed changes to Chapter 324 which include adoption by reference of federal rule changes to the RCRA Used Oil Management program that were adopted by EPA from July 2003 through July 2006 for used oil facilities. The proposed rulemaking would also incorporate several grammatical corrections to errors found in 40 CFR Chapter 279. A used oil facility may have several regulated participants (marketers, burners, transporters, etc.) at the same facility.

Parts of the proposed rules for Chapter 324 are expected to clear up current ambiguities regarding the used oil recycling program for the regulated community. For example, the proposed rulemaking incorporates EPA's intent to clarify the applicability of the RCRA used oil management standards to used oil containing PCBs. Specifically, the rulemaking clarifies that used oil that contains less than 50 parts per million of PCBs is generally subject to regulation under the RCRA used oil management standards. The proposed rulemaking also incorporates clarifying language regarding tracking requirements for used oil marketers. Specifically, the initial marketer need only keep a record of a shipment of used oil to the facility to which the used oil is delivered.

The proposed rulemaking also makes it easier for used oil facilities to ensure that used oil does not contain significant concentrations of halogenated hazardous constituents by removing the requirement to use only one testing method (SW-846) as the testing method for these hazardous elements. Used oil facilities could use other, equally protective testing methods.

In general, the proposed rules are not expected to have a significant fiscal impact on governmental entities. The agency knows of only one governmental entity (a state agency) that participates in used oil recycling. The proposed rules are clarifying in nature or provide alternative testing methods for used oil recycling. All testing methods for concentrations of halogenated hazardous constituents in used oil cost about the same, and the flexibility of testing methods is not expected to generate significant cost savings.

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 protection of the environment and public safety through continued consistency with federal regulations for recycling used oil.

In general, the proposed rules are not expected to have a significant fiscal impact on individuals. The proposed rules are clarifying in nature or provide alternative testing methods for concentrations of halogenated hazardous constituents in used oil.

The proposed rules are not expected to have a significant fiscal impact on large businesses that own or operate used oil facilities. The agency estimates there may be as many as 397 used oil facilities statewide. The proposed rules clarify ambiguities regarding the used oil recycling program for the regulated community and provide alternative testing methods for concentrations of halogenated hazardous constituents in used oil. Since all testing methods cost about the same, the flexibility of testing methods is not expected to generate significant cost savings.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules clarify ambiguities regarding the used oil recycling program for the regulated community and provide alternative testing methods for concentrations of halogenated hazardous constituents in used oil. Since all testing methods cost about the same, the flexibility of testing methods is not expected to generate significant cost savings.

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 protect the environment and to comply with federal regulations.

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 Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of the rulemaking is to protect the environment and reduce the risk to human health from environmental exposure, the rulemaking is not a major environmental rule because it will 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. There is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state from those revisions under 42 United States Code (USC), §6926(g), which already imposes the more stringent federal requirements on the regulated community under the Hazardous and Solid Waste Amendments of 1984. Likewise, there is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state from those revisions outside 42 USC, §6926(g), because either the changes are not substantive or the regulated community benefits from the greater flexibility and reduced compliance burden. The regulated community must comply with the more stringent federal requirements beginning on the effective date of the federal regulations. Because the regulated community is already required to comply with the more stringent federal rules, equivalent state rules would not cause any adverse effects. There is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state because the rulemaking is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Because the rulemaking does not have an adverse material impact on the economy, the rulemaking does not meet the definition of a major environmental rule. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). First, the rulemaking does not exceed a standard set by federal law because the commission proposes this rulemaking to implement revisions to the federal hazardous waste program. The commission must meet the

minimum standards and mandatory requirements of the federal program to maintain authorization of the state hazardous waste program. The other changes do not alter substantive requirements although various changes may increase flexibility for the regulated community and move forward compliance deadlines. Second, although the rulemaking contains some requirements that are more stringent than existing state rules, federal law requires the commission to promulgate rules that are as stringent as federal law for the commission to maintain authorization of the state hazardous waste program. Third, the rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government, where the delegation agreement or contract is to implement a state and federal program. On the contrary, the commission must undertake the waste program. And fourth, the rulemaking does not seek to adopt a rule solely under the general powers of the agency instead of under a specific state law. The commission proposes this rulemaking under Texas Water Code, §5.103 and §5.105 and under Texas Health and Safety Code, §361.017 and §361.024.

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

Takings Impact Assessment

The commission evaluated the rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007 applies. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to the rulemaking because this action is reasonably taken to fulfill an obligation mandated by federal law; therefore, this action is exempt under Texas Government Code, §2007.003(b)(4). The specific purpose of the rulemaking is to maintain state RCRA authorization by adopting state hazardous waste rules that are equivalent to the federal regulations. The rulemaking substantially advances this purpose by adopting rules that incorporate and refer to the federal regulations. Promulgation and enforcement of the rules is not a statutory or constitutional taking of private real property. Specifically, the rulemaking does not affect a landowner's rights in private real property because this rulemaking does not constitutionally burden the owner's right to property, does not restrict or limit the owner's right to property, and does not reduce the value of property by 25% or more beyond that which would otherwise exist in the absence of the regulations. The rulemaking seeks to meet the minimum standards of federal RCRA regulations that are already in place. 42 USC, §6926(g) imposes on the regulated community any federal requirements that are more stringent than current state rules. The regulated community must already have complied with the more stringent federal requirements as of the effective date of the federal regulations. Because the regulated community is already required to comply with the more stringent federal regulations, promulgating equivalent state rules does not burden, restrict, or limit the owner's right to property and does not reduce the value of property by 25% or more. Likewise, the regulated community is not unduly burdened by those revisions providing greater flexibility, reduced recordkeeping, reporting, inspection, and sampling requirements.

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.

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.

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 2012-038-335-WS. The comment period closes November 5, 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 Cynthia Palomares, P.G., P.E., Industrial and Hazardous Waste Permits Section, MC-130, P.O. Box 13087, Austin, TX 78711-3087, (512) 239-6079.

30 TAC §§324.1 - 324.4, 324.6, 324.7, 324.11 - 324.16

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §371.026 (relating to Registration and Reporting Requirements of Used Oil Handlers, Other than Generators) and THSC, §371.028 (relating to Rules) which authorize the commission to regulate used oil handlers, to implement the used oil recycling program established by THSC, Chapter 371, and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 371.

§324.1. Federal Rule Adoption by Reference.

Person(s) managing used oil must comply with the requirements in this chapter and the [~~The~~] requirements in 40 Code of Federal Regulations (CFR)[~~,~~] Part 279, Standards for the Management of Used Oil, as amended through July 14, 2006, at 71 FedReg 40280 [~~May 26, 1998 at 69 FedReg 28556~~], which are adopted by reference. For purposes of this chapter, the term "Administrator" or "Regional Administrator" used in 40 CFR Part 279 shall be read to mean "State Administrator, the Executive Director of the Texas Commission on Environmental Quality, or his representative." The term "Environmental Protection Agency" or "EPA" used in 40 CFR Part 279 shall be read to mean "the Texas Commission on Environmental Quality or its successor." [~~However, requirements in this chapter also apply.~~]

§324.2. Definitions.

The commission incorporates by reference the definitions [~~Most words are as defined~~] in 40 Code of Federal Regulations (CFR) §279.1. However, the following words have these additional meanings:

(1) Aboveground tank--A tank used to store or process used oil that is not an underground storage tank as defined in 30 TAC Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks).

(2) Earthen area--The active area of the facility is the earthen area at the facility over which any transportation, storage or processing of used oil occurs.

[(2) Administrator or Regional Administrator--These terms in 40 CFR Part 279 requirements should be replaced with the "State Administrator, the Executive Director of the Texas Natural Resource Conservation Commission or his representative."]

[(3) Commission--The Texas Natural Resource Conservation Commission or its successor.]

[(4) Environmental Protection Agency (EPA)--This term in 40 CFR Part 279 Requirements should be replaced with "Commission."]

(3) [(5)] Recycling of used oil--

(A) Preparing used oil for reuse as a petroleum product by re-refining [rerefining], reclaiming, or other means;

(B) Using used oil as a lubricant or petroleum product instead of using a petroleum product made from new oil; or

(C) Burning used oil for energy recovery.

(4) [(6)] Re-refining--Applying processes (other than crude oil refining) to material composed primarily of used oil to produce high-quality base stocks for petroleum products, including settling, filtering, catalytic conversion, fractional/vacuum distillation, hydro treating, or polishing.

(5) [(7)] Secondary containment--Dikes, berms, retaining walls, and/or equivalent structures made of a material(s) that is sufficiently impervious to used oil. These structures shall be designed to meet the specifications found in §324.22(d)(3) of this title (relating to Soil Remediation Requirements for Used Oil Handlers) to retain [all] potential spills of used oil from the tanks or containers, plus run-on water, until removal of the spill.

(6) [(8)] Sufficiently impervious to used oil--Capable of containing all potential spills of used oil from containers and tanks until removal of the spill.

(7) [(9)] Synthetic oils--Oils not derived from crude oil. This includes those from coal, shale, or a polymer-based starting material; and non-polymeric synthetic fluids used as hydraulic or heat transfer fluids. Synthetic oils are generally used for the same purpose as crude oil derived oils and have relatively the same level of contamination after use.

(8) [(10)] Used oil handler--A transporter or an owner or operator of a used oil transfer, processing, re-refining [rerefining], or off-specification used oil burning facility.

[(11) Earthen area--The active area of the facility is the earthen area at the facility over which any transportation, storage or processing of used oil occurs.]

§324.3. Applicability.

The commission incorporates by reference the Applicability and the Exemptions [exemptions] from Applicability requirements [applicability will be as] in 40 Code of Federal Regulations (CFR) Part 279, Subpart B, §279.10 and §279.11. In addition, the commission adds the following clarifications and requirements: [and as clarified here.]

(1) A used oil contaminated with a listed hazardous waste must be handled under Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste). United States Environmental Protection Agency [EPA] Hazardous Waste Number "F002" must be used on used oil that is listed hazardous due to halogenated contaminants.

(2) Used oil can be stored in tanks and containers not meeting 40 CFR Part 264 or 265. The requirement in 40 CFR Part 279 that refers to compliance with 40 CFR Part 264 or 265, Subpart K, on used oil storage applies to used oil stored in surface impoundments. Storage of used oil in lagoons, pits, or surface impoundments is prohibited, unless the generator is storing only wastewater containing de minimis quantities of used oil, or unless the unit is in compliance with 40 CFR Part 264 or 265, Subpart K.

(3) Requirements applicable to mixing hazardous waste with used oil are in 40 CFR §279.10(b) (relating to Mixtures of Used Oil and Hazardous Waste). Mixing of hazardous waste with used oil, by other than generators, in tanks and containers within their applicable accumulation time limit, requires a hazardous waste permit per §335.2 of this title (relating to Permit Required). A waste that is characteristically hazardous for "ignitability only" can be mixed with used oil. However, the resultant mixture cannot exhibit the hazardous ignitability characteristic to manage it under this chapter and 40 CFR Part 279 rather than Chapter 335 of this title. The resultant mixture formed from mixing used oil and a characteristically hazardous waste, other than solely ignitable waste, must be tested for all likely hazardous characteristics. The resultant mixture will be a hazardous waste rather than used oil if it retains a hazardous characteristic, even if the hazardous characteristic is derived from the used oil. Anyone who mixes used oil with another solid waste to produce from used oil, or to make used oil more amenable for production of fuel oils or products is also a processor subject to 40 CFR Part 279, Subpart F (relating to Standards for Used Oil Processors and Re-refiners) and §324.12 of this title (relating to Processors and Re-refiners [Rerefiners]).

(4) A used oil shall not be regulated until it is a spent material as defined in 40 CFR §261.1(c)(1) and §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials).

(5) Oily water mixtures to be recycled that are contained in waste management units such as tanks, fractionation tanks, and sumps that meet the design requirements of the American Petroleum Institute for oil-water separation or that have been designed for oil-water separation must be managed under this chapter and meet the prohibition requirements found in §324.4 of this title (relating to Prohibitions) to prevent the discharge of hazardous waste into a sanitary sewer. Management of wastes from other tanks, sumps, and grip trap waste management units that are plumbed directly to a sanitary sewer must comply with the requirements in Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation) and Chapter 330 of this title (relating to Municipal Solid Waste).

§324.4. Prohibitions.

The commission incorporates by reference the Prohibitions [will be as] in 40 Code of Federal Regulations [CFR] Subpart B, §279.12 [and as specified here]. In addition, the commission requires the following:

(1) A person must not collect, transport, store, burn, market, recycle, process, use, discharge, or dispose of used oil in any manner that endangers the public health or welfare of the environment.

(2) A person commits an offense if the person:

(A) intentionally discharges used oil into a sewer, drainage system, septic tank, surface water or groundwater, watercourse, or marine water;

(B) knowingly puts used oil in waste that is to be disposed of in landfills or directly disposes of used oil on land;

(C) knowingly transports, treats, stores, disposes of, recycles, markets, burns, processes, re-refines [rerefines] used oil within the state:

(i) without first complying with the registration requirements of this rule; and/or

(ii) in violation of rules for the management of used oil;

(D) intentionally applies used oil to roads or land for dust suppression, weed abatement, or other similar uses;

(E) violates an order of the commission to cease and desist any activity prohibited by this section or any rule applicable to a prohibited activity; or

(F) intentionally makes any false representation in any document used for program compliance.

(3) An exception to paragraph (2) of this section [subsection] is if a person knowingly disposes into the environment any used oil that has not been separated by the generator from other solid wastes.

(4) An exception to paragraph (2)(B) of this section [subsection] is if the mixing or commingling of used oil with waste to be disposed of in landfills is the unavoidable result of the mechanical shredding of motor vehicles, appliances or other metals.

§324.6. Generators.

The commission incorporates by reference rules [Rules] for used oil generators [shall be as] in 40 Code of Federal Regulations [(CFR)] Part 279, particularly Subpart C. A person or entity that services equipment involving removal of used oil or changes used oil at a customer's home or business and transports the used oil from the site in quantities less than or equal to 55 gallons may choose to be the generator. If the service company removing the used oil from equipment does not assume generator responsibility, the site owner or operator will remain the generator.

§324.7. Collection Centers.

The commission incorporates by reference rules for owners or operators of all [Rules for] "do-it-yourselfer used oil collection centers" and "used oil collection centers" (as defined in 40 Code of Federal Regulations (CFR)§279.1) [shall be as] in 40 CFR Part 279, particularly Subpart D[, and as specified here]. All appropriate businesses and government agencies are encouraged to serve as "do-it-yourselfer used oil collection centers" or "used oil collection centers." Collection centers collecting used oil from households will be publicized by the commission. In addition, the commission requires the following:

(1) A "Do-it-yourselfer Used Oil Collection Center" must:

(A) post and maintain a durable and legible sign identifying the site as a household used oil collection center. Written requests for signs shall be sent to the Texas Commission on Environmental Quality, Used Oil Recycling Program, P.O. Box 13087, Austin, Texas 78711-3087;

(B) must register each odd numbered year, no later than January 25 following the close of the year, with the Texas Commission on Environmental Quality [Texas Natural Resource Conservation Commission], Used Oil Recycling Program[, P.O. Box 13087, Austin, Texas 78711-3087] utilizing a commission form. Registrations expire on December 31 in even numbered years. New collection centers must register within 30 days of initial operation;

(C) collect used oil from households during business hours at each location to be exempt from the fee on first sale of automotive oil;

(D) notify the commission in writing within 30 days following abandonment or closure of the collection center or stopping collection of household used oil; and

(E) annually report the amount of household used oil collected by January 25 of each year on a commission form.

(2) Household used oil is not subject to the rebuttable presumption (a requirement to prove that used oil is not hazardous).

(3) A "Used Oil Collection Center" must:

(A) post and maintain a durable and legible sign identifying the site as a household used oil collection center. Written requests for signs shall be sent to the Texas Commission on Environmental Quality, Used Oil Recycling Program, P.O. Box 13087, Austin, Texas 78711-3087;

(B) register each odd numbered year no later than January 25 following the close of the year, with the Texas Commission on Environmental Quality [Texas Natural Resource Conservation Commission], Used Oil Recycling Program[, P.O. Box 13087, Austin, Texas 78711-3087] utilizing a commission form. Registrations expire on December 31 in even numbered years. New collection centers must register within 30 days of initial operation;

(C) collect used oil from households during business hours at each location to be exempt from the fee on first sale of automotive oil;

(D) notify the commission in writing within 30 days following abandonment or closure of the collection center or stopping collection of household used oil; and

(E) report annually the amount of household and non-household used oil collected by January 25 of each year on a commission form. Mixtures of household used oil and non-household used oil shall be considered non-household used oil.

(4) Household used oil is not subject to the rebuttable presumption (a requirement to prove used oil is not hazardous) unless mixed with non-household used oil.

§324.11. Transporters and Transfer Facilities.

The commission incorporates by reference rules [Rules] for used oil transporters and transfer facilities [are] in 40 Code of Federal Regulations (CFR) Part 279, particularly Subpart E[, and in this section]. In addition, the commission requires the following:

(1) Underground storage tanks (USTs). USTs [Underground storage tanks] containing used oil are subject to Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks) and 40 CFR Part 279.

(2) Registration. Transporters must register their used oil activities if they have not previously registered their specific used oil activities with the commission and the United States Environmental Protection Agency (EPA). Transporters must register, through the commission, using EPA Form 8700-12 and a commission form. Mail registration forms to the Texas Commission on Environmental Quality [Texas Natural Resource Conservation Commission], Used Oil Recycling Program[, P.O. Box 13087, Austin, Texas 78711-3087].

§324.12. Processors and Re-refiners [Rerefiners].

The commission incorporates by reference rules [Rules] for owners and operators of used oil processing [processors] and re-refining facilities [rerefiners are] in 40 Code of Federal Regulations (CFR) Part 279, particularly Subpart F[, and in this section.]. In addition, the commission requires the following:

(1) Underground storage tanks. See §324.11(1) of this title (relating to Transporters and Transfer Facilities).

(2) Registration. Processors and re-refiners [~~rerefiners~~] must register their used oil activities if they have not previously registered their specific used oil activities with the commission and the United States Environmental Protection Agency (EPA). Processors and re-refiners [~~rerefiners~~] must register, through the commission, using the EPA Form 8700-12 and a commission form. Mail registration forms to the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~], Used Oil Recycling Program[~~, P.O. Box 13087, Austin, Texas 87811-3087~~].

(3) Analysis plan. Each facility must prepare an analysis plan. The facility will follow the plan when sampling and analyzing, keeping records, and complying with analytical requirements for documenting that used oil is not listed hazardous and/or the used oil fuel specification has been met. This plan must specify the frequency of sampling and analysis. It must also specify procedures and analysis to assure listed hazardous wastes are not mixed with the used oil received. It must also contain procedures for handling a shipment of contaminated used oil. A facility need not prepare an analysis plan if it:

(A) only processes its own used oil; and

(B) uses adequate process knowledge instead of analysis to prove that the used oil meets rule requirements.

(4) Biennial report. The biennial report required by 40 CFR §279.57(b) covering each odd numbered year must be provided to the commission by December 1 of the odd numbered year if all used oil operations have been completed for that year. If not, you must submit the report by January 25 of the following even numbered year. The information must be entered on a commission form. Mail the report to the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~], Used Oil Recycling Program[~~, P.O. Box 13087, Austin, Texas 78711-3087~~].

§324.13. Burners of Off-specification Used Oil for Energy Recovery.

The commission incorporates by reference rules [~~Rules~~] for burners of off-specification used oil for energy recovery [~~are~~] in 40 Code of Federal Regulations (CFR) Part 279, particularly Subpart G[~~, and in this section~~]. In addition, the commission requires the following:

(1) Underground storage tanks. See §324.11(1) of this title (relating to Transporters and Transfer Facilities).

(2) Registration. Burners must register their used oil activities if they have not previously registered their specific used oil activities with the commission and the United States Environmental Protection Agency (EPA). Burners must register, through the commission, using the EPA Form 8700-12 and a commission form. Mail registration forms to the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~], Used Oil Recycling Program[~~, P.O. Box 13087, Austin, Texas 78711-3087~~].

§324.14. Marketers of Used Oil Fuel.

The commission incorporates by reference rules [~~Rules~~] for marketers of used oil which will be burned for energy recovery. These rules are found in 40 Code of Federal Regulations [~~CFR~~] Part 279, [~~particularly~~] Subpart H[~~, and this section~~]. In addition, marketers [~~Marketers~~] must register their used oil activities if they have not previously registered their specific used oil activities with the commission and the United States Environmental Protection Agency (EPA). Marketers must register, through the commission, using the EPA Form 8700-12 and a commission form. Mail registration forms to the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~], Used Oil Recycling Program[~~, P.O. Box 13087, Austin, Texas 78711-3087~~].

§324.15. Spills.

The commission incorporates by reference the Used Oil Spill Prevention, Detection of Releases, and Spill Response requirements in 40 Code of Federal Regulations §§279.22(d), 279.43(c), 279.45(h), 279.54(g), and 279.64. In addition, used oil recyclers shall immediately clean up and properly dispose of any spills of used oil consistent with [~~See~~] Chapter 327 of this title (relating to Spill Prevention and Control), particularly §327.4(b)(2) of this title (relating to Reportable Quantities).

§324.16. Polychlorinated Biphenyls (PCBs).

The commission incorporates by reference [~~Per 40 CFR 279 (Table 1),~~] the rules for burning used oil containing PCBs [~~shall be as~~] in 40 Code of Federal Regulations Part 279 (CFR) (Table 1) and in 40 CFR §761.20(e).

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 September 21, 2012.

TRD-201205010
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 239-0779

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30 TAC §324.5

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

Statutory Authority

The repeal is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §371.026 (relating to Registration and Reporting Requirements of Used Oil Handlers, Other than Generators) and THSC, §361.028 (relating to Rules) which authorize the commission to regulate used oil handlers, to implement the used oil recycling program established by THSC, Chapter 371, and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed repeal implements THSC, Chapter 371.

§324.5. Notice by Retail Dealer.

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 September 21, 2012.

TRD-201205011

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 239-0779

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§335.1, 335.2, 335.10 - 335.13, 335.19, 335.24, 335.61, 335.62, 335.69, 335.76, 335.78, 335.111, 335.112, 335.151, 335.152, 335.155, 335.168, 335.170, 335.213, 335.222, 335.251, 335.431, and 335.504; and new §335.79.

These amendments were originally published for proposal in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3011), withdrawn on September 19, 2012, and are re-proposed to include additional revisions.

Background and Summary of the Factual Basis for the Proposed Rules

The federal hazardous waste program is authorized under the Resource Conservation and Recovery Act of 1976 (RCRA), §3006. States may obtain authorization from the United States Environmental Protection Agency (EPA) to administer the hazardous waste program. State authorization is a rulemaking process through which EPA delegates the primary responsibility of implementing the RCRA hazardous waste program to individual states in lieu of EPA. This process ensures national consistency and minimum standards while providing flexibility to states in implementing rules. State RCRA programs must always be at least as stringent as the federal requirements.

Since the beginning of the federal hazardous waste program, the State of Texas has continuously participated in the EPA's authorization program. To maintain RCRA authorization, the commission must adopt regulations to meet the minimum standards of federal programs administered by EPA. Because the federal regulations undergo regular revision, the commission adopts new regulations regularly to meet the changing federal regulations.

Texas received authorization of its hazardous waste "base program" under the RCRA on December 26, 1984. Texas received authorization for revisions to its base hazardous waste program on February 17, 1987 (Clusters I and II). Texas submitted further revisions to its hazardous waste program and received final authorization of those revisions on March 15, 1990, July 23, 1990, October 21, 1991, December 4, 1992, June 27, 1994, November 26, 1997, October 18, 1999, September 11, 2000, June 14, 2005 (Clusters III - X), March 5, 2009 (Clusters XI - XV) and May 7, 2012 (Clusters IX and XV - XVIII).

The commission proposes in this rulemaking parts of RCRA Rule Clusters XIX, XX, and XXI that implement revisions to the federal hazardous waste program which were made by EPA between July 1, 2008 and June 30, 2011. Both mandatory and optional federal rule changes in these clusters are proposed. Adoption of one of the federal rule changes is mandatory in order to maintain RCRA authorization. Although not necessary in order to maintain authorization, EPA also recommends that the optional federal rule changes be incorporated into the state rules. In addition, the commission proposes revisions to parts of previously adopted Clusters XIV, XV, XVI, and XVII that implement revisions requested by EPA that are needed to maintain authorization. Establishing equivalency with federal regulations will enable the State of Texas to operate all aspects of the federal hazardous waste program in lieu of the EPA. All proposed rule changes are discussed further in the Section by Section Discussion portion of this preamble.

Two corresponding rulemakings are published in this issue of the *Texas Register* and include changes to 30 TAC Chapter 305, Consolidated Permits and 30 TAC Chapter 324, Used Oil Standards.

Section by Section Discussion

The commission proposes administrative changes throughout the proposed rulemaking to reflect the agency's current practices and to conform to *Texas Register* and agency guidelines. These changes include updating references to Texas State Agencies, updating cross-references, and correcting typographical, spelling, and grammatical errors.

§335.1, Definitions

The commission proposes to amend §335.1(39) to conform to federal regulations previously promulgated in the March 4, 2005, issue of the *Federal Register* (70 FR 10776). Specifically, this amendment would revise the definition of "Designated facility" so that it is consistent with the EPA definition in 40 Code of Federal Regulations (CFR) §260.10. Also, the definition is proposed to be reorganized to separate out the definition of a Texas Class 1 designated facility from a hazardous waste designated facility.

The commission proposes to amend §335.1(59)(B) to conform to federal regulations previously promulgated in the September 8, 2005, issue of the *Federal Register* (70 FR 53420). This amendment would clarify the definition of "Facility" for the purpose of implementing corrective action under the authority of a standard permit. Specifically, this amendment would incorporate by reference corrective action authorized by 40 CFR Part 267, Subpart F (Releases from Solid Waste Management Units) to address corrective action under the authority of a standard permit.

The commission proposes to amend §335.1(95) to conform to federal regulations previously promulgated in the March 4, 2005, issue of the *Federal Register* (70 FR 10776). Specifically, this amendment would revise the definition of "Manifest" so that it is consistent with the EPA definition in 40 CFR §260.10.

The commission proposes to amend §335.1(96) to conform to federal regulations previously promulgated in the March 4, 2005, issue of the *Federal Register* (70 FR 10776). Specifically, this amendment would revise the definition of "Manifest tracking number" so that it is consistent with the EPA definition in 40 CFR §260.10.

The commission proposes to amend §335.1(138)(A)(iv) to conform to federal regulations previously promulgated in the July 28, 2006, issue of the *Federal Register* (71 FR 42928). This amendment would add requirements for notification and recordkeeping to exclude cathode ray tubes (CRTs) that meet the requirements in 40 CFR §261.39 and §261.40 for reuse and recycling from classification as a solid waste. This exclusion is also found in 40 CFR §261.4 which was adopted in a previous rulemaking. This amendment would add additional language from 40 CFR Part 261, Subpart E concerning conditional exclusions and notification and recordkeeping requirements for CRTs. In addition, technical corrections are incorporated by reference to conform

to federal regulations previously promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989).

The commission also proposes to amend §335.1(142) to conform to federal regulations previously promulgated in the September 8, 2005, issue of the *Federal Register* (70 FR 53420). Specifically, this amendment would revise the definition of "Standard permit" so that it is consistent with the EPA definition in 40 CFR §124.2(a).

§335.2, Permit Required

The commission proposes to amend §335.2(g) to conform to federal regulations previously promulgated in the April 4, 2006, issue of the *Federal Register* (71 FR 16862). Specifically, this amendment would revise the reporting requirements for treatability studies by reducing the amount of information required to be submitted.

§335.10, Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste

The commission proposes to amend §335.10 by restructuring to separate Texas Class 1 waste from hazardous waste manifest requirements thereby eliminating confusion between the two programs. The commission proposes to incorporate by reference EPA manifest requirements to ensure consistency. Current Class 1 waste manifest requirements are the same as EPA hazardous waste manifest requirements with some minor differences. This rulemaking does not change any of those requirements. The Uniform Hazardous Waste Manifest requirements are incorporated by reference as published in the March 4, 2005, issue of the *Federal Register* (70 FR 10776) and amended through the March 18, 2010, issue of the *Federal Register* (75 FR 12989). These changes would allow generators of hazardous and industrial waste to more readily identify applicable manifest requirements. This proposed amendment would help ensure compliance with manifest requirements including proper completion of the manifest form. Additionally, references to the EPA are proposed to be changed to the TCEQ and references to the regional director are proposed to be changed to the executive director.

§335.11, Shipping Requirements for Transporters of Hazardous Waste or Class 1 Waste

The commission proposes to amend §335.11 by restructuring to separate Texas Class 1 waste from hazardous waste manifest requirements thereby eliminating confusion between the two programs. The commission proposes to incorporate by reference EPA manifest requirements to ensure consistency. Current Class 1 waste manifest requirements are the same as EPA hazardous waste manifest requirements with some minor differences. This proposed rulemaking would not change any of the manifest requirements. The Uniform Hazardous Waste Manifest requirements are incorporated by reference as published in the March 4, 2005, issue of the *Federal Register* (70 FR 10821) and amended through June 16, 2005, issue of the *Federal Register* (70 FR 35034).

§335.12, Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities

The commission proposes to amend §335.12 by restructuring to separate Texas Class 1 waste from hazardous waste manifest requirements thereby eliminating confusion between the two programs. Manifest requirements for hazardous waste are proposed to be adopted by reference from EPA rules to ensure consistency. The Uniform Hazardous Waste Manifest requirements are incorporated by reference as published in the March 4, 2005, issue of the *Federal Register* (70 FR 10821) and amended through March 18, 2010, issue of the *Federal Register* (75 FR 12989).

§335.13, Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste

The commission proposes to amend §335.13(n) to conform to federal regulations previously promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). Specifically, this amendment would make corrections to typographical errors in the CFR.

The commission proposes the addition of §335.13(o) to conform to federal regulations promulgated in the January 8, 2010, issue of the *Federal Register* (75 FR 1236). Specifically, this amendment would implement recent changes to the federal agreements concerning the transboundary movement of hazardous waste among countries belonging to the Organization for Economic Cooperation and Development (OECD), establish notice and consent requirements for spent lead-acid batteries intended for reclamation in a foreign country, specify that all exception reports concerning hazardous waste exports be sent to the International Compliance and Assurance Division in the Office of Enforcement and Compliance Assurance's Office of Federal Activities in Washington, D.C., and require United States receiving facilities to match EPA-provided import consent documentation to incoming hazardous waste import shipments and to submit to EPA a copy of the matched import consent documentation and RCRA hazardous waste manifest for each import shipment. Because of the federal government's special role in matters of foreign policy, EPA does not authorize states to administer federal import/export functions in any section of the RCRA hazardous waste regulations. Although states do not receive authorization to administer the federal government's export functions in 40 CFR Part 262, Subpart E, import functions in 40 CFR Part 262, Subpart F, import/export functions in 40 CFR Part 262, Subpart H, or the import/export related functions in any other section of the RCRA hazardous waste regulations, state programs are required to adopt those federal provisions that are more stringent than existing state requirements to maintain their equivalency with the federal program. This amendment is more stringent than the current state rules. Therefore, this amendment is required by EPA to be adopted into state rules, in order to maintain authorization.

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

The commission proposes to amend §335.19(b) to conform to federal regulations previously promulgated in the April 4, 2006, issue of the *Federal Register* (71 FR 16862). Specifically, this amendment would reduce the requirements for requests for a variance from classifying as a solid waste those materials that are reclaimed and then reused as feedstock within the original production process in which the materials were generated if the reclamation operation is an essential part of the production process.

§335.24, Requirements for Recyclable Materials and Nonhazardous Recyclable Materials

The commission proposes to amend §335.24(c)(1)(A) to conform to federal regulations promulgated in the January 8, 2010, issue of the *Federal Register* (75 FR 1236). Specifi-

cally, this amendment would implement recent changes to the federal agreements concerning the transboundary movement of hazardous waste among countries belonging to the OECD, establish notice and consent requirements for spent lead-acid batteries intended for reclamation in a foreign country, specify that all exception reports concerning hazardous waste exports be sent to the International Compliance and Assurance Division in the Office of Enforcement and Compliance Assurance's Office of Federal Activities in Washington, D.C., and require United States receiving facilities to match EPA-provided import consent documentation to incoming hazardous waste import shipments and to submit to EPA a copy of the matched import consent documentation and RCRA hazardous waste manifest for each import shipment. Because of the federal government's special role in matters of foreign policy, EPA does not authorize states to administer federal import/export functions in any section of the RCRA hazardous waste regulations. Although states do not receive authorization to administer the federal government's export functions in 40 CFR Part 262, Subpart E, import functions in 40 CFR Part 262, Subpart F, import/export functions in 40 CFR Part 262, Subpart H, or the import/export related functions in any other section of the RCRA hazardous waste regulations, state programs are required to adopt those federal provisions that are more stringent than existing state requirements to maintain their equivalency with the federal program. This amendment is more stringent than the current state rules. Therefore, this amendment is required by EPA to be adopted into state rules to maintain authorization.

§335.61, Purpose, Scope and Applicability

The commission proposes the addition of §335.61(i) to conform to federal regulations promulgated in the December 1, 2008, issue of the *Federal Register* (73 FR 72912). This amendment proposes exemptions for a specific generator status (i.e., large and small quantity generators and conditionally exempt small quantity generators (CESQGs)) if those eligible academic entities choose to comply with 40 CFR Part 262, Subpart K (known as the "Academic Laboratories rule"). The Academic Laboratories rule is proposed to be incorporated by reference in §335.79. The Academic Laboratories rule establishes an alternative set of generator requirements applicable to laboratories owned by eligible academic entities. The alternative requirements are flexible but protective and address the specific nature of hazardous waste generation and accumulation in these laboratories. Further detailed discussion of the Academic Laboratories rule can be found in the Section by Section Discussion in §335.79.

In particular, the amendment to §335.61 would set out exemptions for eligible academic laboratories under different hazardous waste generator statuses. Specifically, this amendment would exempt large and small quantity generators from the requirements of hazardous waste determination (set out in §335.504) and the satellite accumulation area rule (set out in §335.69). In addition, this amendment would eliminate exemptions (set out in §335.78) for CESQGs, such as the exemption from regulations under 40 CFR Parts 124, 262 - 266, and 268, and the notification requirements of RCRA, §3010. However, academic laboratories under CESQG status would be able to take advantage of the benefits of the Academic Laboratories rule. Those benefits include the flexibility to decide when and where on-site hazardous waste determinations are made and the incentive to remove old and expired chemicals from the laboratories.

§335.62, Hazardous Waste Determination and Waste Classification

The commission proposes to amend §335.62 to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). The amendment would add a reference to 40 CFR Part 267 which EPA inadvertently omitted after the rule was promulgated in September, 2005. The amendment would add 40 CFR Part 267 to a list of Parts (261, 264 - 266, 268, and 273) to which a hazardous waste generator must refer for possible exclusions or restrictions pertaining to managing specific waste.

§335.69, Accumulation Time

The commission proposes to amend §335.69(a)(4)(B) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). This amendment would correct a limited reference to 40 CFR §268.7(a)(5) which only addresses waste analysis plans. The amendment would apply all applicable requirements under 40 CFR Part 268 (pertaining to Land Disposal Restrictions) to large and small quantity generators.

The commission also proposes to amend §335.69(b) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). The amendment would clarify that the requirements in §335.69(b), pertaining to hazardous waste accumulation time, apply only to large quantity generators.

The commission also proposes to amend §335.69(d) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). The amendment would clarify that the satellite accumulation provisions for large quantity generators are also applicable to small quantity generators. The amendment would also add the citation of 40 CFR §261.31 to clarify that this provision applies to acutely hazardous wastes.

The commission also proposes to amend §335.69(e) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). The amendment would add the citation of 40 CFR §261.31, which was inadvertently omitted after the dioxin listings for acutely hazardous wastes listed under 40 CFR §261.31 were promulgated in 1985.

The commission also proposes to amend §335.69(f)(4)(B) to delete "and" to allow the addition of a new subparagraph.

The commission also proposes to renumber §335.69(f)(4)(C) to §335.69(f)(4)(D) to add a new subparagraph, and also proposes an amendment to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). This amendment would correct a limited reference to 40 CFR §268.7(a)(5) which only addresses waste analysis plans. The amendment would apply all applicable requirements under 40 CFR Part 268 (pertaining to Land Disposal Restrictions) to large and small quantity generators.

The commission also proposes the addition of §335.69(f)(4)(C) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). Subparagraph (C) would add 40 CFR Part 267 to the list of other requirements hazardous waste generators must follow. EPA inadvertently did not include 40 CFR Part 267 in the list after the rule was promulgated in September, 2005.

The commission proposes changes to §335.69(m) by adding paragraphs (1) and (2) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). Specifically, the amendment would incorporate

requirements for completion of the manifest regarding rejected loads.

The commission also proposes the addition of §335.69(n) to separate requirements for rejected loads of hazardous waste from Class 1 waste. The commission proposes §335.69(n) with new language addressing Class 1 waste generators. Specifically, this amendment would add requirements for Class 1 waste to alleviate confusion for requirements for each type of rejected waste.

§335.76, Additional Requirements Applicable to International Shipments

The commission proposes to amend §335.76(a) to conform to federal regulations promulgated in the January 8, 2010, issue of the *Federal Register* (75 FR 1236). This amendment would implement recent changes to the federal agreements concerning the transboundary movement of hazardous waste among countries belonging to the OECD. Specifically, this amendment would clarify that countries belonging to the OECD must comply with the requirements of 40 CFR Part 262, Subpart H (Transfrontier Shipments of Hazardous Waste for Recovery within the OECD).

The commission proposes to amend §335.76(d) to conform to federal requirements promulgated in the March 4, 2005, issue of the *Federal Register* (70 FR 10776) and amended through the March 18, 2010, issue of the *Federal Register* (75 FR 12989). Specifically, the amendment would incorporate requirements for completion of the manifest regarding imports of hazardous waste.

The commission proposes to amend §335.76(f) to conform to federal regulations promulgated in the January 8, 2010, issue of the *Federal Register* (75 FR 1236). This amendment would implement recent changes to the federal agreements concerning the transboundary movement of hazardous waste among countries belonging to the OECD. Specifically, this amendment would clarify that any person who exports hazardous waste to a foreign country or imports hazardous waste from a foreign country into the state must comply with the requirements contained in 40 CFR §262.58 (International Agreements).

The commission proposes to amend §335.76(h) to conform to federal regulations promulgated in the January 8, 2010, issue of the *Federal Register* (75 FR 1236). This amendment would implement recent changes to the federal agreements concerning the transboundary movement of hazardous waste among countries belonging to the OECD. Specifically, this amendment would clarify that transfrontier shipments of hazardous waste for recovery within the countries belonging to the OECD must comply with the requirements of 40 CFR Part 262, Subpart H.

§335.78, Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators

The commission proposes to amend §335.78(c)(6) to conform to federal regulations promulgated in the December 1, 2008, issue of the *Federal Register* (73 FR 72954). The amendment would remove a period at the end of the paragraph and add the word "or" to allow for an additional paragraph.

The commission also proposes to add §335.78(c)(7) to conform to federal regulations promulgated in the December 1, 2008, issue of the *Federal Register* (73 FR 72912). This amendment would allow an eligible academic entity to exclude the amount of unused commercial chemical product (listed in 40 CFR Part 261, Subpart D or exhibiting one or more characteristics in 40 CFR Part 261, Subpart C) generated solely during a laboratory clean-out from being counted toward its hazardous waste generator status.

The commission proposes to amend §335.78(j) to conform to federal regulations promulgated in the July 30, 2003, issue of the *Federal Register* (68 FR 44659). The amendment would remove the phrase "if it is destined to be burned for energy recovery." This amendment would clarify recycled used oil management standards for CESQGs.

§335.79, Alternative Requirements for Hazardous Waste Determination and Accumulation of Unwanted Material for Laboratories Owned by Eligible Academic Entities

The commission proposes new §335.79 to conform to federal regulations promulgated in the December 1, 2008, issue of the *Federal Register* (73 FR 72912), as amended through the December 20, 2010, issue of the *Federal Register* (75 FR 79304). This proposed new section would incorporate by reference an alternative set of generator requirements applicable to laboratories owned by eligible academic entities promulgated under 40 CFR Part 262, Subpart K. Eligible academic entities are colleges and universities, as well as teaching hospitals and nonprofit research institutes that are either owned by or formally affiliated with a college or university. The Academic Laboratories rule does not apply to non-laboratory generated hazardous wastes from other operations of a university or college nor commercial laboratories.

The Academic Laboratories rule would provide a flexible but protective set of regulations that address the specific nature of hazardous waste generation and accumulation in the laboratories owned or operated by academic entities. Specifically, this rule would allow eligible academic entities the flexibility to make hazardous waste determinations in the laboratory; at an on-site central accumulation area; or at an on-site treatment, storage, or disposal facility. Also, this rule would provide incentives for eligible academic entities to clean-out old and expired chemicals that may pose unnecessary risk. Further, this rule would require the development of a Laboratory Management Plan (LMP) which is expected to result in safer laboratory practices and increased awareness of hazardous waste management.

The proposed rule would be optional for eligible academic entities. That is, eligible academic laboratories could choose to comply with 40 CFR Part 262, Subpart K in lieu of the existing generator regulations. In states authorized to implement the RCRA program, such as Texas, 40 CFR Part 262, Subpart K would only be available as an option once it has been adopted by the state in which the eligible academic entity is located.

The commission also proposes the incorporation of six technical corrections to the Academic Laboratories rule published in the December 20, 2010, issue of the *Federal Register* (75 FR 79304). These proposed changes include correction of errors such as omissions and redundancies as well as removal of an obsolete reference to the now-terminated Performance Track program. These proposed technical corrections would improve the clarity of the state's Academic Laboratories rule. The Academic Laboratories rule and the corrections are recommended by EPA to be adopted into state rules, but are not required to maintain RCRA authorization.

§335.111, Purpose, Scope, and Applicability

The commission proposes to amend §335.111 to make technical corrections.

§335.112, Standards

The commission proposes to amend §335.112(a)(1) to conform to federal regulations promulgated in the January 8, 2010, issue of the *Federal Register* (75 FR 1236). This amendment would implement recent changes to the federal agreements concerning the transboundary movement of hazardous waste among countries belonging to the OECD. Specifically, this amendment would specify that all exception reports concerning hazardous waste exports be sent to the International Compliance and Assurance Division in the Office of Enforcement and Compliance Assurance's Office of Federal Activities in Washington, D.C., and would require United States receiving facilities to match EPA-provided import consent documentation to incoming hazardous waste import shipments and to submit to EPA a copy of the matched import consent documentation and RCRA hazardous waste manifest for each import shipment.

The commission proposes to amend §335.112(a)(3), (4), and (13) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). Revisions to interim standards for owners and operators of hazardous waste treatment, storage, or disposal facilities in 40 CFR Part 265 are proposed to be adopted by reference under this section. This amendment would correct citations, clarify regulatory requirements, and incorporate conforming changes that were inadvertently omitted by EPA under the interim standards for owners and operators of hazardous waste treatment, storage, or disposal facilities in 40 CFR Part 265. This amendment is as stringent as the current state rules. EPA recommends that this amendment be adopted into state rules, but it is not required to maintain RCRA authorization.

The commission also proposes to amend §335.112(a)(4), to add language that was inadvertently omitted in a previous rule adoption. Specifically, the language to be added would reinstate the exception to 40 CFR §§265.71, 265.72, 265.75, 265.76, and 265.77 because these requirements are found elsewhere.

The commission also proposes to amend §335.112(a)(14) to conform to federal regulations previously promulgated in the October 12, 2005, issue of the *Federal Register* (70 FR 59402). This amendment was previously adopted into §335.221 which incorporated final National Emission Standards for Hazardous Air Pollutants for hazardous waste combustors. These standards implemented Federal Clean Air Act, §112(d) by requiring hazardous waste combustors to meet hazardous air pollutants emission standards reflecting the performance of the maximum available control technology. In addition, the commission proposes an amendment to §335.112(a)(14) to include this incorporation by reference.

The commission also proposes to amend §335.112(b)(7) to update a cross-reference.

§335.151, Purpose, Scope, and Applicability

The commission proposes to amend §335.151 to make technical corrections.

§335.152, Standards

The commission proposes to amend §335.152(a)(1) to conform to federal regulations promulgated in the January 8, 2010, issue of the *Federal Register* (75 FR 1236). This amendment would implement recent changes to the federal agreements concerning the transboundary movement of hazardous waste among countries belonging to the OECD. Specifically, this amendment would specify that all exception reports concerning hazardous waste exports be sent to the International Compliance and Assurance Division in the Office of Enforcement and Compliance Assurance's Office of Federal Activities in Washington, D.C., and would require United States receiving facilities to match EPA-provided import consent documentation to incoming hazardous waste import shipments and to submit to EPA a copy of the matched import consent documentation and RCRA hazardous waste manifest for each import shipment.

The commission proposes to amend §335.152(a)(4) to add language that was inadvertently omitted in a previous rule adoption. Specifically, the language to be added would reinstate the exception to 40 CFR §§264.71, 264.72, 264.76, and 264.77 because these requirements are found elsewhere.

The commission also proposes to amend §335.152(a)(9) to conform to federal regulations previously promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40254). Specifically, this amendment would make corrections to typographical errors in the CFR.

The commission also proposes to amend §335.152(a)(3), (4), (12), and (14) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). This amendment would correct citations, clarify regulatory requirements, and incorporate conforming changes that were inadvertently omitted by EPA under the permitting standards for owners and operators of hazardous waste treatment, storage, or disposal facilities in 40 CFR Part 264. This amendment is as stringent as the current state rules. EPA recommends that this amendment be adopted into state rules, but it is not required to maintain RCRA authorization.

The commission also proposes to amend §335.152(c)(7) to update a cross-reference.

§335.155, Additional Reports

The commission proposes to amend §335.155 to make technical corrections.

§335.168, Design and Operating Requirements (Surface Impoundments)

The commission proposes to amend §335.168(c) to conform to federal regulations previously promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40254). Specifically, this amendment would make corrections to typographical errors in the CFR.

§335.170, Design and Operating Requirements (Waste Piles)

The commission proposes to amend §335.170(c) to conform to federal regulations previously promulgated in the April 4, 2006, issue of the *Federal Register* (71 FR 16862). This amendment would adopt by reference requirements that reduce the recordkeeping and reporting burden imposed on the regulated community by ensuring that only the information needed and used to implement the hazardous waste program is collected from facilities. In addition, outdated language that references a construction time period would be deleted. This amendment is less stringent than the current state rules, but the reduction in recordkeeping poses minimal risk to human health or the environment. EPA recommends that this amendment be adopted into state rules, but it is not required to maintain RCRA authorization.

§335.213, Standards Applicable to Storers of Materials That Are To Be Used in a Manner That Constitutes Disposal Who Are Not the Ultimate Users

The commission proposes to amend §335.213 to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). The amendment would add a reference to Chapter 335, Subchapter U, Standards for Owners and Operators of Hazardous Waste Facilities Operating under a Standard Permit, to include applicable requirements in 40 CFR Part 267, which EPA inadvertently omitted after the rule was promulgated in September, 2005.

§335.222, Management Prior to Burning

The commission proposes §335.222(c)(1)(E) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). Specifically, subparagraph (E) would add a reference to Chapter 335, Subchapter U to include applicable requirements in 40 CFR Part 267, which EPA inadvertently omitted after the rule was promulgated in September, 2005. Subsequent subparagraph (E) has been relettered accordingly.

§335.251, Applicability and Requirements

The commission proposes to amend §335.251(a) to conform to federal regulations promulgated in the January 8, 2010, issue of the *Federal Register* (75 FR 1236). This amendment would implement recent changes to the federal agreements concerning the transboundary movement of hazardous waste among countries belonging to the OECD. Specifically, this amendment would clarify that entities who transport spent lead-acid batteries in the United States to export them for reclamation in a foreign country or who export spent lead-acid batteries for reclamation in a foreign country are not subject to the requirements of §335.251.

The commission also proposes to amend §335.251(b)(1) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). The amendment would add a reference to Chapter 335, Subchapter U to include applicable requirements in 40 CFR Part 267, which EPA inadvertently omitted after the rule was promulgated in September, 2005.

The commission proposes §335.251(c) to conform to federal regulations promulgated in the January 8, 2010, issue of the *Federal Register* (75 FR 1236). This amendment would implement recent changes to the federal agreements concerning the transboundary movement of hazardous waste among countries belonging to the OECD. Specifically, this amendment would clarify that entities who transport spent lead-acid batteries in the United States to export them for reclamation in a foreign country or who export spent lead-acid batteries for reclamation in a foreign country are subject to the requirements of §335.13 and §335.76(h).

§335.431, Purpose, Scope, and Applicability

The commission proposes to amend §335.431(c)(1) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). This amendment would correct errors in two tables: Treatment Standards for Hazardous Wastes (40 CFR §268.40) and Universal Treatment Standards (40 CFR §268.48). This amendment is as stringent as current state rules. EPA recommends that this amendment be adopted into state rules, but it is not required to maintain RCRA authorization.

§335.504, Hazardous Waste Determination

The commission proposes to amend §335.504(1) to conform to federal regulations previously promulgated in the July 28, 2006, issue of the *Federal Register* (71 FR 42928). This amendment was inadvertently left out of the last RCRA rulemaking and would exclude CRTs that meet the requirements in 40 CFR §261.4(a)(22) for reuse and recycling from classification as a solid waste. This exclusion is currently found in 40 CFR §261.4. This amendment is less stringent than current state rules and encourages recycling of CRTs. EPA recommends that this amendment be adopted into state rules, but it is not required to maintain RCRA authorization.

The commission also proposes to amend §335.504(1) - (3) to conform to federal regulations promulgated in the March 18, 2010, issue of the *Federal Register* (75 FR 12989). This amendment would correct typographical errors and citations, and incorporate omissions. This amendment is as stringent as the current state rules. EPA recommends that this amendment be adopted into state rules, but it is not required to maintain RCRA authorization.

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 are not expected to have a fiscal impact on most local governments since they are typically not generators of industrial or hazardous waste nor do they typically treat, store, or dispose of these wastes. However, some units of state and local government may experience cost savings as a result of the proposed rules if they are eligible academic institutions, teaching hospitals, or non-profit research institutes with laboratories generating hazardous waste.

The proposed rules would adopt optional and mandatory parts of some federal rule revisions to the hazardous waste programs of the RCRA. The proposed rulemaking would make these state requirements equivalent to federal requirements and allow the state to maintain its federal authorization of the RCRA program. The proposed rules also contain provisions to correct typographical errors, revise citations, and make other administrative corrections.

The proposed rules are part of a comprehensive rule package implementing RCRA requirements involving proposed changes to several chapters of 30 TAC. This fiscal note applies only to the proposed changes to Chapter 335.

Chapter 335 Optional RCRA Hazardous Waste Rules

Adoption of the optional federal RCRA requirements would provide generators of hazardous waste and hazardous waste facilities with less costly alternatives than those found in current rules. If these optional requirements are not adopted into state rules, these less costly disposal methods will not be available to generators of hazardous waste and operators of hazardous waste facilities in Texas, and they will be required to comply with current and potentially more expensive rules. The proposed optional rules would clarify requirements for notification and recordkeeping to exclude CRTs that meet the requirements in 40 CFR §261.39 and §261.40 for reuse and recycling from classification as a solid waste. Cost savings are estimated to range from $50 to $200 per ton of waste recycled. The proposed rules would revise the definition of "Standard permit" so that it is consistent with the EPA definition at 40 CFR §124.2(a). The proposed rules would also revise the reporting requirements for treatability studies by reducing the amount of information required to be submitted. Cost savings could range from $50 to $10,000 per report. The proposed rules would reduce the requirements for

requests for a variance from classifying as a solid waste those materials that are reclaimed and then reused as feedstock within the original production process in which the materials were generated if the reclamation operation is an essential part of the production process. Resulting cost savings, depending on the type of waste, could range from $50 to $200 per barrel of waste. The proposed rulemaking would reduce the recordkeeping and reporting burden imposed on the regulated community by ensuring that only the information needed and used to implement the hazardous waste program is collected from facilities. In addition, outdated language that references a construction time period would be deleted. Cost savings could range from $50 to $200 per ton of waste that is recycled. The proposed rulemaking would provide academic laboratories increased regulatory flexibility by allowing them to make hazardous waste determinations in the laboratory; at an on-site central accumulation area; or at an on-site treatment, storage, or disposal facility. These rules would also provide incentives for the eligible academic entities to clean-out old and expired chemicals and require them to develop an LMP. An LMP is expected to result in safer laboratory practices and increased awareness of hazardous waste management. There are approximately 93 eligible academic laboratories at colleges, universities, teaching hospitals, and nonprofit research institutions statewide. The annual cost savings for a laboratory classified as a large quantity generator could be as much as $12,000 per year, and savings for a laboratory classified as a small quantity generator could be as much as $1,000 per year if these laboratories manage their hazardous waste under the proposed option. The development of an LMP could cost as much as $2,000. The proposed rulemaking would clarify the requirements for usage of the EPA Uniform Hazardous Waste Manifest form when shipping federally regulated hazardous waste and when shipping state regulated Class 1 waste. The proposed rulemaking would adopt by reference the EPA Uniform Hazardous Waste Manifest system to more closely conform to the EPA manifest requirements for shipping hazardous waste. The rulemaking would specify requirements for manifesting Class 1 waste when the requirements deviate from the EPA manifest requirements. The proposed rulemaking would also correct omissions and inaccuracies in the existing rule.

The proposed rules would also incorporate by reference mandatory federal RCRA requirements concerning the transboundary movement of hazardous waste among countries belonging to the OECD; establish notice and consent requirements for spent lead-acid batteries intended for reclamation in a foreign country; specify that all exception reports concerning hazardous waste exports be sent to the International Compliance and Assurance Division in the Office of Enforcement and Compliance Assurance's Office of Federal Activities in Washington, D.C.; and require United States receiving facilities to match EPA-provided import consent documentation to incoming hazardous waste import shipments and to submit to EPA a copy of the matched import consent documentation and RCRA hazardous waste manifest for each import shipment.

In general, the proposed rules are not expected to have a significant fiscal impact on governmental entities. The optional requirements of the proposed rules are less expensive than compliance with current rules, and estimated cost savings are detailed under each option. The significance of cost savings will depend on the amount of waste generated and, in many cases, on whether an entity has chosen to use consultants when complying with current requirements. There may be increased reporting costs to comply with the mandatory requirements concerning transboundary movement of hazardous waste, but if a regulated entity uses existing staff, the increase in reporting costs is not expected to be significant.

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 protection of the environment and public safety through increased recycling, less risk that hazardous materials would be released to the environment, safer management of laboratory waste, and less risk that waste shipped to other countries will be discarded in non-regulated areas. The proposed rules will also allow generators and operators of hazardous waste facilities to continue to operate efficiently because state rules will be consistent with federal RCRA requirements.

In general, the proposed rules are not expected to have a significant fiscal impact on individuals. Most hazardous wastes are not generated by individuals and individuals do not typically own or operate hazardous waste facilities.

The proposed rules are not expected to have a significant fiscal impact on large businesses. Staff estimates that there are 180 permitted hazardous waste treatment, storage, or disposal facilities owned by large businesses and close to 13,000 generators of industrial and hazardous waste that are large businesses. Compliance with the proposed optional requirements is expected to be less expensive than compliance with current rules. Cost savings for a business or individual is expected to be about the same as the cost savings for governmental entities. The significance of cost savings will depend on the amount of waste generated and, in many cases, on whether an entity has chosen to use consultants when complying with current requirements. There may be increased reporting costs to comply with the mandatory requirements concerning transboundary movement of hazardous waste, but if a business uses existing staff, the increase in reporting costs is not expected to be significant.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Most generators of hazardous waste and most owners or operators of hazardous waste facilities are large businesses. If a small business is impacted by the proposed rules, it should experience the same type of cost savings or increases as those experienced by a large business.

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 protect the environment and to comply with federal regulations.

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 Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of the rulemaking is to protect the environment and reduce the risk to human health from environmental exposure, the rulemaking is not a major environmental rule because it will 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. There is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state from those revisions under 42 United States Code (USC), §6926(g), which already imposes the more stringent federal requirements on the regulated community under the Hazardous and Solid Waste Amendments of 1984. Likewise, there would be no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state from those revisions outside 42 USC, §6926(g), because either the changes are not substantive, or the regulated community would benefit from the greater flexibility and reduced compliance burden. The regulated community must comply with the more stringent federal requirements beginning on the effective date of the federal regulations. Because the regulated community is already required to comply with the more stringent federal rules, equivalent state rules would not cause any adverse effects. There is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state because the rulemaking is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Because the proposed rulemaking does not have an adverse material impact on the economy, the rulemaking does not meet the definition of a major environmental rule. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). First, the proposed rulemaking does not exceed a standard set by federal law because the commission proposes this rulemaking to implement revisions to the federal hazardous waste program. The commission must meet the minimum standards and mandatory requirements of the federal program to maintain authorization of the state hazardous waste program. The other proposed changes do not alter substantive requirements although various changes may increase flexibility for the regulated community. Second, although the rulemaking proposes some requirements that are more stringent than existing state rules, federal law requires the commission to promulgate rules that are as stringent as federal law for the commission to maintain authorization of the state hazardous waste program. Third, the rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government, where the delegation agreement or contract is to implement a state and federal program. On the contrary, the commission must undertake the waste program. And fourth, the rulemaking does not seek to adopt a rule solely under the general powers of the agency instead of under a specific state law. The commission proposes this rulemaking under Texas Water Code, §5.103 and §5.105 and under Texas Health and Safety Code, §361.017 and §361.024.

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

Takings Impact Assessment

The commission evaluated the rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007 applies. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to the proposed rulemaking because this action is reasonably taken to fulfill an obligation mandated by federal law; therefore, this action is exempt under Texas Government Code, §2007.003(b)(4). The specific purpose of the rulemaking is to maintain state RCRA authorization by adopting state hazardous waste rules that are equivalent to the federal regulations. The rulemaking substantially advances this purpose by adopting rules that incorporate and refer to the federal regulations. Promulgation and enforcement of the rules is not a statutory or constitutional taking of private real property. Specifically, the proposed rulemaking does not affect a landowner's rights in private real property because this rulemaking does not constitutionally burden the owner's right to property, does not restrict or limit the owner's right to property, and does not reduce the value of property by 25% or more beyond that which will otherwise exist in the absence of the regulations. The rulemaking seeks to meet the minimum standards of federal RCRA regulations that are already in place. 42 USC, §6926(g) imposes on the regulated community any federal requirements that are more stringent than current state rules. The regulated community must already have complied with the more stringent federal requirements as of the effective date of the federal regulations. Because the regulated community is already required to comply with the more stringent federal regulations, promulgating equivalent state rules does not burden, restrict, or limit the owner's right to property and does not reduce the value of property by 25% or more. Likewise, the regulated community is not unduly burdened by those revisions providing greater flexibility, reduced recordkeeping, reporting, inspection, and sampling requirements.

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 CMP goal applicable to the rulemaking is to protect, preserve, restore and enhance the diversity, quality, quantity, functions and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 USC, §§6901 *et seq.* Promulgation and enforcement of these rules are consistent with the applicable CMP goals and policies because the rulemaking would update and enhance the commission's rules concerning hazardous waste facilities. In addition, the rules would not violate any applicable provisions of the CMP's stated 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.

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 2012-038-335-WS. The comment period closes November 5, 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 Cynthia Palomares, P.G., P.E., Industrial and Hazardous Waste Permits Section, (512) 239-6079, MC-130, P.O. Box 13087, Austin, Texas 78711-3087.

SUBCHAPTER A. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE IN GENERAL

30 TAC §§335.1, 335.2, 335.10 - 335.13, 335.19, 335.24

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§335.1. Definitions.

In addition to the terms defined in Chapter 3 of this title (relating to Definitions), the following words and terms, when used in this chapter, have the following meanings.

(1) Aboveground tank--A device meeting the definition of tank in this section and that is situated in such a way that the entire surface area of the tank is completely above the plane of the adjacent surrounding surface and the entire surface area of the tank (including the tank bottom) is able to be visually inspected.

(2) Act--Texas Health and Safety Code, Chapter 361.

(3) Active life--The period from the initial receipt of hazardous waste at the facility until the executive director receives certification of final closure.

(4) Active portion--That portion of a facility where processing, storage, or disposal operations are being or have been conducted after November 19, 1980, and which is not a closed portion. (See also "closed portion" and "inactive portion.")

(5) Activities associated with the exploration, development, and production [~~protection~~] of oil or gas or geothermal resources--Activities associated with:

(A) the drilling of exploratory wells, oil wells, gas wells, or geothermal resource wells;

(B) the production of oil or gas or geothermal resources, including:

(i) activities associated with the drilling of injection water source wells that penetrate the base of usable quality water;

(ii) activities associated with the drilling of cathodic protection holes associated with the cathodic protection of wells and pipelines subject to the jurisdiction of the commission to regulate the production of oil or gas or geothermal resources;

(iii) activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants;

(iv) activities associated with any underground natural gas storage facility, provided the terms "natural gas" and "storage facility" shall have the meanings set out in the Texas Natural Resources Code, §1.173;

(v) activities associated with any underground hydrocarbon storage facility, provided the terms "hydrocarbons" and "underground hydrocarbon storage facility" shall have the meanings set out in the Texas Natural Resources Code, §91.201; and

(vi) activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil or gas prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel;

(C) the operation, abandonment, and proper plugging of wells subject to the jurisdiction of the commission to regulate the exploration, development, and production of oil or gas or geothermal resources; and

(D) the discharge, storage, handling, transportation, reclamation, or disposal of waste or any other substance or material associated with any activity listed in subparagraphs (A) - (C) of this paragraph, except for waste generated in connection with activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants if that waste is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency in accordance with the Federal Solid Waste Disposal Act, as amended (42 United States Code, §§6901 *et seq.).*

(6) Administrator--The administrator of the United States Environmental Protection Agency or his designee.

(7) Ancillary equipment--Any device that is used to distribute, meter, or control the flow of solid waste or hazardous waste from its point of generation to a storage or processing tank(s), between solid waste or hazardous waste storage and processing tanks to a point of disposal on site, or to a point of shipment for disposal off site. Such devices include, but are not limited to, piping, fittings, flanges, valves, and pumps.

(8) Aquifer--A geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs.

(9) Area of concern--Any area of a facility under the control or ownership of an owner or operator where a release to the environment of hazardous wastes or hazardous constituents has occurred, is suspected to have occurred, or may occur, regardless of the frequency or duration.

(10) Authorized representative--The person responsible for the overall operation of a facility or an operation unit (i.e., part of a facility), e.g., the plant manager, superintendent, or person of equivalent responsibility.

(11) Battery--As defined in §335.261 of this title (relating to Universal Waste Rule).

(12) Boiler--An enclosed device using controlled flame combustion and having the following characteristics:

(A) the unit must have physical provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases;

(B) the unit's combustion chamber and primary energy recovery section(s) must be of integral design. To be of integral design, the combustion chamber and the primary energy recovery section(s) (such as waterwalls and superheaters) must be physically formed into one manufactured or assembled unit. A unit in which the combustion chamber and the primary energy recovery section(s) are joined only by ducts or connections carrying flue gas is not integrally designed; however, secondary energy recovery equipment (such as economizers or air preheaters) need not be physically formed into the same unit as the combustion chamber and the primary energy recovery section. The following units are not precluded from being boilers solely because they are not of integral design:

(i) process heaters (units that transfer energy directly to a process stream); and

(ii) fluidized bed combustion units;

(C) while in operation, the unit must maintain a thermal energy recovery efficiency of at least 60%, calculated in terms of the recovered energy compared with the thermal value of the fuel; and

(D) the unit must export and utilize at least 75% of the recovered energy, calculated on an annual basis. In this calculation, no credit shall be given for recovered heat used internally in the same unit. (Examples of internal use are the preheating of fuel or combustion air, and the driving of induced or forced draft fans or feedwater pumps); or

(E) the unit is one which the executive director has determined, on a case-by-case basis, to be a boiler, after considering the standards in §335.20 of this title (relating to Variance To Be Classified as a Boiler).

(13) Captive facility--A facility that accepts wastes from only related (within the same corporation) off-site generators.

(14) Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(15) Captured receiver--A receiver that is located within the property boundaries of the generators from which it receives waste.

(16) Carbon regeneration unit--Any enclosed thermal treatment device used to regenerate spent activated carbon.

(17) Cathode ray tube or CRT--A vacuum tube, composed primarily of glass, which is the visual or video display component of an electronic device. A used, intact CRT means a CRT whose vacuum has not been released. A used, broken CRT means its glass has been removed from its housing, or casing whose vacuum has been released.

(18) Certification--A statement of professional opinion based upon knowledge and belief.

(19) Class 1 wastes--Any industrial solid waste or mixture of industrial solid wastes which because of its concentration, or physical or chemical characteristics, is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, or may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or disposed of or otherwise managed, as further defined in §335.505 of this title (relating to Class 1 Waste Determination).

(20) Class 2 wastes--Any individual solid waste or combination of industrial solid waste which cannot be described as hazardous, Class 1, or Class 3 as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(21) Class 3 wastes--Inert and essentially insoluble industrial solid waste, usually including, but not limited to, materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable, as further defined in §335.507 of this title (relating to Class 3 Waste Determination).

(22) Closed portion--That portion of a facility which an owner or operator has closed in accordance with the approved facility closure plan and all applicable closure requirements. (See also "active portion" and "inactive portion.")

(23) Closure--The act of permanently taking a waste management unit or facility out of service.

(24) Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(25) Component--Either the tank or ancillary equipment of a tank system.

(26) Confined aquifer--An aquifer bounded above and below by impermeable beds or by beds of distinctly lower permeability than that of the aquifer itself; an aquifer containing confined groundwater.

(27) Consignee--The ultimate treatment, storage, or disposal facility in a receiving country to which the hazardous waste will be sent.

(28) Container--Any portable device in which a material is stored, transported, processed, or disposed of, or otherwise handled.

(29) Containment building--A hazardous waste management unit that is used to store or treat hazardous waste under the provisions of §335.152(a)(19) or §335.112(a)(21) of this title (relating to Standards).

(30) Contaminant--Includes, but is not limited to, "solid waste," "hazardous waste," and "hazardous waste constituent" as defined in this subchapter; "pollutant" as defined in Texas Water Code (TWC), §26.001, and Texas Health and Safety Code (THSC), §361.401; "hazardous substance" as defined in THSC, §361.003; and other substances that are subject to the Texas Hazardous Substances Spill Prevention and Control Act, TWC, §§26.261 - 26.267.

(31) Contaminated medium/media--A portion or portions of the physical environment to include soil, sediment, surface water, groundwater or air, that contain contaminants at levels that pose a substantial present or future threat to human health and the environment.

(32) Contingency plan--A document setting out an organized, planned, and coordinated course of action to be followed in case of a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

(33) Control--To apply engineering measures such as capping or reversible treatment methods and/or institutional measures such as deed restrictions to facilities or areas with wastes or contaminated

media which result in remedies that are protective of human health and the environment when combined with appropriate maintenance, monitoring, and any necessary further corrective action.

(34) Corrosion expert--A person who, by reason of his knowledge of the physical sciences and the principles of engineering and mathematics, acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be certified as being qualified by the National Association of Corrosion Engineers or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control on buried or submerged metal piping systems and metal tanks.

(35) Cathode Ray Tube collector--A person who receives used, intact Cathode Ray Tubes for recycling, repair, resale, or donation.

(36) Cathode Ray Tube glass manufacturer--An operation or part of an operation that uses a furnace to manufacture Cathode Ray Tube glass.

(37) Cathode Ray Tube processing--Conducting all of the following activities:

(A) Receiving broken or intact Cathode Ray Tubes (CRTs);

(B) Intentionally breaking intact CRTs or further breaking or separating broken CRTs; and

(C) Sorting or otherwise managing glass removed from CRT monitors.

(38) Decontaminate--To apply a treatment process(es) to wastes or contaminated media whereby the substantial present or future threat to human health and the environment is eliminated.

(39) Designated facility--A [~~Class 1 or~~] hazardous waste treatment, storage, or disposal facility which: has received a [~~United States Environmental Protection Agency~~] permit (or [~~a facility with~~] interim status) in accordance with the requirements of 40 Code of Federal Regulations (CFR) Parts 270 and 124; has received a permit (or interim status) from a state authorized in accordance with 40 CFR Part 271 [~~(in the case of hazardous waste; a permit issued in accordance with §335.2 of this title (relating to Permit Required) (in the case of nonhazardous waste)~~]; or [~~that~~] is regulated under 40 CFR §261.6(c)(2) or 40 CFR Part 266, Subpart F [~~§335.24(f), (g), or (h) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials) or §335.241 of this title (relating to Applicability and Requirements)~~] and [~~that~~] has been designated on the manifest by the generator pursuant to 40 CFR §262.20. For hazardous wastes, if [~~in accordance with §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste). If~~] a waste is destined to a facility in an authorized state which has not yet obtained authorization to regulate that particular waste as hazardous, then the designated facility must be a facility allowed by the receiving state to accept such waste. For Class 1 wastes, a designated facility is any treatment, storage, or disposal facility authorized to receive the Class 1 waste that has been designated on the manifest by the generator. Designated facility also means a generator site designated on the manifest to receive its waste as a return shipment from a facility that has rejected the waste in accordance with §335.12 [~~§335.12(e)~~] of this title (relating to Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities).

(40) Destination facility--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(41) Dike--An embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(42) Dioxins and furans (D/F)--Tetra, penta, hexa, hepta, and octa-chlorinated dibenzo dioxins and furans.

(43) Discharge or hazardous waste discharge--The accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of waste into or on any land or water.

(44) Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

(45) Disposal facility--A facility or part of a facility at which solid waste is intentionally placed into or on any land or water, and at which waste will remain after closure. The term "disposal facility" does not include a corrective action management unit into which remediation wastes are placed.

(46) Drip pad--An engineered structure consisting of a curbed, free-draining base, constructed of non-earthen materials and designed to convey preservative kick-back or drippage from treated wood, precipitation, and surface water run-on to an associated collection system at wood preserving plants.

(47) Elementary neutralization unit--A device which:

(A) is used for neutralizing wastes which are hazardous only because they exhibit the corrosivity characteristic defined in 40 Code of Federal Regulations (CFR) §261.22, or are listed in 40 CFR Part 261, Subpart D, only for this reason; or is used for neutralizing the pH of non-hazardous industrial solid waste; and

(B) meets the definition of tank, tank system, container, transport vehicle, or vessel as defined in this section.

(48) United States Environmental Protection Agency (EPA) acknowledgment of consent--The cable sent to EPA from the United States Embassy in a receiving country that acknowledges the written consent of the receiving country to accept the hazardous waste and describes the terms and conditions of the receiving country's consent to the shipment.

(49) United States Environmental Protection Agency (EPA) hazardous waste number--The number assigned by the EPA to each hazardous waste listed in 40 Code of Federal Regulations (CFR) Part 26l, Subpart D and to each characteristic identified in 40 CFR Part 26l, Subpart C.

(50) United States Environmental Protection Agency (EPA) identification number--The number assigned by the EPA or the commission to each generator, transporter, and processing, storage, or disposal facility.

(51) Essentially insoluble--Any material, which if representatively sampled and placed in static or dynamic contact with deionized water at ambient temperature for seven days, will not leach any quantity of any constituent of the material into the water in excess of current United States Public Health Service or United States Environmental Protection Agency limits for drinking water as published in the *Federal Register*.

(52) Equivalent method--Any testing or analytical method approved by the administrator under 40 Code of Federal Regulations §260.20 and §260.21.

(53) Existing portion--That land surface area of an existing waste management unit, included in the original Part A permit application, on which wastes have been placed prior to the issuance of a permit.

(54) Existing tank system or existing component--A tank system or component that is used for the storage or processing of hazardous waste and that is in operation, or for which installation has commenced on or prior to July 14, 1986. Installation will be considered to have commenced if the owner or operator has obtained all federal, state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system and if either:

(A) a continuous on-site physical construction or installation program has begun; or

(B) the owner or operator has entered into contractual obligations--which cannot be canceled or modified without substantial loss--for physical construction of the site or installation of the tank system to be completed within a reasonable time.

(55) Explosives or munitions emergency--A situation involving the suspected or detected presence of unexploded ordnance, damaged or deteriorated explosives or munitions, an improvised explosive device, other potentially explosive material or device, or other potentially harmful military chemical munitions or device, that creates an actual or potential imminent threat to human health, including safety, or the environment, including property, as determined by an explosives or munitions emergency response specialist. These situations may require immediate and expeditious action by an explosives or munitions emergency response specialist to control, mitigate, or eliminate the threat.

(56) Explosives or munitions emergency response--All immediate response activities by an explosives and munitions emergency response specialist to control, mitigate, or eliminate the actual or potential threat encountered during an explosives or munitions emergency, subject to the following:

(A) an explosives or munitions emergency response includes in-place render-safe procedures, treatment or destruction of the explosives or munitions and/or transporting those items to another location to be rendered safe, treated, or destroyed;

(B) any reasonable delay in the completion of an explosives or munitions emergency response caused by a necessary, unforeseen, or uncontrollable circumstance will not terminate the explosives or munitions emergency; and

(C) explosives and munitions emergency responses can occur on either public or private lands and are not limited to responses at hazardous waste facilities.

(57) Explosives or munitions emergency response specialist--An individual trained in chemical or conventional munitions or explosives handling, transportation, render-safe procedures, or destruction techniques, including United States Department of Defense (DOD) emergency explosive ordnance disposal, technical escort unit, and DOD-certified civilian or contractor personnel; and, other federal, state, or local government, or civilian personnel similarly trained in explosives or munitions emergency responses.

(58) Extrusion--A process using pressure to force ground poultry carcasses through a decreasing-diameter barrel or nozzle, causing the generation of heat sufficient to kill pathogens, and resulting in an extruded product acceptable as a feed ingredient.

(59) Facility--Includes:

(A) all contiguous land, and structures, other appurtenances, and improvements on the land, used for storing, processing, or disposing of municipal hazardous waste or industrial solid waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them);

(B) for the purpose of implementing corrective action under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) or §335.602(a)(5) of this title (relating to Standards), all contiguous property under the control of the owner or operator seeking a permit for the treatment, storage, and/or disposal of hazardous waste. This definition also applies to facilities implementing corrective action under Texas Water Code, §7.031 (Corrective Action Relating to Hazardous Waste).

(60) Final closure--The closure of all hazardous waste management units at the facility in accordance with all applicable closure requirements so that hazardous waste management activities under Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) and Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) are no longer conducted at the facility unless subject to the provisions in §335.69 of this title (relating to Accumulation Time).

(61) Food-chain crops--Tobacco, crops grown for human consumption, and crops grown for feed for animals whose products are consumed by humans.

(62) Freeboard--The vertical distance between the top of a tank or surface impoundment dike, and the surface of the waste contained therein.

(63) Free liquids--Liquids which readily separate from the solid portion of a waste under ambient temperature and pressure.

(64) Gasification--For the purpose of complying with 40 Code of Federal Regulations §261.4(a)(12)(i), gasification is a process, conducted in an enclosed device or system, designed and operated to process petroleum feedstock, including oil-bearing hazardous secondary materials through a series of highly controlled steps utilizing thermal decomposition, limited oxidation, and gas cleaning to yield a synthesis gas composed primarily of hydrogen and carbon monoxide gas.

(65) Generator--Any person, by site, who produces municipal hazardous waste or industrial solid waste; any person who possesses municipal hazardous waste or industrial solid waste to be shipped to any other person; or any person whose act first causes the solid waste to become subject to regulation under this chapter. For the purposes of this regulation, a person who generates or possesses Class 3 wastes only shall not be considered a generator.

(66) Groundwater--Water below the land surface in a zone of saturation.

(67) Hazardous industrial waste--Any industrial solid waste or combination of industrial solid wastes identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency in accordance with the Resource Conservation and Recovery Act of 1976, §3001 (42 United States Code, §6921). The administrator has identified the characteristics of hazardous wastes and listed certain wastes as hazardous in 40 Code of Federal Regulations Part 26l. The executive director will maintain in the offices of the commission a current list of hazardous wastes,

a current set of characteristics of hazardous waste, and applicable appendices, as promulgated by the administrator.

(68) Hazardous substance--Any substance designated as a hazardous substance under 40 Code of Federal Regulations Part 302.

(69) Hazardous waste--Any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency in accordance with the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq*.

(70) Hazardous waste constituent--A constituent that caused the administrator to list the hazardous waste in 40 Code of Federal Regulations (CFR) Part 261, Subpart D or a constituent listed in Table 1 of 40 CFR §261.24.

(71) Hazardous waste management facility--All contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of hazardous waste. The term includes a publicly- or privately-owned hazardous waste management facility consisting of processing, storage, or disposal operational hazardous waste management units such as one or more landfills, surface impoundments, waste piles, incinerators, boilers, and industrial furnaces, including cement kilns, injection wells, salt dome waste containment caverns, land treatment facilities, or a combination of units.

(72) Hazardous waste management unit--A landfill, surface impoundment, waste pile, industrial furnace, incinerator, cement kiln, injection well, container, drum, salt dome waste containment cavern, or land treatment unit, or any other structure, vessel, appurtenance, or other improvement on land used to manage hazardous waste.

(73) In operation--Refers to a facility which is processing, storing, or disposing of solid waste or hazardous waste.

(74) Inactive portion--That portion of a facility which is not operated after November 19, 1980. (See also "active portion" and "closed portion.")

(75) Incinerator--Any enclosed device that:

(A) uses controlled flame combustion and neither meets the criteria for classification as a boiler, sludge dryer, or carbon regeneration unit, nor is listed as an industrial furnace; or

(B) meets the definition of infrared incinerator or plasma arc incinerator.

(76) Incompatible waste--A hazardous waste which is unsuitable for:

(A) placement in a particular device or facility because it may cause corrosion or decay of containment materials (e.g., container inner liners or tank walls); or

(B) commingling with another waste or material under uncontrolled conditions because the commingling might produce heat or pressure, fire or explosion, violent reaction, toxic dusts, mists, fumes, or gases, or flammable fumes or gases.

(77) Individual generation site--The contiguous site at or on which one or more solid waste or hazardous wastes are generated. An individual generation site, such as a large manufacturing plant, may have one or more sources of solid waste or hazardous waste, but is considered a single or individual generation site if the site or property is contiguous.

(78) Industrial furnace--Includes any of the following enclosed devices that use thermal treatment to accomplish recovery of materials or energy:

(A) cement kilns;

(B) lime kilns;

(C) aggregate kilns;

(D) phosphate kilns;

(E) coke ovens;

(F) blast furnaces;

(G) smelting, melting, and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, and foundry furnaces);

(H) titanium dioxide chloride process oxidation reactors;

(I) methane reforming furnaces;

(J) pulping liquor recovery furnaces;

(K) combustion devices used in the recovery of sulfur values from spent sulfuric acid;

(L) halogen acid furnaces for the production of acid from halogenated hazardous waste generated by chemical production facilities where the furnace is located on the site of a chemical production facility, the acid product has a halogen acid content of at least 3.0%, the acid product is used in a manufacturing process, and, except for hazardous waste burned as fuel, hazardous waste fed to the furnace has a minimum halogen content of 20% as generated; and

(M) other devices the commission may list, after the opportunity for notice and comment is afforded to the public.

(79) Industrial solid waste--Solid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include hazardous waste as defined in this section.

(80) Infrared incinerator--Any enclosed device that uses electric powered resistance heaters as a source of radiant heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(81) Inground tank--A device meeting the definition of tank in this section whereby a portion of the tank wall is situated to any degree within the ground, thereby preventing visual inspection of that external surface area of the tank that is in the ground.

(82) Injection well--A well into which fluids are injected. (See also "underground injection.")

(83) Inner liner--A continuous layer of material placed inside a tank or container which protects the construction materials of the tank or container from the contained waste or reagents used to treat the waste.

(84) Installation inspector--A person who, by reason of his knowledge of the physical sciences and the principles of engineering, acquired by a professional education and related practical experience, is qualified to supervise the installation of tank systems.

(85) International shipment--The transportation of hazardous waste into or out of the jurisdiction of the United States.

(86) Lamp--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(87) Land treatment facility--A facility or part of a facility at which solid waste or hazardous waste is applied onto or incorporated into the soil surface and that is not a corrective action management

unit; such facilities are disposal facilities if the waste will remain after closure.

(88) Landfill--A disposal facility or part of a facility where solid waste or hazardous waste is placed in or on land and which is not a pile, a land treatment facility, a surface impoundment, an injection well, a salt dome formation, a salt bed formation, an underground mine, a cave, or a corrective action management unit.

(89) Landfill cell--A discrete volume of a solid waste or hazardous waste landfill which uses a liner to provide isolation of wastes from adjacent cells or wastes. Examples of landfill cells are trenches and pits.

(90) Leachate--Any liquid, including any suspended components in the liquid, that has percolated through or drained from solid waste or hazardous waste.

(91) Leak-detection system--A system capable of detecting the failure of either the primary or secondary containment structure or the presence of a release of solid waste or hazardous waste or accumulated liquid in the secondary containment structure. Such a system must employ operational controls (e.g., daily visual inspections for releases into the secondary containment system of aboveground tanks) or consist of an interstitial monitoring device designed to detect continuously and automatically the failure of the primary or secondary containment structure or the presence of a release of solid waste or hazardous waste into the secondary containment structure.

(92) Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(93) Liner--A continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment, landfill, or landfill cell, which restricts the downward or lateral escape of solid waste or hazardous waste, hazardous waste constituents, or leachate.

(94) Management or hazardous waste management--The systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of solid waste or hazardous waste.

(95) Manifest--The waste shipping document, United States Environmental Protection Agency (EPA) Form 8700-22, (including, if necessary, EPA Form 8700-22A), originated and signed by the generator or offeror in accordance with the instructions in §335.10 of this title and the applicable requirements of 40 CFR Parts 262 - 265. [~~, that will accompany and be used for tracking the transportation, disposal, treatment, storage, or recycling of shipments of hazardous wastes or Class 1 industrial solid wastes. The form used for this purpose is the EPA Form 8700-22, obtainable from any printer registered with the EPA.~~]

(96) Manifest tracking number--The alphanumeric identification number (i.e., a unique three-letter suffix preceded by nine numerical digits), which is pre-printed in Item 4 of [~~on~~] the manifest by a registered source.

(97) Military munitions--All ammunition products and components produced or used by or for the Department of Defense (DOD) or the United States Armed Services for national defense and security, including military munitions under the control of the DOD, the United States Coast Guard, the United States Department of Energy (DOE), and National Guard personnel. The term "military munitions":

(A) includes confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof; and

(B) includes non-nuclear components of nuclear devices, managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, have been completed; but

(C) does not include wholly inert items, improvised explosive devices, and nuclear weapons, nuclear devices, and nuclear components thereof.

(98) Miscellaneous unit--A hazardous waste management unit where hazardous waste is stored, processed, or disposed of and that is not a container, tank, surface impoundment, pile, land treatment unit, landfill, incinerator, boiler, industrial furnace, underground injection well with appropriate technical standards under Chapter 331 of this title (relating to Underground Injection Control), corrective action management unit, containment building, staging pile, or unit eligible for a research, development, and demonstration permit or under Chapter 305, Subchapter K of this title (relating to Research, Development, and Demonstration Permits).

(99) Movement--That solid waste or hazardous waste transported to a facility in an individual vehicle.

(100) Municipal hazardous waste--A municipal solid waste or mixture of municipal solid wastes which has been identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency.

(101) Municipal solid waste--Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities; including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial waste.

(102) New tank system or new tank component--A tank system or component that will be used for the storage or processing of hazardous waste and for which installation has commenced after July 14, 1986; except, however, for purposes of 40 Code of Federal Regulations (CFR) §264.193(g)(2) (incorporated by reference at §335.152(a)(8) of this title (relating to Standards)) and 40 CFR §265.193(g)(2) (incorporated by reference at §335.112(a)(9) of this title (relating to Standards)), a new tank system is one for which construction commences after July 14, 1986. (See also "existing tank system.")

(103) Off-site--Property which cannot be characterized as on-site.

(104) Onground tank--A device meeting the definition of tank in this section and that is situated in such a way that the bottom of the tank is on the same level as the adjacent surrounding surface so that the external tank bottom cannot be visually inspected.

(105) On-Site--The same or geographically contiguous property which may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property.

(106) Open burning--The combustion of any material without the following characteristics:

(A) control of combustion air to maintain adequate temperature for efficient combustion;

(B) containment of the combustion-reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and

(C) control of emission of the gaseous combustion products. (See also "incineration" and "thermal treatment.")

(107) Operator--The person responsible for the overall operation of a facility.

(108) Owner--The person who owns a facility or part of a facility.

(109) Partial closure--The closure of a hazardous waste management unit in accordance with the applicable closure requirements of Subchapters E and F of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities; and Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) at a facility that contains other active hazardous waste management units. For example, partial closure may include the closure of a tank (including its associated piping and underlying containment systems), landfill cell, surface impoundment, waste pile, or other hazardous waste management unit, while other units of the same facility continue to operate.

(110) PCBs or polychlorinated biphenyl compounds--Compounds subject to 40 Code of Federal Regulations Part 761.

(111) Permit--A written permit issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify, or operate a specified municipal hazardous waste or industrial solid waste treatment, storage, or disposal facility in accordance with specified limitations.

(112) Personnel or facility personnel--All persons who work at, or oversee the operations of, a solid waste or hazardous waste facility, and whose actions or failure to act may result in noncompliance with the requirements of this chapter.

(113) Pesticide--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(114) Petroleum substance--A crude oil or any refined or unrefined fraction or derivative of crude oil which is a liquid at standard conditions of temperature and pressure.

(A) Except as provided in subparagraph (C) of this paragraph for the purposes of this chapter, a "petroleum substance" shall be limited to a substance in or a combination or mixture of substances within the following list (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 United States Code (USC), §§6921, *et seq.))* and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere):

(i) basic petroleum substances--i.e., crude oils, crude oil fractions, petroleum feedstocks, and petroleum fractions;

(ii) motor fuels--a petroleum substance which is typically used for the operation of internal combustion engines and/or motors (which includes, but is not limited to, stationary engines and engines used in transportation vehicles and marine vessels);

(iii) aviation gasolines--i.e., Grade 80, Grade 100, and Grade 100-LL;

(iv) aviation jet fuels--i.e., Jet A, Jet A-1, Jet B, JP-4, JP-5, and JP-8;

(v) distillate fuel oils--i.e., Number 1-D, Number 1, Number 2-D, and Number 2;

(vi) residual fuel oils--i.e., Number 4-D, Number 4-light, Number 4, Number 5-light, Number 5-heavy, and Number 6;

(vii) gas-turbine fuel oils--i.e., Grade O-GT, Grade 1-GT, Grade 2-GT, Grade 3-GT, and Grade 4-GT;

(viii) illuminating oils--i.e., kerosene, mineral seal oil, long-time burning oils, 300 oil, and mineral colza oil;

(ix) lubricants--i.e., automotive and industrial lubricants;

(x) building materials--i.e., liquid asphalt and dust-laying oils;

(xi) insulating and waterproofing materials--i.e., transformer oils and cable oils; and

(xii) used oils--See definition for "used oil" in this section.

(B) For the purposes of this chapter, a "petroleum substance" shall include solvents or a combination or mixture of solvents (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 USC, §§6921, *et seq.))* and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere) i.e., Stoddard solvent, petroleum spirits, mineral spirits, petroleum ether, varnish makers' and painters' naphthas, petroleum extender oils, and commercial hexane.

(C) The following materials are not considered petroleum substances:

(i) polymerized materials, i.e., plastics, synthetic rubber, polystyrene, high and low density polyethylene;

(ii) animal, microbial, and vegetable fats;

(iii) food grade oils;

(iv) hardened asphalt and solid asphaltic materials--i.e., roofing shingles, roofing felt, hot mix (and cold mix); and

(v) cosmetics.

(115) Pile--Any noncontainerized accumulation of solid, nonflowing solid waste or hazardous waste that is used for processing or storage, and that is not a corrective action management unit or a containment building.

(116) Plasma arc incinerator--Any enclosed device using a high intensity electrical discharge or arc as a source of heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(117) Post-closure order--An order issued by the commission for post-closure care of interim status units, a corrective action management unit unless authorized by permit, or alternative corrective action requirements for contamination commingled from Resource Conservation and Recovery Act and solid waste management units.

(118) Poultry--Chickens or ducks being raised or kept on any premises in the state for profit.

(119) Poultry carcass--The carcass, or part of a carcass, of poultry that died as a result of a cause other than intentional slaughter for use for human consumption.

(120) Poultry facility--A facility that:

(A) is used to raise, grow, feed, or otherwise produce poultry for commercial purposes; or

(B) is a commercial poultry hatchery that is used to produce chicks or ducklings.

(121) Primary exporter--Any person who is required to originate the manifest for a shipment of hazardous waste in accordance with the regulations contained in 40 Code of Federal Regulations Part 262, Subpart B, which are in effect as of November 8, 1986, or equivalent state provision, which specifies a treatment, storage, or disposal facility in a receiving country as the facility to which the hazardous waste will be sent and any intermediary arranging for the export.

(122) Processing--The extraction of materials, transfer, volume reduction, conversion to energy, or other separation and preparation of solid waste for reuse or disposal, including the treatment or neutralization of solid waste or hazardous waste, designed to change the physical, chemical, or biological character or composition of any solid waste or hazardous waste so as to neutralize such waste, or so as to recover energy or material from the waste or so as to render such waste nonhazardous, or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage, or reduced in volume. The transfer of solid waste for reuse or disposal as used in this definition does not include the actions of a transporter in conveying or transporting solid waste by truck, ship, pipeline, or other means. Unless the executive director determines that regulation of such activity is necessary to protect human health or the environment, the definition of processing does not include activities relating to those materials exempted by the administrator of the United States Environmental Protection Agency in accordance with the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.,* as amended.

(123) Publicly-owned treatment works (POTW)--Any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a state or municipality (as defined by the Clean Water Act, §502(4)). The definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

(124) Qualified groundwater scientist--A scientist or engineer who has received a baccalaureate or post-graduate degree in the natural sciences or engineering, and has sufficient training and experience in groundwater hydrology and related fields as may be demonstrated by state registration, professional certifications, or completion of accredited university courses that enable that individual to make sound professional judgments regarding groundwater monitoring and contaminant fate and transport.

(125) Receiving country--A foreign country to which a hazardous waste is sent for the purpose of treatment, storage, or disposal (except short-term storage incidental to transportation).

(126) Regional administrator--The regional administrator for the United States Environmental Protection Agency region in which the facility is located, or his designee.

(127) Remediation--The act of eliminating or reducing the concentration of contaminants in contaminated media.

(128) Remediation waste--All solid and hazardous wastes, and all media (including groundwater, surface water, soils, and sediments) and debris, which contain listed hazardous wastes or which themselves exhibit a hazardous waste characteristic, that are managed for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and Texas Water Code, §7.031 (Corrective Action Relating to Hazardous Waste). For a given facility, remediation wastes may originate only from within the facility boundary, but may include waste managed in implementing corrective action for releases beyond the facility boundary under §335.166(5) of this title (relating to Corrective Action Program) or §335.167(c) of this title.

(129) Remove--To take waste, contaminated design or operating system components, or contaminated media away from a waste management unit, facility, or area to another location for treatment, storage, or disposal.

(130) Replacement unit--A landfill, surface impoundment, or waste pile unit:

(A) from which all or substantially all the waste is removed; and

(B) that is subsequently reused to treat, store, or dispose of hazardous waste. "Replacement unit" does not apply to a unit from which waste is removed during closure, if the subsequent reuse solely involves the disposal of waste from that unit and other closing units or corrective action areas at the facility, in accordance with an approved closure plan or United States Environmental Protection Agency or state approved corrective action.

(131) Representative sample--A sample of a universe or whole (e.g., waste pile, lagoon, groundwater) which can be expected to exhibit the average properties of the universe or whole.

(132) Run-off--Any rainwater, leachate, or other liquid that drains over land from any part of a facility.

(133) Run-on--Any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

(134) Saturated zone or zone of saturation--That part of the earth's crust in which all voids are filled with water.

(135) Shipment--Any action involving the conveyance of municipal hazardous waste or industrial solid waste by any means offsite.

(136) Sludge dryer--Any enclosed thermal treatment device that is used to dehydrate sludge and that has a maximum total thermal input, excluding the heating valve of the sludge itself, of 2,500 British thermal units per pound of sludge treated on a wet-weight basis.

(137) Small quantity generator--A generator who generates less than 1,000 kilograms of hazardous waste in a calendar month.

(138) Solid waste--

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

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

(ii) uncontaminated soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements. The material serving as fill may also serve as a surface improvement such as a structure foundation, a road, soil erosion control, and flood protection. Man-made materials exempted under this

provision shall only be deposited at sites where the construction is in progress or imminent such that rights to the land are secured and engineering, architectural, or other necessary planning have been initiated. Waste disposal shall be considered to have occurred on any land which has been filled with man-made inert materials under this provision if the land is sold, leased, or otherwise conveyed prior to the completion of construction of the surface improvement. Under such conditions, deed recordation shall be required. The deed recordation shall include the information required under §335.5(a) of this title (relating to Deed Recordation of Waste Disposal), prior to sale or other conveyance of the property;

(iii) waste materials which result from activities associated with the exploration, development, or production of oil or gas or geothermal resources, as those activities are defined in this section, and any other substance or material regulated by the Railroad Commission of Texas in accordance with the Natural Resources Code, §91.101, unless such waste, substance, or material results from activities associated with gasoline plants, natural gas, or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency in accordance with the federal Solid Waste Disposal Act, 42 United States Code, §§6901 *et seq.,* as amended; or

(iv) a material excluded by 40 Code of Federal Regulations (CFR) §§261.4(a)(1) - (22),261.39, and 261.40, as amended through March 18, 2010 (75 FR 12989) [~~July 28, 2006 (71 FR 42928)~~], subject to the changes in this clause, or by variance granted under §335.18 of this title (relating to Variances from Classification as a Solid Waste) and §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste). For the purposes of the exclusions under 40 CFR §261.39 and §261.40, 40 CFR §261.41 is adopted by reference as amended through July 28, 2006 (71 FR 42928). For the purposes of the exclusion under 40 CFR §261.4(a)(16), 40 CFR §261.38 is adopted by reference as amended through July 10, 2000 (65 FR 42292), and is revised as follows, with "subparagraph (A)(iv) under the definition of 'solid Waste' in 30 TAC §335.1" meaning "subparagraph (A)(iv) under the definition of 'solid Waste' in §335.1 of this title (relating to Definitions)":

(I) in the certification statement under 40 CFR §261.38(c)(1)(i)(C)(4), the reference to "40 CFR §261.38" is changed to "40 CFR §261.38, as revised under subparagraph (A)(iv) under the definition of 'solid Waste' in 30 TAC §335.1," and the reference to "40 CFR §261.28(c)(10)" is changed to "40 CFR §261.38(c)(10)";

(II) in 40 CFR §261.38(c)(2), the references to "§260.10 of this chapter" are changed to "§335.1 of this title (relating to Definitions)," and the reference to "parts 264 or 265 of this chapter" is changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) or Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities)";

(III) in 40 CFR §261.38(c)(3) - (5), the references to "parts 264 and 265, or §262.34 of this chapter" are changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) and Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities), or §335.69 of this title (relating to Accumulation Time)";

(IV) in 40 CFR §261.38(c)(5), the reference to "§261.6(c) of this chapter" is changed to "§335.24(e) and (f) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials)";

(V) in 40 CFR §261.38(c)(7), the references to "appropriate regulatory authority" and "regulatory authority" are changed to "executive director";

(VI) in 40 CFR §261.38(c)(8), the reference to "§262.11 of this chapter" is changed to "§335.62 of this title (relating to Hazardous Waste Determination and Waste Classification)";

(VII) in 40 CFR §261.38(c)(9), the reference to "§261.2(c)(4) of this chapter" is changed to §335.1(138)(D)(iv) " of this title (relating to Definitions)"; and

(VIII) in 40 CFR §261.38(c)(10), the reference to "implementing authority" is changed to "executive director."

(B) A discarded material is any material which is:

(i) abandoned, as explained in subparagraph (C) of this paragraph;

(ii) recycled, as explained in subparagraph (D) of this paragraph;

(iii) considered inherently waste-like, as explained in subparagraph (E) of this paragraph; or

(iv) a military munition identified as a solid waste in 40 CFR §266.202.

(C) Materials are solid wastes if they are abandoned by being:

(i) disposed of;

(ii) burned or incinerated; or

(iii) accumulated, stored, or processed (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

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

(i) Used in a manner constituting disposal. Materials noted with an asterisk in Column 1 of Table 1 are solid wastes when they are:

(I) applied to or placed on the land in a manner that constitutes disposal; or

(II) used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste). However, commercial chemical products listed in 40 CFR §261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.

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

(I) burned to recover energy; or

(II) used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste). However, commercial chemical products, which are listed in 40 CFR

§261.33, not listed in §261.33, but that exhibit one or more of the hazardous waste characteristics, or will be considered nonhazardous waste if disposed, are not solid wastes if they are fuels themselves and burned for energy recovery.

(iii) Reclaimed. Materials noted with an asterisk in Column 3 of Table 1 are solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17)). Materials without an asterisk in Column 3 of Table 1 are not solid wastes when reclaimed.

(iv) Accumulated speculatively. Materials noted with an asterisk in Column 4 of Table 1 are solid wastes when accumulated speculatively.
Figure: 30 TAC §335.1(138)(D)(iv)

(E) Materials that are identified by the administrator of the EPA as inherently waste-like materials under 40 CFR §261.2(d) are solid wastes when they are recycled in any manner.

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

(i) used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed;

(ii) used or reused as effective substitutes for commercial products;

(iii) returned to the original process from which they were generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at 40 CFR §261.4(a)(17) apply rather than this provision; or

(iv) secondary materials that are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process provided:

(I) only tank storage is involved, and the entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed means of conveyance;

(II) reclamation does not involve controlled flame combustion (such as occurs in boilers, industrial furnaces, or incinerators);

(III) the secondary materials are never accumulated in such tanks for over 12 months without being reclaimed; and

(IV) the reclaimed material is not used to produce a fuel, or used to produce products that are used in a manner constituting disposal.

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

(i) materials used in a manner constituting disposal, or used to produce products that are applied to the land;

(ii) materials burned for energy recovery, used to produce a fuel, or contained in fuels;

(iii) materials accumulated speculatively; or

(iv) materials deemed to be inherently waste-like by the administrator of the EPA, as described in 40 CFR §261.2(d)(1) and (2).

(H) With the exception of contaminated soils which are being relocated for use under §350.36 of this title (relating to Relocation of Soils Containing Chemicals of Concern for Reuse Purposes) and other contaminated media, materials that will otherwise be identified as nonhazardous solid wastes if disposed of are not considered solid wastes when recycled by being applied to the land or used as ingredients in products that are applied to the land, provided these materials can be shown to meet all of the following criteria:

(i) a legitimate market exists for the recycling material as well as its products;

(ii) the recycling material is managed and protected from loss as will be raw materials or ingredients or products;

(iii) the quality of the product is not degraded by substitution of raw material/product with the recycling material;

(iv) the use of the recycling material is an ordinary use and it meets or exceeds the specifications of the product it is replacing without treatment or reclamation, or if the recycling material is not replacing a product, the recycling material is a legitimate ingredient in a production process and meets or exceeds raw material specifications without treatment or reclamation;

(v) the recycling material is not burned for energy recovery, used to produce a fuel, or contained in a fuel;

(vi) the recycling material can be used as a product itself or to produce products as it is generated without treatment or reclamation;

(vii) the recycling material must not present an increased risk to human health, the environment, or waters in the state when applied to the land or used in products which are applied to the land and the material, as generated:

(I) is a Class 3 waste under Subchapter R of this chapter (relating to Waste Classification), except for arsenic, cadmium, chromium, lead, mercury, nickel, selenium, and total dissolved solids; and

(II) for the metals listed in subclause (I) of this clause:

(-a-) is a Class 2 or Class 3 waste under Subchapter R of this chapter; and

(-b-) does not exceed a concentration limit under §312.43(b)(3), Table 3 of this title (relating to Metal Limits); and

(viii) with the exception of the requirements under §335.17(a)(8) of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials):

(I) at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on an annual basis; and

(II) if the recycling material is placed in protective storage, such as a silo or other protective enclosure, at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on a biennial basis.

(I) Respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate

that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial.

(J) Materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under 40 CFR §261.3(c) unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.

(K) Other portions of this chapter that relate to solid wastes that are recycled include §335.6 of this title (relating to Notification Requirements), §§335.17 - 335.19 of this title, §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities).

(139) Sorbent--A material that is used to soak up free liquids by either adsorption or absorption, or both. Sorb means to either adsorb or absorb, or both.

(140) Spill--The accidental spilling, leaking, pumping, emitting, emptying, or dumping of solid waste or hazardous wastes or materials which, when spilled, become solid waste or hazardous wastes into or on any land or water.

(141) Staging pile--An accumulation of solid, non-flowing remediation waste, as defined in this section, that is not a containment building and that is used only during remedial operations for temporary storage at a facility. Staging piles must be designated by the executive director according to the requirements of 40 Code of Federal Regulations §264.554, as adopted by reference under §335.152(a) of this title (relating to Standards).

(142) Standard permit [~~Permit~~]--A Resource Conservation and Recovery Act (RCRA) permit authorizing management of hazardous waste issued under Chapter 305, Subchapter R of this title (relating to Resource Conservation and Recovery Act Standard Permits for Storage and Treatment Units) and Subchapter U of this chapter (relating to Standards for Owners and Operators of Hazardous Waste Facilities Operating Under a Standard Permit). The standard permit may have two parts, a uniform portion issued in all cases and a supplemental portion issued at the executive director's discretion. [~~A written permit issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify, or operate a specified municipal hazardous waste non-thermal treatment and/or storage facility in accordance with specified limitations.~~]

(143) Storage--The holding of solid waste for a temporary period, at the end of which the waste is processed, disposed of, recycled, or stored elsewhere.

(144) Sump--Any pit or reservoir that meets the definition of tank in this section and those troughs/trenches connected to it that serve to collect solid waste or hazardous waste for transport to solid waste or hazardous waste treatment, storage, or disposal facilities; except that as used in the landfill, surface impoundment, and waste pile rules, "sump" means any lined pit or reservoir that serves to collect liquids drained from a leachate collection and removal system or leak detection system for subsequent removal from the system.

(145) Surface impoundment or impoundment--A facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well or a corrective action management unit. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons.

(146) Tank--A stationary device, designed to contain an accumulation of solid waste which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provide structural support.

(147) Tank system--A solid waste or hazardous waste storage or processing tank and its associated ancillary equipment and containment system.

(148) TEQ--Toxicity equivalence, the international method of relating the toxicity of various dioxin/furan congeners to the toxicity of 2,3,7,8-tetrachlorodibenzo-p-dioxin.

(149) Thermal processing--The processing of solid waste or hazardous waste in a device which uses elevated temperatures as the primary means to change the chemical, physical, or biological character or composition of the solid waste or hazardous waste. Examples of thermal processing are incineration, molten salt, pyrolysis, calcination, wet air oxidation, and microwave discharge. (See also "incinerator" and "open burning.")

(150) Thermostat--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(151) Totally enclosed treatment facility--A facility for the processing of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during processing. An example is a pipe in which acid waste is neutralized.

(152) Transfer facility--Any transportation-related facility including loading docks, parking areas, storage areas, and other similar areas where shipments of hazardous or industrial solid waste are held during the normal course of transportation.

(153) Transit country--Any foreign country, other than a receiving country, through which a hazardous waste is transported.

(154) Transport vehicle--A motor vehicle or rail car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, railroad freight car, etc.) is a separate transport vehicle. Vessel includes every description of watercraft, used or capable of being used as a means of transportation on the water.

(155) Transporter--Any person who conveys or transports municipal hazardous waste or industrial solid waste by truck, ship, pipeline, or other means.

(156) Treatability study--A study in which a hazardous or industrial solid waste is subjected to a treatment process to determine:

(A) whether the waste is amenable to the treatment process;

(B) what pretreatment (if any) is required;

(C) the optimal process conditions needed to achieve the desired treatment;

(D) the efficiency of a treatment process for a specific waste or wastes; or

(E) the characteristics and volumes of residuals from a particular treatment process. Also included in this definition for the

purpose of 40 Code of Federal Regulations §261.4(e) and (f) (§§335.2, 335.69, and 335.78 of this title (relating to Permit Required; Accumulation Time; and Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators)) exemptions are liner compatibility, corrosion, and other material compatibility studies and toxicological and health effects studies. A treatability study is not a means to commercially treat or dispose of hazardous or industrial solid waste.

(157) Treatment--To apply a physical, biological, or chemical process(es) to wastes and contaminated media which significantly reduces the toxicity, volume, or mobility of contaminants and which, depending on the process(es) used, achieves varying degrees of long-term effectiveness.

(158) Treatment zone--A soil area of the unsaturated zone of a land treatment unit within which hazardous constituents are degraded, transferred, or immobilized.

(159) Underground injection--The subsurface emplacement of fluids through a bored, drilled, or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension. (See also "injection well.")

(160) Underground tank--A device meeting the definition of tank in this section whose entire surface area is totally below the surface of and covered by the ground.

(161) Unfit-for-use tank system--A tank system that has been determined through an integrity assessment or other inspection to be no longer capable of storing or processing solid waste or hazardous waste without posing a threat of release of solid waste or hazardous waste to the environment.

(162) Universal waste--Any of the hazardous wastes defined as universal waste under §335.261(b)(13)(F) of this title (relating to Universal Waste Rule) that are managed under the universal waste requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(163) Universal waste handler--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(164) Universal waste transporter--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(165) Unsaturated zone or zone of aeration--The zone between the land surface and the water table.

(166) Uppermost aquifer--The geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected within the facility's property boundary.

(167) Used oil--Any oil that has been refined from crude oil, or any synthetic oil, that has been used, and, as a result of such use, is contaminated by physical or chemical impurities. Used oil fuel includes any fuel produced from used oil by processing, blending, or other treatment. Rules applicable to nonhazardous used oil, oil characteristically hazardous from use versus mixing, conditionally exempt small quantity generator hazardous used oil, and household used oil after collection that will be recycled are found in Chapter 324 of this title (relating to Used Oil Standards) and 40 Code of Federal Regulations Part 279 (Standards for Management of Used Oil).

(168) Wastewater treatment unit--A device which:

(A) is part of a wastewater treatment facility subject to regulation under either the Federal Water Pollution Control Act (Clean Water Act), 33 United States Code, §§466 *et seq.,* §402 or §307(b), as amended;

(B) receives and processes or stores an influent wastewater which is a hazardous or industrial solid waste, or generates and accumulates a wastewater treatment sludge which is a hazardous or industrial solid waste, or processes or stores a wastewater treatment sludge which is a hazardous or industrial solid waste; and

(C) meets the definition of tank or tank system as defined in this section.

(169) Water (bulk shipment)--The bulk transportation of municipal hazardous waste or Class 1 industrial solid waste which is loaded or carried on board a vessel without containers or labels.

(170) Well--Any shaft or pit dug or bored into the earth, generally of a cylindrical form, and often walled with bricks or tubing to prevent the earth from caving in.

(171) Zone of engineering control--An area under the control of the owner/operator that, upon detection of a solid waste or hazardous waste release, can be readily cleaned up prior to the release of solid waste or hazardous waste or hazardous constituents to groundwater or surface water.

§335.2. Permit Required.

(a) Except with regard to storage, processing, or disposal to which subsections (c) - (h) of this section apply, and as provided in §335.45(b) of this title (relating to Effect on Existing Facilities), and in accordance with the requirements of §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials) and §335.25 of this title (relating to Handling, Storing, Processing, Transporting, and Disposing of Poultry Carcasses), and as provided in §332.4 of this title (relating to General Requirements), no person may cause, suffer, allow, or permit any activity of storage, processing, or disposal of any industrial solid waste or municipal hazardous waste unless such activity is authorized by a permit, amended permit, or other authorization from the Texas Commission on Environmental Quality (commission) or its predecessor agencies, the Department of State Health Services (DSHS), or other valid authorization from a Texas state agency. No person may commence physical construction of a new hazardous waste management facility without first having submitted Part A and Part B of the permit application and received a finally effective permit.

(b) In accordance with the requirements of subsection (a) of this section, no generator, transporter, owner or operator of a facility, or any other person may cause, suffer, allow, or permit its wastes to be stored, processed, or disposed of at an unauthorized facility or in violation of a permit. In the event this requirement is violated, the executive director will seek recourse against not only the person who stored, processed, or disposed of the waste, but also against the generator, transporter, owner or operator, or other person who caused, suffered, allowed, or permitted its waste to be stored, processed, or disposed.

(c) Any owner or operator of a solid waste management facility that is in existence on the effective date of a statutory or regulatory change that subjects the owner or operator to a requirement to obtain a hazardous waste permit who has filed a hazardous waste permit application with the commission in accordance with the rules and regulations of the commission, may continue the storage, processing, or disposal of hazardous waste until such time as the commission approves or denies the application, or, if the owner or operator becomes subject to a requirement to obtain a hazardous waste permit after November 8, 1984, except as provided by the United States Environmental Protection Agency (EPA) or commission rules relative to termination of interim status. If a solid waste facility which has become a commercial hazardous waste management facility as a result of the federal toxicity characteristic rule effective September 25, 1990, and is required to obtain a hazardous waste permit, such facility that qualifies for interim

status is limited to those activities that qualify it for interim status until the facility obtains the hazardous waste permit. Owners or operators of municipal hazardous waste facilities that satisfied this requirement by filing an application on or before November 19, 1980, with the EPA are not required to submit a separate application with the DSHS. Applications filed under this section shall meet the requirements of §335.44 of this title (relating to Application for Existing On-Site Facilities). Owners and operators of solid waste management facilities that are in existence on the effective date of statutory or regulatory amendments under the Texas Solid Waste Disposal Act (Vernon's Supplement 1991), Texas Civil Statutes, Article 4477-7, or the Resource Conservation and Recovery Act (RCRA), 42 United States Code, §§6901 *et seq.,* that render the facilities subject to the requirement to obtain a hazardous waste permit, may continue to operate if Part A of their permit application is submitted no later than six months after the date of publication of regulations by the EPA under RCRA, which first require them to comply with the standards in Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities), or Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities); or 30 days after the date they first become subject to the standards in these subchapters, whichever first occur; or for generators who generate greater than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month and who process, store, or dispose of these wastes on-site, a Part A permit application shall be submitted to the EPA by March 24, 1987, as required by 40 Code of Federal Regulations (CFR) §270.10(e)(1)(iii). This subsection shall not apply to a facility if it has been previously denied a hazardous waste permit or if authority to operate the facility has been previously terminated. Applications filed under this section shall meet the requirements of §335.44 of this title. For purposes of this subsection, a solid waste management facility is in existence if the owner or operator has obtained all necessary federal, state, and local preconstruction approvals or permits, as required by applicable federal, state, and local hazardous waste control statutes, regulations, or ordinances; and either:

(1) a continuous physical, on-site construction program has begun; or

(2) the owner or operator has entered into contractual obligations, which cannot be cancelled or modified without substantial loss, for construction of the facility to be completed within a reasonable time.

(d) No permit shall be required for:

(1) the processing or disposal of nonhazardous industrial solid waste, if the waste is processed or disposed on property owned or otherwise effectively controlled by the owner or operator of the industrial plant, manufacturing plant, mining operation, or agricultural operation from which the waste results or is produced; the property is within 50 miles of the plant or operation; and the waste is not commingled with waste from any other source or sources (An industrial plant, manufacturing plant, mining operation, or agricultural operation owned by one person shall not be considered an "other source" with respect to other plants and operations owned by the same person.);

(2) the storage of nonhazardous industrial solid waste, if the waste is stored on property owned or otherwise effectively controlled by the owner or operator of the industrial plant, manufacturing plant, mining operation, or agricultural operation from which the waste results or is produced, and the waste is not commingled with waste from any other source or sources (An industrial plant, manufacturing plant, mining operation, or agricultural operation owned by one person shall not be considered an "other source" with respect to other plants and operations owned by the same person.);

(3) the storage or processing of nonhazardous industrial solid waste, if the waste is processed in an elementary neutralization unit;

(4) the collection, storage, or processing of nonhazardous industrial solid waste, if the waste is collected, stored, or processed as part of a treatability study;

(5) the storage of nonhazardous industrial solid waste, if the waste is stored in a transfer facility in containers for a period of ten days or less, unless the executive director determines that a permit should be required in order to protect human health and the environment;

(6) the storage or processing of nonhazardous industrial solid waste, if the waste is processed in a publicly owned treatment works with discharges subject to regulation under the Clean Waste Act, §402, as amended through October 4, 1996, if the owner or operator has a National Pollutant Discharge Elimination System permit and complies with the conditions of the permit;

(7) the storage or processing of nonhazardous industrial solid waste, if the waste is stored or processed in a wastewater unit and is discharged in accordance with a Texas Pollutant Discharge Elimination System authorization issued under Texas Water Code, Chapter 26;

(8) the storage or processing of nonhazardous industrial solid waste, if the waste is stored or processed in a wastewater treatment unit that discharges to a publicly owned treatment works and the units are located at a noncommercial solid waste management facility; or

(9) the storage or processing of nonhazardous industrial solid waste, if the waste is processed in a wastewater treatment unit that discharges to a publicly owned treatment works liquid wastes that are incidental to the handling, processing, storage, or disposal of solid wastes at municipal solid waste facilities or commercial industrial solid waste landfill facilities.

(e) No permit shall be required for the on-site storage of hazardous waste by a person who is a conditionally exempt small quantity generator as described in §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators).

(f) No permit under this chapter shall be required for the storage, processing, or disposal of hazardous waste by a person described in §335.41(b) - (d) of this title (relating to Purpose, Scope, and Applicability) or for the storage of hazardous waste under the provisions of 40 CFR §261.4(c) and (d).

(g) No permit under this chapter shall be required for the storage, processing, or disposal of hazardous industrial waste or municipal hazardous waste that is generated or collected for the purpose of conducting treatability studies. Such samples are subject to the requirements in 40 CFR §261.4(e) and (f), as amended and adopted in the CFR through April 4, 2006 [~~February 18, 1994~~], as published in the *Federal Register* (71 FR 16862) [(~~59 FR 8362~~)], which are adopted by reference.

(h) A person may obtain authorization from the executive director for the storage, processing, or disposal of nonhazardous industrial solid waste in an interim status landfill that has qualified for interim status in accordance with 40 CFR Part 270, Subpart G, and that has complied with the standards in Subchapter E of this chapter, by complying with the notification and information requirements in §335.6 of this title (relating to Notification Requirements). The executive director may approve or deny the request for authorization or grant the request for authorization subject to conditions, which may include, with-

out limitation, public notice and technical requirements. A request for authorization for the disposal of nonhazardous industrial solid waste under this subsection shall not be approved unless the executive director determines that the subject facility is suitable for disposal of such waste at the facility as requested. At a minimum, a determination of suitability by the executive director must include approval by the executive director of construction of a hazardous waste landfill meeting the design requirements of 40 CFR §265.301(a). In accordance with §335.6 of this title, such person shall not engage in the requested activities if denied by the executive director or unless 90 days' notice has been provided and the executive director approves the request except where express executive director approval has been obtained prior to the expiration of the 90 days. Authorization may not be obtained under this subsection for:

(1) nonhazardous industrial solid waste, the storage, processing, or disposal of which is expressly prohibited under an existing permit or site development plan applicable to the facility or a portion of the facility;

(2) polychlorinated biphenyl compounds wastes subject to regulation by 40 CFR Part 761;

(3) explosives and shock-sensitive materials;

(4) pyrophorics;

(5) infectious materials;

(6) liquid organic peroxides;

(7) radioactive or nuclear waste materials, receipt of which will require a license from the DSHS [~~TDH~~] or the commission or any other successor agency; and

(8) friable asbestos waste unless authorization is obtained in compliance with the procedures established under §330.171(c)(3)(B) - (E) of this title (relating to Disposal of Special Wastes). Authorizations obtained under this subsection shall be effective during the pendency of the interim status and shall cease upon the termination of interim status, final administrative disposition of the subject permit application, failure of the facility to operate the facility in compliance with the standards set forth in Subchapter E of this chapter, or as otherwise provided by law.

(i) Owners or operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit. Owners or operators of surface impoundments, landfills, land treatment units, and waste pile units that received wastes after July 26, 1982, or that certified closure (according to 40 CFR §265.115) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under 40 CFR §270.1(c)(5) and (6), or obtain an order in lieu of a post-closure permit, as provided in subsection (m) of this section. If a post-closure permit is required, the permit must address applicable provisions of 40 CFR Part 264, and Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) provisions concerning groundwater monitoring, unsaturated zone monitoring, corrective action, and post-closure care requirements. The denial of a permit for the active life of a hazardous waste management facility or unit does not affect the requirement to obtain a post-closure permit under this section.

(j) Upon receipt of the federal Hazardous and Solid Waste Act (HSWA) authorization for the commission's Hazardous Waste Program, the commission shall be authorized to enforce the provisions that the EPA imposed in hazardous waste permits that were issued before the HSWA authorization was granted.

(k) Any person who intends to conduct an activity under subsection (d) of this section shall comply with the notification requirements of §335.6 of this title.

(l) No permit shall be required for the management of universal wastes by universal waste handlers or universal waste transporters, in accordance with the definitions and requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(m) At the discretion of the commission, an owner or operator may obtain a post-closure order in lieu of a post-closure permit for interim status units, a corrective action management unit unless authorized by a permit, or alternative corrective action requirements for contamination commingled from RCRA and solid waste management units. The post-closure order must address the facility-wide corrective action requirements of §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and groundwater monitoring requirements of §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response).

(n) Except as provided in subsection (d)(9) of this section, owners or operators of commercial industrial solid waste facilities that receive industrial solid waste for discharge to a publicly owned treatment works are required to obtain a permit under this subchapter. By June 1, 2006, owners or operators of existing commercial industrial solid waste facilities that receive industrial solid waste for discharge to a publicly owned treatment works must have a permit issued under this subchapter or obtain a general permit issued under Chapter 205 of this title (relating to General Permits for Waste Discharges) to continue operating. A general permit issued under Chapter 205 of this title will authorize operations until a final decision is made on the application for an individual permit or 15 months, whichever is earlier. The general permit shall authorize operations for a maximum period of 15 months except that authorization may be extended on an individual basis in one-year increments at the discretion of the executive director. Should an application for a general permit issued under Chapter 205 of this title be submitted, the applicant shall also submit to the commission, by June 1, 2006, the appropriate information to demonstrate compliance with financial assurance requirements for closure of industrial solid waste facilities in accordance with Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities). Owners or operators of commercial industrial solid waste facilities that receive industrial solid waste for discharge to a publicly owned treatment works operating under a general permit issued under Chapter 205 of this title shall submit an application for a permit issued under this subchapter prior to September 1, 2006.

(o) Treatment, storage, and disposal facilities that are otherwise subject to permitting under RCRA and that meet the criteria in paragraphs (1) or paragraph (2) of this subsection, may be eligible for a standard permit under Subchapter U of this chapter (relating to Standards for Owners and Operators of Hazardous Waste Facilities Operating Under a Standard Permit) if they satisfy one of the two following criteria:

(1) facility generates hazardous waste and then non-thermally treats and/or stores hazardous waste on-site; or

(2) facility receives hazardous waste generated off-site by a generator under the same ownership as the receiving facility.

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

(a) Except as provided in paragraph (2) of this subsection [~~(g) and (h) of this section~~], no person who generates, transports, processes, stores, or disposes [~~generator~~] of hazardous [~~or Class 1~~] waste

[consigned to an off-site solid waste treatment, storage, or disposal facility within the United States or a primary exporter of hazardous waste consigned to a foreign country] shall cause, suffer, allow, or permit the shipment of hazardous waste [or Class 1 waste] unless he complies with the requirements of paragraph (1) of this subsection, and the manifest requirements in 40 Code of Federal Regulations (CFR) §§262.20 - 262.23, 262.27, 262.42, 262.54, 262.55, and 262.60 and the Appendix to 40 CFR Part 262, as these sections are amended through March 18, 2010 (75 FR 12989).[:]

(1) In addition, generators, owners or operators of treatment, storage, or disposal facilities, and primary exporters shall include a Texas waste code for each hazardous waste itemized on the manifest. [for generators of industrial nonhazardous Class 1 waste in a quantity greater than 100 kilograms per month and/or generators of hazardous waste shipping hazardous waste which is part of a total quantity of hazardous waste generated in quantities greater than 100 kilograms in a calendar month, or quantities of acute hazardous waste in excess of quantities specified in §335.78(e) of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators), who consign that waste to an off-site solid waste treatment, storage, or disposal facility in Texas, a standard (nationally uniform) Resource Conservation and Recovery Act (RCRA) manifest form (United States Environmental Protection Agency (EPA) Form 8700-22), under both RCRA and Department of Transportation (DOT) statutory authorities, is prepared;]

(2) No manifest is required for a hazardous waste generated by a [the generator is either an industrial] generator that generates less than [100 kilograms of nonhazardous Class 1 waste per month and less than] the quantity limits of hazardous waste specified in §335.78 of this title or a municipal generator that generates less than the quantity limit of hazardous waste specified in §335.78 of this title(relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators).[;]

(3) For the purposes of the federal hazardous waste manifest requirements incorporated by reference the term, "regional administrator" is changed to the "executive director" of the Texas Commission on Environmental Quality or to the commission, consistent with the organization of the commission as set out in Texas Water Code, Chapter 5, Subchapter B. [for generators of hazardous waste or Class 1 waste generated in Texas for consignment to another state the standard (nationally uniform) RCRA manifest form (EPA Form 8700-22) is prepared, unless the generator is identified in paragraph (2) of this section;]

(4) For the purposes of the federal hazardous waste manifest requirements incorporated by reference, reference to the United States Environmental Protection Agency (EPA) is changed to the Texas Commission on Environmental Quality. [for a primary exporter of hazardous waste for consignment to a foreign country the hazardous waste is accompanied by a standard (nationally uniform) RCRA manifest form (EPA Form 8700-22); and]

[(5) a generator designates on the manifest one facility which is authorized to receive the waste described on the manifest. A generator may also designate one alternate facility which is authorized to receive the waste in the event an emergency prevents delivery of the waste to the primary designated facility. An alternate facility shall be identified on the manifest in the item marked "Alternate Facility." If the transporter is unable to deliver the waste to the designated facility or the alternate facility, the generator must either designate another facility or instruct the transporter to return the waste;]

[(6) for shipments of hazardous waste to a designated facility in an authorized state which has not yet obtained authorization to regulate that particular waste as hazardous, the generator must assure that the designated facility agrees to sign and return the manifest to the generator, and that any out-of-state transporter signs and forwards the manifest to the designated facility.]

(b) No manifest and no marking in accordance with §335.67(b) of this title (relating to Marking) is required for hazardous waste transported on a public or private right-of-way within or along the border of contiguous property under the control of the same person, even if such contiguous property is divided by a public or private right-of-way. However, in the event of a hazardous waste discharge on a public or private right-of-way, the generator or transporter must comply with the requirements of §335.93 of this title (relating to Hazardous Waste Discharges). [Generators may obtain the manifest from any source that is registered with the EPA as a supplier of manifests. A registrant may not print, or have printed, the manifest for use or distribution unless it has received approval from the EPA director of the Office of Solid Waste to do so under 40 Code of Federal Regulations (CFR) §262.21.]

(c) Except as provided in subsections (d) and (e) of this section, persons who generate, transport, process, store, or dispose of Class 1 waste shall not cause, suffer, allow, or permit the shipment of Class 1 waste unless the person complies with the manifest requirements listed in subsection (a) of this section except for 40 CFR §262.54 and §262.55 with the following changes: [All manifests for hazardous wastes must be prepared according to the instructions found in the Appendix to 40 CFR Part 262, and must also contain the Texas Waste Code for each waste. Manifests for Class 1 wastes must be prepared according to the instructions found in the Appendix to 40 CFR Part 262 (pre-printed on the back of the Uniform Hazardous Waste Manifest) with the addition of the Texas Waste Codes for each waste. When itemizing Class 1 waste, the TCEQ solid waste registration numbers will be used when EPA identification numbers are not required.]

(1) When Class 1 waste is itemized on the manifest, use the Texas Commission on Environmental Quality solid waste registration (SWR) number in place of the EPA identification number and the Texas waste code in place of the EPA waste code;

(2) When both hazardous and Class 1 waste are itemized on the same manifest, use EPA identification numbers to identify the generator, transporter, and receiver;

(3) Use Texas waste codes for each waste itemized on the manifest;

(4) The term, "regional administrator" is changed to the "executive director" of the Texas Commission on Environmental Quality or to the commission, consistent with the organization of the commission as set out in Texas Water Code, Chapter 5, Subchapter B; and

(5) Reference to the EPA is changed to the Texas Commission on Environmental Quality.

(d) No manifest is required for the shipment of Class 1 waste where the generator is an industrial generator that generates less than the quantity limits of Class 1 waste specified in §335.78 of this title or is a municipal generator that generates less than the quantity limit of Class 1 waste specified in §335.78 of this title. [At the time of waste transfer, the generator shall:]

[(1) use a manifest system that ensures that interstate and intrastate shipments of hazardous waste are designated for delivery and, in the case of intrastate shipments, are delivered to facilities that are authorized to operate under an approved state program or the federal program; and]

[(2) ensure that all hazardous and Class 1 wastes offered for transportation are accompanied by a manifest except shipments subject to subsections (g) and (h) of this section or shipments by rail or water, as specified in subsections (e) and (f) of this section.]

[(e) For shipments of Class 1 waste within the United States solely by water (bulk shipments only), the generator shall send three copies of the manifest dated and signed in accordance with this section to the owner or operator of the designated facility or to the last water (bulk shipment) transporter to handle the waste in the United States if exported by water. Copies of the manifest are not required for each transporter.]

[(f) For rail shipments of hazardous waste or Class 1 waste within the United States which originate at the site of generation, the generator shall send at least three copies of the manifest dated and signed in accordance with this section to:]

[(1) the next non-rail transporter, if any;]

[(2) the designated facility if transported solely by rail; or]

[(3) the last rail transporter to handle the waste in the United States if exported by rail.]

(e) [(g)] No manifest is required for the shipment of Class 1 waste [which is not hazardous waste] to property owned or otherwise effectively controlled by the owner or operator of an industrial plant, manufacturing plant, mining operation, or agricultural operation from which the waste results or is produced, provided that the property is within 50 miles of the plant or operation and the waste is not commingled with waste from any other source or sources. An industrial plant, manufacturing plant, mining operation, or agricultural operation owned by one person shall not be considered another source with respect to other plants or operations owned by the same person.

[(h) No manifest and no marking in accordance with §335.67(b) of this title (relating to Marking) is required for hazardous waste transported on a public or private right-of-way within or along the border of contiguous property under the control of the same person, even if such contiguous property is divided by a public or private right-of-way. However, in the event of a hazardous waste discharge on a public or private right-of-way, the generator or transporter must comply with the requirements of §335.93 of this title (relating to Hazardous Waste Discharges).]

§335.11. Shipping Requirements for Transporters of Hazardous Waste or Class 1 Waste.

(a) Except as provided by §335.10(a)(2), (d), and (e) of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste), persons who transport hazardous [No transporter may cause, suffer, allow, or permit the shipment of solid] waste must comply with the manifest requirements in 40 Code of Federal Regulations (CFR) §263.20, §263.21, and the Appendix to 40 CFR Part 262, as these sections are amended through June 16, 2005 (70 FR 35034) as well as the following: [for which a manifest is required under §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) to an off-site treatment, storage, or disposal facility, unless the transporter:]

(1) the person must comply [complies] with §335.10 of this title; and

(2) in the case of hazardous waste exports, the person must ensure [ensures] that the shipment conforms to the requirements set forth in the regulations contained in 40 [Code of Federal Regulations (]CFR[)] §263.20.

(b) Except as provided by §335.10(d) and (e) of this title, a person who transports Class 1 waste must comply with the requirements of subsection (a) of this section, except those requirements in 40 CFR §263.20(a)(2). [A transporter may not cause, suffer, allow, or permit the delivery of a shipment of hazardous or Class 1 waste to another designated transporter or to a treatment, storage, or disposal facility unless accompanied by a standard (nationally uniform) Resource Conservation and Recovery Act (RCRA) manifest form (United States Environmental Protection Agency (EPA) Form 8700-22) prepared according to §335.10 of this title and complies with 40 CFR Part263.]

[(c) The requirements of subsections (b) and (d) of this section do not apply to water (bulk shipment) transporters if:]

[(1) the waste is delivered by water (bulk shipment) to the facility designated on the manifest;]

[(2) a shipping paper containing all the information required on the manifest (excluding the identification numbers, generator certification, and signatures) and, for hazardous waste exports, an EPA acknowledgment of consent accompanies the waste;]

[(3) the delivering transporter obtains the date of delivery and handwritten signature of the owner or operator of the facility on either the manifest or the shipping paper;]

[(4) the person delivering the waste to the initial water (bulk shipment) transporter obtains the date of delivery and the signature of the water (bulk shipment) transporter on the manifest and forwards it to the facility; and]

[(5) a copy of the shipping paper or manifest is retained by each water (bulk shipment) transporter in accordance with §335.14(b) of this title (relating to Recordkeeping Requirements Applicable to Transporters of Hazardous Waste or Class 1 Waste).]

[(d) For shipments involving rail transportation, the requirements of subsections (b) and (c) of this section do not apply and the following requirements do apply.]

[(1) When accepting Class 1 waste from a non-rail transporter, the initial rail transporter must:]

[(A) sign and date, the manifest acknowledging acceptance of the waste;]

[(B) return a copy of the manifest to the non-rail transporter;]

[(C) forward at least three copies of the manifest to:]

[(i) the next non-rail transporter, if any;]

[(ii) the designated facility, if the shipment is delivered to that facility by rail; or]

[(iii) the last rail transporter designated to handle the waste in the United States;]

[(D) retain one copy of the manifest and rail shipping paper in accordance with §335.14(c) of this title.]

[(2) Rail transporters must ensure that a shipping paper containing all the information required on the manifest (excluding the EPA identification numbers, generator certification, and signatures) and, for hazardous waste exports, an EPA acknowledgment of consent accompanies the waste at all times. Intermediate rail transporters are not required to sign either the manifest or shipping paper.]

[(3) When delivering Class 1 waste or municipal hazardous waste to the designated facility, a rail transporter must:]

[(A) obtain the date of delivery and handwritten signature of the owner or operator of the designated facility on the manifest or shipping paper (if the manifest has not been received by the facility); and]

[(B) retain a copy of the manifest or signed shipping paper in accordance with §335.14(c) of this title.]

[(4) When delivering hazardous waste or Class 1 waste to a non-rail transporter, a rail transporter must:]

[(A) obtain the date of delivery and the handwritten signature of the next non-rail transporter on the manifest; and]

[(B) retain a copy of the manifest in accordance with §335.14(c) of this title.]

[(5) Before accepting municipal hazardous waste or Class 1 waste from a rail transporter, a non-rail transporter must sign and date the manifest and provide a copy to the rail transporter.]

[(e) Transporters who transport hazardous waste or Class 1 waste out of the United States shall comply with manifest requirements according to §335.10 of this title and 40 CFR Part 263.]

[(f) The transporter must deliver the entire quantity of municipal hazardous waste or Class 1 waste which he has accepted from a generator or a transporter to:]

[(1) the designated facility listed on the manifest;]

[(2) the alternate designated facility if the waste cannot be delivered to the designated facility because an emergency prevents delivery;]

[(3) the next designated transporter; or]

[(4) the place outside the United States designated by the generator.]

[(g) If the transporter cannot deliver the waste in accordance with subsection (h) of this section because of an emergency condition other than rejection of the waste by the designated facility, then the transporter must contact the generator for further directions and must revise the manifest according to the generator's instructions.]

[(h) If hazardous waste is rejected by the designated facility while the transporter is on the facility's premises, then the transporter must obtain the following:]

[(1) for a partial load rejection or for regulated quantities of container residues, a copy of the original manifest that includes the facility's date and signature, the manifest tracking number of the new manifest that will accompany the shipment, and a description of the partial rejection or container residue in the discrepancy block of the original manifest. The transporter must retain a copy of this manifest and give the remaining copies of the original manifest to the rejecting designated facility. If the transporter is forwarding the rejected part of the shipment or a regulated container residue to an alternate facility or returning it to the generator, the transporter must obtain a new manifest to accompany the shipment, and the new manifest must include all of the information required;]

[(2) for a full load rejection that will be taken back by the transporter, a copy of the original manifest that includes the rejecting facility's signature and date attesting to the rejection, the description of the rejection, and the name, address, phone number, and EPA identification number for the alternate facility or generator to whom the shipment must be delivered. The transporter must retain a copy of the manifest containing this information to the rejecting designated facility. If the original manifest is not used, then the transporter must obtain a new manifest for the shipment.]

§335.12. Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities.

(a) Except as provided by §335.10(a)(2) of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste), persons who generate, process, store, or dispose of hazardous waste must comply with 40 Code of Federal Regulations (CFR) §265.71 and §265.72, or 40 CFR §264.71 and §264.72, depending on the status of the person, and with the Appendix to 40 CFR Part 262, as these sections are amended through March 18, 2010 (75 FR 12989). [No owner or operator of a treatment, storage, or disposal facility may accept delivery of solid waste for which a manifest is required under §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste), for off-site treatment, storage, or disposal unless:]

[(1) a manifest accompanies the shipment which designates that facility to receive the waste;]

[(2) the manifest complies with §335.10 of this title and 40 Code of Federal Regulations (CFR) Part 264; Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities.]

[(3) the owner or operator retains one copy of the manifest in accordance with §335.15(a) of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities);]

[(4) within 30 days after the delivery, the owner or operator sends a copy of the manifest to the generator or primary exporter where appropriate; and]

[(5) in the case of hazardous waste exports, a copy of the United States Environmental Protection Agency (EPA) acknowledgment of consent also accompanies the waste and the owner or operator has no knowledge that the shipment does not conform to the EPA acknowledgment of consent.]

(b) Except as provided by §335.10(d) and (e) of this title, persons who generate, transport, process, store, or dispose of Class 1 waste must comply with 40 CFR §§264.71, 264.72, and 264.76, and the Appendix to 40 CFR Part 262, as amended through March 18, 2010 (75 FR 12989), and a manifest must accompany the shipment which designates that facility to receive the waste. [If a facility receives, from a rail or water (bulk shipment) transporter, hazardous waste or Class 1 waste which is accompanied by a shipping paper containing all the information required on the manifest, the owner or operator, or his agent, shall process the manifest in accordance with §335.10 of this title and comply with 40 CFR Part 264.]

[(c) If a facility receives hazardous waste or Class 1 waste accompanied by a manifest, or in the case of shipments by rail or water (bulk shipment) by a shipping paper, the owner or operator, or his agent must note any significant discrepancies on each copy of the manifest or shipping paper (if the manifest has not been received).]

[(1) Manifest discrepancies are:]

[(A) significant differences between the quantity or type of hazardous waste designated on the manifest or shipping paper, and the quantity and type of hazardous waste a facility actually receives;]

[(B) rejected wastes, which may be a full or partial shipment of hazardous waste that the treatment, storage, and disposal facility cannot accept; or]

[(C) container residues, which are residues that exceed the quantity limits for "empty" containers set forth in 40 CFR §261.7(b).]

[(2) Significant differences in quantity are for bulk weight, variations greater than 10% in weight; and for batch waste, any variation in piece count, such as a discrepancy of one drum in a truckload.]

[(3) Significant differences in type are obvious differences that can be discovered by inspection or waste analysis, such as waste solvent substituted for waste acid, or toxic constituents not reported on the manifest or shipping paper.]

[(4) Upon discovering a significant difference in quantity or type, the owner or operator must attempt to reconcile the discrepancy with the waste generator or transporter (e.g., with telephone conversations). If the discrepancy is not resolved within 15 days after receiving the waste, the owner or operator must immediately submit to the executive director a letter describing the discrepancy and attempts to reconcile it, and a copy of the manifest or shipping paper at issue. The commission does not intend that the owner or operator of a facility perform the general waste analysis required by 40 CFR §264.13 or §265.13 before signing the manifest and giving it to the transporter. However, subsection (c) of this section does require reporting an unreconciled discrepancy discovered during later analysis.]

[(d) Facilities that receive hazardous waste imported from a foreign source must mail a copy of the manifest for the imported hazardous waste to the following address within 30 days of delivery: International Compliance Assurance Division, OFA/OECA (2254A), United States Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington DC 20460. Manifests that only document the shipment of imported Class 1 waste do not need to be sent to the International Compliance Office.]

[(e) The guidelines for rejecting waste are as follows.]

[(1) Upon rejecting waste or identifying a container residue that exceeds the quantity limits for "empty" containers set forth in 40 CFR §261.7(b), the facility must consult with the generator prior to forwarding the waste to another facility that can manage the waste.]

[(A) If it is impossible to locate an alternative facility that can receive the waste, the facility may return the rejected waste or residue to the generator. The facility must send the waste to the alternative facility or to the generator within 60 days of the rejection or the container residue identification.]

[(B) While the facility is making arrangements for forwarding rejected wastes or residues to another facility under this section, it must ensure that either the delivering transporter retains custody of the waste, or the facility must provide for secure, temporary custody of the waste, pending delivery of the waste to the first transporter designated on the manifest prepared under paragraph (2) or (3) of this subsection.]

[(2) Except as provided in subsection (e)(3) of this section, for full or partial load rejections and residues that are to be sent off-site to an alternate facility, the facility is required to prepare a new manifest as set in §335.10 of this title.]

[(3) For full load rejections that are made while the transporter remains present at the facility, the facility may forward the rejected shipment to the alternate facility.]

[(4) Except as provided in paragraph (5) of this subsection, for rejected wastes and residues that must be sent back to the generator, the facility is required to prepare a new manifest in accordance with §335.10 of this title.]

[(5) For full load rejections that are made while the transporter remains at the facility, the facility may return the shipment to the generator with the original manifest designating the generator as the alternate facility. The facility must retain a copy for its records then give the remaining copies of the manifest to the transporter to accompany the shipment. If the original manifest is not used, then the facility must use a new manifest.]

[(6) If a facility rejects a waste or identifies a container residue that exceeds the quantity limits for "empty" containers set forth in 40 CFR §261.7(b) after it has signed, dated, and returned a copy of the manifest to the delivering transporter or to the generator, the facility must amend its copy of the manifest to indicate the rejected wastes or residues in the discrepancy space of the amended manifest. The facility must also copy the manifest tracking number of the new manifest to the discrepancy space of the amended manifest, and must re-sign and date the manifest to certify to the information as amended. The facility must retain the amended manifest for at least three years from the date of amendment, and must within 30 days, send a copy of the amended manifest to the transporter and generator that received copies prior to the amendments.]

§335.13. Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste.

(a) Unregistered generators who ship hazardous waste or Class 1 waste shall prepare a complete and correct Waste Shipment Summary (S1) from the manifests.

(b) Unregistered generators or out-of-state primary exporters who export hazardous waste from or through Texas to a foreign country, shall prepare a complete and correct Waste Shipment Summary (S1) from the manifests.

(c) Registered generators or out-of-state primary exporters who import hazardous or Class 1 waste from a foreign country through Texas to another state shall prepare a complete and correct Foreign Waste Shipment Summary (F1) from the manifests.

(d) The Waste Shipment Summary (S1) and the Foreign Waste Shipment Summary (F1) shall be prepared in a form provided or approved by the executive director and submitted to the executive director on or before the 25th of each month for shipments originating during the previous month. The unregistered generator or in-state/out-of-state primary exporter must keep a copy of each summary for a period of at least three years from the due date of the summary. These generators are required to prepare and submit a Waste Shipment Summary (S1) and/or Foreign Waste Shipment Summary (F1) only for those months in which shipments are actually made. Conditionally exempt small quantity generators shipping municipal hazardous waste are not subject to the requirements of this subsection.

(e) The following figure is a graphic representation illustrating generator, waste type, shipment type, and report method.
Figure: 30 TAC §335.13(e) (No change.)

(f) A registered generator is defined as an in-state generator who has complied with §335.6 of this title (relating to Notification Requirements), and is assigned a solid waste registration number.

(g) An unregistered generator is defined as an in-state generator who is not a conditionally exempt small quantity generator, as defined in §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators), that ships hazardous waste and/or Class 1 waste using a temporary solid waste registration number and a temporary Texas waste code number assigned by the executive director.

(h) A primary exporter/importer is defined as:

(1) an in-state generator who imports hazardous waste or Class 1 waste from a foreign country into or through Texas to another state and/or exports hazardous waste to a foreign country; or

(2) an out-of-state generator/importer of record who imports hazardous waste or Class 1 waste from a foreign country into or through Texas to another state and/or exports hazardous waste through Texas to a foreign country.

(i) The registered/unregistered generator or primary exporter shall retain a copy of each manifest required by §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) for a minimum of three years from the date of shipment by the registered/unregistered generator or primary exporter.

(j) A registered/unregistered generator who does not receive a copy of the manifest with the handwritten signature of the owner or operator of the designated facility within 35 days of the date the waste was accepted by the initial transporter must contact the transporter and/or the owner or operator of the designated facility to determine the status of the hazardous waste or Class 1 waste.

(k) A registered/unregistered generator or primary exporter of hazardous waste subject to §335.76(c) of this title (relating to Additional Requirements Applicable to International Shipments) must submit an exception report to the executive director if he has not received a copy of the manifest with the handwritten signatures of the owner or operator of the designated facility within 45 days of the date that the waste was accepted by the initial transporter. The exception report must be retained by the registered/unregistered generator or primary exporter for at least three years from the date the waste was accepted by the initial transporter and must include:

(1) a legible copy of the manifest for which the generator does not have confirmation of delivery; and

(2) a copy of a letter signed by the generator or his authorized representative explaining the efforts taken to locate the hazardous waste or Class 1 waste and the results of those efforts.

(l) The periods of record retention required by this section are automatically extended during the course of any unresolved enforcement action regarding the regulated activity.

(m) The requirements of subsections (j) and (k) of this section do not apply to generators who generate hazardous waste or Class 1 waste in quantities less than 100 kilograms in a calendar month, or acute hazardous waste in quantities specified in §335.78 of this title.

(n) Primary exporters of hazardous waste as defined in 40 Code of Federal Regulations (CFR) §262.51 must submit an annual report in accordance with the requirements set out in the regulations contained in 40 CFR §262.56, as amended and adopted through March 18, 2010 (75 FR 12989). [~~April 12, 1996, at 61 FedReg 16290.~~]

(o) Primary exporters of hazardous waste as defined in 40 CFR §262.51, or importers of hazardous waste, to or from countries listed in 40 CFR §262.58(a)(1) for recovery, must comply with 40 CFR Part 262, Subparts A and H.

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

(a) The executive director may grant requests for a variance from classifying as a solid waste those materials that are accumulated speculatively without sufficient amounts being recycled if the applicant demonstrates that sufficient amounts of the material will be recycled or transferred for recycling in the following year. If a variance is granted, it is valid only for the following year, but can be renewed, on an annual basis, by filing a new application. The executive director's decision will be based on the following criteria:

(1) the manner in which the material is expected to be recycled, when the material is expected to be recycled, and whether this expected disposition is likely to occur (for example, because of past practice, market factors, the nature of the material, or contractual arrangements for recycling);

(2) the reason that the applicant has accumulated the material for one or more years without recycling 75% of the weight or volume accumulated at the beginning of the year;

(3) the quantity of material already accumulated and the quantity expected to be generated and accumulated before the material is recycled;

(4) the extent to which the material is handled to minimize loss; and

(5) other relevant factors.

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

(1) how economically viable the production process would be if it were to use virgin materials, rather than reclaimed materials;

[~~(2) the prevalence of the practice on an industry-wide basis;~~]

(2) [~~(3)~~] the extent to which the material is handled before reclamation to minimize loss;

(3) [~~(4)~~] the time periods between generating the material and its reclamation, and between reclamation and return to the original primary production process;

(4) [~~(5)~~] the location of the reclamation operation in relation to the production process;

(5) [~~(6)~~] whether the reclaimed material is used for the purpose for which it was originally produced when it is returned to the original process, and whether it is returned to the process in substantially its original form;

(6) [~~(7)~~] whether the person who generates the material also reclaims it; and

(7) [~~(8)~~] other relevant factors.

(c) The executive director may grant requests for a variance from classifying as a solid waste those materials that have been reclaimed but must be reclaimed further before recovery is completed if, after initial reclamation, the resulting material is commodity-like (even though it is not yet a commercial product, and has to be reclaimed further). This determination will be based on the following factors:

(1) the degree of processing the material has undergone and the degree of further processing that is required;

(2) the value of the material after it has been reclaimed;

(3) the degree to which the reclaimed material is like an analogous raw material;

(4) the extent to which an end market for the reclaimed material is guaranteed;

(5) the extent to which the reclaimed material is handled to minimize loss; and

(6) other relevant factors.

(d) Other portions of this chapter that relate to solid wastes that are recycled include §335.1 of this title (relating to Definitions), under the definition of "Solid Waste," §335.6 of this title (relating to Notification Requirements), §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Variances from Classification as a Solid Waste), §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities [~~Materials~~]).

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

(a) Hazardous wastes that are recycled are subject to the requirements for generators, transporters, and storage facilities of subsections (d) - (f) of this section, except for the materials listed in subsections (b) and (c) of this section. Hazardous wastes that are recycled will be known as recyclable materials. Nonhazardous industrial wastes that are recycled will be known as nonhazardous recyclable materials. Nonhazardous recyclable materials are subject to the requirements of subsections (h) - (l) of this section.

(b) The following recyclable materials are not subject to the requirements of this section, except as provided in subsections (g) and (h) of this section, but are regulated under the applicable provisions of Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities) and all applicable provisions in Chapter 305 of this title (relating to Consolidated Permits); Chapter 1 of this title (relating to Purpose of Rules, General Provisions); Chapter 3 of this title (relating to Definitions); Chapter 10 of this title (relating to Commission Meetings); Chapter 17 of this title (relating to Tax Relief for Property Used for Environmental Protection); Chapter 20 of this title (relating to Rulemaking); Chapter 37 of this title (relating to Financial Assurance); Chapter 39 of this title (relating to Public Notice); Chapter 40 of this title (relating to Alternative Dispute Resolution Procedure); Chapter 50 of this title (relating to Action on Applications and Other Authorizations); Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment); Chapter 70 of this title (relating to Enforcement); Chapter 80 of this title (relating to Contested Case Hearings); and Chapter 86 of this title (relating to Special Provisions for Contested Case Hearings)[~~; and Chapter 261 of this title (relating to Impact Statements)~~].

(1) recyclable materials used in a manner constituting disposal;

(2) hazardous wastes burned for energy recovery in boilers and industrial furnaces that are not regulated under Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities) or Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities);

(3) recyclable materials from which precious metals are reclaimed;

(4) spent lead-acid batteries that are being reclaimed.

(c) The following recyclable materials are not subject to regulation under Subchapters B - I or O of this chapter (relating to Hazardous Waste Management General Provisions; Standards Applicable to Generators of Hazardous Waste; Standards Applicable to Transporters of Hazardous Waste; Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities; Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities; Location Standards for Hazardous Waste Storage, Processing, or Disposal; Standards for the Management of Specific Wastes and Specific Types of Facilities; Prohibition on Open Dumps; and Land Disposal Restrictions); Chapter 1 of this title; Chapter 3 of this title; Chapter 10 of this title; Chapter 17 of this title; Chapter 20 of this title; Chapter 37 of this title; Chapter 39 of this title; Chapter 40 of this title; Chapter 50 of this title; Chapter 55 of this title; Chapter 70 of this title; Chapter 80 of this title; Chapter 86 of this title; [~~Chapter 261 of this title;~~] or Chapter 305 of this title, except as provided in subsections (g) and (h) of this section:

(1) industrial ethyl alcohol that is reclaimed except that, unless provided otherwise in an international agreement as specified in the regulations contained in 40 Code of Federal Regulations (CFR) §262.58, which are in effect as of November 8, 1986:

(A) a person initiating a shipment for reclamation in a foreign country, and any intermediary arranging for the shipment, must comply with the requirements applicable to a primary exporter in the regulations contained in 40 CFR §§262.53, 262.55, 262.56(a)(1) - (4) and (6) and (b), and 262.57, as amended through January 8, 2010 (75 FR 1236) [~~which are in effect as of November 8, 1986~~], export such materials only upon such consent of the receiving country and in conformance with the United States Environmental Protection Agency (EPA) [~~EPA~~] acknowledgment of consent as defined in the regulations contained in 40 CFR Part 262, Subpart E, as amended through January 8, 2010 (75 FR 1236) [~~which are in effect as of November 8, 1986~~], and provide a copy of the EPA acknowledgment of consent to the shipment to the transporter transporting the shipment for export;

(B) transporters transporting a shipment for export may not accept a shipment if he knows the shipment does not conform to the EPA acknowledgment of consent, must ensure that a copy of the EPA acknowledgment of consent accompanies the shipment and must ensure that it is delivered to the facility designated by the person initiating the shipment;

(2) scrap metal that is not already excluded under 40 CFR §261.4(a)(13);

(3) fuels produced from the refining of oil-bearing hazardous waste along with normal process streams at a petroleum refining facility if such wastes result from normal petroleum refining, production, and transportation practices (this exemption does not apply to fuels produced from oil recovered from oil-bearing hazardous waste, where such recovered oil is already excluded under 40 CFR §261.4(a)(12)); and

(4) the following hazardous waste fuels:

(A) Hazardous waste fuel produced from oil-bearing hazardous wastes from petroleum refining, production or transportation practices, or produced from oil reclaimed from such hazardous wastes where such hazardous wastes are reintroduced into a process that does not use distillation or does not produce products from crude oil so long as the resulting fuel meets the used oil specification under 40 CFR §279.11 and so long as no other hazardous wastes are used to produce the hazardous waste fuel;

(B) Hazardous waste fuel produced from oil-bearing hazardous waste from petroleum refining production, and transportation practices, where such hazardous wastes are reintroduced into a refining process after a point at which contaminants are removed, so

long as the fuel meets the used oil fuel specification under 40 CFR §279.11;

(C) Oil reclaimed from oil-bearing hazardous wastes from petroleum refining, production, and transportation practices, which reclaimed oil is burned as fuel without reintroduction to a refining process, so long as the reclaimed oil meets the used oil fuel specification under 40 CFR §279.11.

(d) Generators and transporters of recyclable materials are subject to the applicable requirements of Subchapter C of this chapter [~~(relating to Standards Applicable to Generators of Hazardous Waste)~~] and Subchapter D of this chapter [~~(relating to Standards Applicable to Transporters of Hazardous Waste)~~], and the notification requirements of §335.6 of this title (relating to Notification Requirements), except as provided in subsections (a) - (c) of this section.

(e) Owners or operators of facilities that store recyclable materials before they are recycled are regulated under all applicable provisions of this chapter, and Chapter 305 of this title; Chapter 1 of this title; Chapter 3 of this title; Chapter 10 of this title; Chapter 17 of this title; Chapter 20 of this title; Chapter 37 of this title; Chapter 39 of this title; Chapter 40 of this title; Chapter 50 of this title; Chapter 55 of this title; Chapter 70 of this title; Chapter 80 of this title; and the notification requirements under §335.6 of this title, except as provided in subsections (a) - (c) of this section. The recycling process itself is exempt from regulation.

(f) Owners or operators of facilities that recycle recyclable materials without storing them before they are recycled are subject to the following requirements, except as provided in subsections (a) - (c) of this section:

(1) notification requirements under §335.6 of this title; and

(2) Section 335.12 [~~§335.12~~] of this title (relating to Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, [~~Processing,~~] or Disposal Facilities).

(g) Recyclable materials (excluding those listed in subsections (b)(4), and (c)(1) - (5) [~~(c)(1) and (2) - (5)~~] of this section) remain subject to the requirements of §§335.4, 335.6, and 335.9 - 335.15 of this title (relating to General Prohibitions; Notification Requirements; Recordkeeping and Annual Reporting Procedures Applicable to Generators; Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste; Shipping Requirements for Transporters of Hazardous Waste or Class 1 Waste; Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, [~~Processing,~~] or Disposal Facilities; Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class 1 Waste; Recordkeeping Requirements Applicable to Transporters of Hazardous Waste or Class 1 Waste; and Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Treatment, Storage, [~~Processing,~~] or Disposal Facilities, respectively), as applicable. Recyclable materials listed in subsections (b)(4) and (c)(2) of this section remain subject to the requirements of subsection (h) of this section.

(h) Industrial solid wastes that are nonhazardous recyclable materials and recyclable materials listed in subsections (b)(4) and (c)(2) of this section remain subject to the requirements of §335.4 of this title. In addition, industrial solid wastes that are nonhazardous recyclable materials and recyclable materials listed in subsection (c)(2) of this section remain subject to the requirements of §335.6 of this title. Industrial solid wastes that are nonhazardous recyclable materials and recyclable materials listed in subsections (b)(4) and (c)(2) of this section may also be subject to the requirements of §§335.10 - 335.15 of this title, as applicable, if the executive director determines that such requirements are necessary to protect human health and the environment. In making the determination, the executive director shall consider the following criteria:

(1) the waste's toxicity, corrosivity, flammability, ability to sensitize or irritate, or propensity for decomposition and creation of sudden pressure;

(2) the potential for the objectionable constituent to migrate from the waste into the environment if improperly managed;

(3) the persistence of any objectionable constituent or any objectionable degradation product in the waste;

(4) the potential for the objectionable constituent to degrade into nonharmful constituents;

(5) the degree to which the objectionable constituent bioaccumulates in ecosystems;

(6) the plausible types of improper management to which the waste could be subjected;

(7) the nature and severity of potential damage to the public health and environment;

(8) whether subjecting the waste to additional regulation will provide additional protection for human health and the environment; and

(9) other relevant factors.

(i) Except as provided in Texas Health and Safety Code, §361.090, facilities managing recyclable materials that are required to obtain a permit under this section may also be permitted to manage nonhazardous recyclable materials at the same facility if the executive director determines that such regulation is necessary to protect human health and the environment. In making this determination, the executive director shall consider the following criteria:

(1) whether managing nonhazardous recyclable materials will create an additional risk of release of the hazardous recyclable materials into the environment;

(2) whether hazardous and nonhazardous wastes that are incompatible are stored and/or processed in the same or connected units;

(3) whether the management of recyclable materials and nonhazardous recyclable materials is segregated within the facility;

(4) the waste's toxicity, corrosivity, flammability, ability to sensitize or irritate, or propensity for decomposition and creation of sudden pressure;

(5) the potential for the objectionable constituent to migrate from the waste into the environment if improperly managed;

(6) the persistence of any objectionable constituent or any objectionable degradation product in the waste;

(7) the potential for the objectionable constituent to degrade into harmful constituents;

(8) the degree to which the objectionable constituent bioaccumulates in ecosystems;

(9) the plausible types of improper management to which the waste could be subjected;

(10) the nature and severity of potential damage to the public health and environment;

(11) whether subjecting the waste to additional regulation will provide additional protection for human health and the environment; and

(12) other relevant factors.

(j) Closure cost estimates.

(1) Except as otherwise approved by the executive director, an owner or operator of a recycling facility that stores combustible nonhazardous materials outdoors, or that poses a significant risk to public health and safety as determined by the executive director, shall provide a written cost estimate, in current dollars, showing the cost of hiring a third party to close the facility by disposition of all processed and unprocessed materials in accordance with all applicable regulations. The closure cost estimate for financial assurance must be submitted with any new notification in accordance with §335.6 within 60 days of the effective date of this rule for existing facilities or as otherwise requested by the executive director.

(2) The estimate must:

(A) equal the costs of closure of the facility, including disposition of the maximum inventories of all processed and unprocessed combustible materials stored outdoors on site during the life of the facility, in accordance with all applicable regulations;

(B) be based on the costs of hiring a third party that is not affiliated (as defined in §328.2 of this title (relating to Definitions)) with the owner or operator; and

(C) be based on a per cubic yard and/or short ton measure for collection and disposition costs.

(k) Financial assurance. An owner or operator of a recycling facility that stores nonhazardous combustible recyclable materials outdoors, or that poses a significant risk to public health and safety as determined by the executive director, shall establish and maintain financial assurance for closure of the facility in accordance with Chapter 37, Subchapter J of this title (relating to Financial Assurance for Recycling Facilities).

(l) Closure requirements.

(1) Closure must include collecting processed and unprocessed materials, and transporting the materials to an authorized facility for disposition unless otherwise approved or directed in writing by the executive director.

(2) Closure of the facility must be completed within 180 days following the most recent acceptance of processed or unprocessed materials unless otherwise approved or directed in writing by the executive director.

(m) Used oil that is recycled and is also a hazardous waste solely because it exhibits a hazardous characteristic is not subject to the requirements of Subchapters A - I or O of this chapter, but is regulated under Chapter 324 of this title (relating to Used Oil Standards). Used oil that is recycled includes any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes, but is not limited to, oil which is re-refined, reclaimed, burned for energy recovery, or reprocessed.

(n) Owners or operators of facilities subject to hazardous waste permitting requirements with hazardous waste management units that recycle hazardous wastes are subject to the requirements of 40 CFR Part 264 or Part 265, Subparts AA and BB, as adopted by reference under §335.152(a)(17) and (18) and §335.112(a)(19) and (20) of this title (relating to Standards).

(o) Hazardous waste that is exported to or imported from designated member countries of the Organization for Economic Cooperation and Development (OECD), as defined in 40 CFR §262.58(a)(1), for purpose of recovery, and any person who exports or imports such hazardous waste, is subject to the requirements of 40 CFR Part 262, Subpart H (both federal regulation references as amended and adopted through April 12, 1996 at 61 FedReg 16290), if the hazardous waste is subject to the federal manifesting requirements of 40 CFR Part 262, or subject to the universal waste management standards of 40 CFR Part 273, or subject to Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(p) Other portions of this chapter that relate to solid wastes that are recycled include §335.1 of this title (relating to Definitions), under the definition of "Solid waste," §335.6 of this title, §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste), and Subchapter H of this chapter.

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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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER C. STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

30 TAC §§335.61, 335.62, 335.69, 335.76, 335.78, 335.79

Statutory Authority

The amendments and new section are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024, (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments and new section implement THSC, Chapter 361.

§335.61. Purpose, Scope and Applicability.

(a) Except as provided in subsection (b) of this section, this subchapter establishes standards for generators of hazardous waste. These standards are in addition to any applicable provisions contained

in Subchapter A of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste [~~Management~~] in General).

(b) The provisions of this subchapter with which a generator who stores, processes or disposes of hazardous waste on-site must comply are §335.62 of this title (relating to Hazardous Waste Determination and Waste Classification), §335.63 of this title (relating to EPA Identification Numbers), §335.70 of this title (relating to Recordkeeping), §335.73 of this title (relating to Additional Reporting), and, if applicable, §335.77 of this title (relating to Farmers), and §335.69 of this title (relating to Accumulation Time).

(c) Any person who imports hazardous waste into the state from a foreign country shall comply with standards applicable to generators.

(d) An owner or operator who initiates a shipment of hazardous waste from a processing, storage or disposal facility must comply with the generator standards contained in §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) and §335.13 of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste), and this subchapter. The provisions of §335.69 of this title [(~~relating to Accumulation Time~~)] are applicable to on-site accumulation of hazardous wastes by generators. Therefore, the provisions of §335.69 of this title only apply to owners or operators who are shipping hazardous waste which they generate at that facility.

(e) A farmer who generates waste pesticides which are hazardous waste and who complies with §335.77 of this title is not required to comply with this chapter with respect to those pesticides.

(f) A generator who treats, stores, or disposes of hazardous waste on-site must comply with the applicable standards and permit requirements set forth in Subchapters E, F, H, and O of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste) and with Chapter 305 of this title (relating to Consolidated Permits).

(g) Section 335.78(c) and (d) of this title (relating to Special Requirements for Hazardous Waste Generated By Conditionally Exempt Small Quantity Generators) must be used to determine the applicability of provisions of this subchapter that are dependent on calculations of the quantity of hazardous waste generated per month.

(h) The requirements of this subchapter do not apply to persons responding to an explosives or munitions emergency in accordance with §335.41(d)(2) of this title (relating to Purpose, Scope and Applicability).

(i) For purposes of this subsection, the terms "laboratory" and "eligible academic entity" shall have the meaning as defined in 40 Code of Federal Regulations §262.200. The laboratories owned by an eligible academic entity that chooses to be subject to the requirements of §335.79 of this title (relating to Alternative Requirements for Hazardous Waste Determination and Accumulation of Unwanted Material for Laboratories Owned by Eligible Academic Entities) are not subject to:

(1) for large and small quantity generators, the requirements of §335.504 of this title (relating to Hazardous Waste Determination) and §335.69 of this title, except as provided in §335.79 of this title; and

(2) for conditionally exempt small quantity generators, the conditions of §335.78 of this title, except as provided in §335.79 of this title.

§335.62. Hazardous Waste Determination and Waste Classification.

A person who generates a solid waste must determine if that waste is hazardous pursuant to §335.504 of this title (relating to Hazardous Waste Determination) and must classify any nonhazardous waste under the provisions of Subchapter R of this chapter (relating to Waste Classification). If the waste is determined to be hazardous, the generator must refer to this chapter and to 40 Code of Federal Regulations Parts 261, 264, 265, 266, 267, 268, and 273 for any possible applicable exclusions or restrictions pertaining to management of the specific waste.

§335.69. Accumulation Time.

(a) Generators that comply with the requirements of paragraph (1) of this subsection are exempt from all requirements adopted by reference in §335.112(a)(6) and (7) of this title (relating to Standards), except 40 Code of Federal Regulations (CFR) §265.111 and §265.114. Except as provided in subsections (f) - (h) and (n) of this section, a generator may accumulate hazardous waste on-site for 90 days without a permit or interim status provided that:

(1) the waste is placed:

(A) in containers and the generator complies with the applicable requirements of 40 CFR Part 265, Subparts I, AA, [~~and~~] BB, and CC, as adopted by reference under §335.112(a) of this title; and/or

(B) in tanks and the generator complies with the applicable requirements of 40 CFR Part 265, Subparts J, AA, BB, and CC, except 40 CFR §265.197(c) and §265.200, as adopted by reference under §335.112(a) of this title; and/or

(C) on drip pads and the generator complies with §335.112(a)(18) of this title and maintains the following records at the facility: a description of procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal; and/or

(D) in containment buildings and the generator complies with 40 CFR Part 265, Subpart DD, as adopted by reference under §335.112(a) of this title and has placed its professional engineer certification that the building complies with the design standards specified in 40 CFR §265.1101 in the facility's operating record prior to operation of the unit. The owner or operator shall maintain the following records at the facility:

(i) a written description of procedures to ensure that each waste volume remains in the unit for no more than 90 days, a written description of the waste generation and management practices for the facility showing that they are consistent with respecting the 90-day limit, and documentation that the procedures are complied with; or

(ii) documentation that the unit is emptied at least once every 90 days;

(2) the date upon which each period of accumulation begins is clearly marked and visible for inspection on each container; and

(3) while being accumulated on-site, each container and tank is labeled or marked clearly with the words, "Hazardous Waste"; and

(4) the generator complies with the following:

(A) the requirements for owners or operators in 40 CFR Part 265, Subparts C and D and with 40 CFR §265.16, as adopted by reference in §335.112(a) of this title;

(B) all applicable requirements under 40 CFR Part 268 [~~40 CFR §268.7(a)(5)~~], as adopted by reference under §335.431

[§335.431(c)] of this title (relating to Purpose, Scope, and Applicability); and

(C) Section 335.113 [§335.113] of this title (relating to Reporting of Emergency Situations by Emergency Coordinator).

(b) A generator of 1,000 kilograms or greater of hazardous waste in a calendar month, or greater than 1 kilogram of acute hazardous waste listed in 40 CFR §261.31 or §261.33(e) in a calendar month, who accumulates hazardous waste or acute hazardous waste for more than 90 days is an operator of a storage facility and is subject to the requirements of 40 CFR Parts 264, 265, and 267 and the permit requirements of 40 CFR Part 270 unless he has been granted an extension to the 90-day period. [A generator who accumulates hazardous waste for more than 90 days is an operator of a hazardous waste storage facility and is subject to the requirements of this chapter and Chapter 305 of this title (relating to Consolidated Permits) applicable to such owners and operators, unless he has been granted an extension to the 90-day period.] Such extension may be granted by the executive director if hazardous wastes must remain on-site for longer than 90 days due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days may be granted at the discretion of the executive director on a case-by-case basis.

(c) Persons exempted under this provision, who generate hazardous waste, are still subject to the requirements in Subchapter A of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste in General) applicable to generators of Class 1 waste.

(d) A generator, other than a conditionally exempt small quantity generator regulated under §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators), may accumulate as much as 55 gallons of hazardous waste or one quart of acutely hazardous waste listed in 40 CFR §261.31 or §261.33(e) in containers at or near any point of generation where wastes initially accumulate, which is under the control of the operator of the process generating the waste, without a permit or interim status and without complying with subsection (a) or (f) of this section provided he:

(1) complies with 40 CFR §§265.171, 265.172, and 265.173(a), as adopted by reference under §335.112(a) of this title; and

(2) marks his containers either with the words "Hazardous Waste" or with other words that identify the contents of the containers.

(e) A generator who accumulates either hazardous waste or acutely hazardous waste listed in 40 CFR §261.31 or §261.33(e) in excess of the amounts listed in subsection (d) of this section at or near any point of generation must, with respect to that amount of excess waste, comply within three days with subsection (a) of this section or other applicable provisions of this chapter. During the three-day period, the generator must continue to comply with subsection (d) of this section. The generator must mark the container holding the excess accumulation of hazardous waste with the date the excess amount began accumulating.

(f) A generator who generates greater than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month may accumulate hazardous waste on-site for 180 days or less without a permit or without having interim status provided that:

(1) the quantity of waste accumulated on-site never exceeds 6,000 kilograms;

(2) the generator complies with the requirements of 40 CFR Part 265, Subpart I, as adopted by reference under §335.112(a) of this title, except 40 CFR §265.176 and §265.178;

(3) the generator complies with the requirements of 40 CFR §265.201, as adopted by reference under §335.112(a) of this title;

(4) the generator complies with the requirements of:

(A) subsection (a)(2) and (3) of this section;

(B) 40 CFR Part 265, Subpart C, as adopted by reference under §335.112(a) of this title; [and]

(C) all applicable requirements under 40 CFR Part 267, as adopted by reference under §335.601 and §335.602 of this title (relating to Purpose, Scope, and Applicability; and Standards); and

(D) [(C)] all applicable requirements under 40 CFR Part 268 [40 CFR §268.7(a)(5)], as adopted by reference under §335.431 [§335.431(c)] of this title; and

(5) the generator complies with the following requirements.

(A) At all times there must be at least one employee either on the premises or on call (i.e., available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures specified in subparagraph (D) of this paragraph. This employee is the emergency coordinator.

(B) The generator must post the following information next to telephones that may be used to summon emergency assistance:

(i) the name and telephone number of the emergency coordinator;

(ii) location of fire extinguishers and spill control material, and, if present, fire alarm; and

(iii) the telephone number of the fire department, unless the facility has a direct alarm.

(C) The generator must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures, relevant to their responsibilities during normal facility operations and emergencies;

(D) The emergency coordinator or his designee must respond to any emergencies that arise. The applicable responses are as follows.

(i) In the event of a fire, call the fire department or attempt to extinguish it using a fire extinguisher.

(ii) In the event of a spill, contain the flow of hazardous waste to the extent possible, and as soon as is practicable, clean up the hazardous waste and any contaminated materials or soil.

(iii) In the event of a fire, explosion, or other release which could threaten human health outside the facility or when the generator has knowledge that a spill has reached surface water, the generator must immediately notify the National Response Center (using its 24-hour toll free number (800) 424-8802) and the commission according to the procedures set out in the State of Texas oil and hazardous substances spill contingency plan. The reports must include the following information:

(I) the name, address, and United States Environmental Protection Agency (EPA) identification number of the generator;

(II) date, time, and type of incident (e.g., spill or fire);

(III) quantity and type of hazardous waste involved in the incident;

(IV) extent of injuries, if any; and

(V) estimated quantity and disposition of recovered materials, if any.

(g) A generator who generates greater than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month and who must transport his waste, or offer his waste for transportation, over a distance of 200 miles or more for off-site processing, storage, or disposal may accumulate hazardous waste on-site for 270 days or less without a permit or without having interim status, provided that he complies with the requirements of subsection (f) of this section.

(h) A generator who generates greater than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month and who accumulates hazardous waste in quantities exceeding 6,000 kilograms or accumulates hazardous waste for more than 180 days (or for more than 270 days if he must transport his waste, or offer his waste for transportation, over a distance of 200 miles or more) is an operator of a storage facility and is subject to the requirements of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste), and Subchapters E and F of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities; and Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) and the permit requirements of Chapter 305 of this title (relating to Consolidated Permits), unless he has been granted an extension to the 180-day (or 270-day, if applicable) period. Such extension may be granted by the executive director if hazardous wastes must remain on-site for longer than 180 days (or 270 days, if applicable) due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days may be granted at the discretion of the executive director on a case-by-case basis.

(i) A generator who generates or collects hazardous waste for the purpose of treatability studies is not subject to this section.

(j) A generator of 1,000 kilograms or greater of hazardous waste per calendar month who also generates wastewater treatment sludges from electroplating operations that meet the listing description for EPA hazardous waste number F006, may accumulate F006 waste on-site for more than 90 days, but not more than 180 days without a permit or without having interim status provided that:

(1) the generator has implemented pollution prevention practices that reduce the amount of any hazardous substances, pollutants, or contaminants entering the F006 waste or otherwise released to the environment prior to its recycling;

(2) the F006 waste is legitimately recycled through metals recovery;

(3) no more than 20,000 kilograms of F006 waste is accumulated on-site at any one time; and

(4) the F006 waste is managed in accordance with the following:

(A) the F006 waste is placed:

(i) in containers and the generator complies with the applicable requirements of 40 CFR Part 265, Subparts I, AA, and BB, as adopted by reference under §335.112(a) of this title, and 40 CFR Part 265, Subpart CC; and/or

(ii) in tanks and the generator complies with the applicable requirements of 40 CFR Part 265, Subparts J, AA, BB, as adopted by reference under §335.112(a) of this title, and 40 CFR Part 265, Subpart CC, except 40 CFR §265.197(c) and §265.200; and/or

(iii) in containment buildings and the generator complies with 40 CFR Part 265, Subpart DD, as adopted by reference under §335.112(a) of this title, and has placed its professional engineer certification that the building complies with the design standards specified in 40 CFR §265.1101 in the facility's operating record prior to operation of the unit. The owner or operator shall maintain the following records at the facility:

(I) a written description of procedures to ensure that the F006 waste remains in the unit for no more than 180 days, a written description of the waste generation and management practices for the facility showing that they are consistent with the 180-day limit, and documentation that the generator is complying with the procedures; or

(II) documentation that the unit is emptied at least once every 180 days;

(B) the generator complies with 40 CFR §265.111 and §265.114, as adopted by reference under §335.112(a)(6) of this title;

(C) the date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

(D) while being accumulated on-site, each container and tank is labeled or marked clearly with the words "Hazardous Waste"; and

(E) the generator complies with the following:

(i) the requirements for owners or operators in 40 CFR Part 265, Subparts C and D, and 40 CFR §265.16, as adopted by reference under §335.112(a) of this title;

(ii) 40 CFR §268.7(a)(5), as adopted by reference under §335.431(c) of this title; and

(iii) Section 335.113 [~~§335.113~~] of this title.

(k) A generator of 1,000 kilograms or greater of hazardous waste per calendar month who also generates wastewater treatment sludges from electroplating operations that meet the listing description for EPA hazardous waste number F006, and who must transport this waste, or offer this waste for transportation, over a distance of 200 miles or more for off-site metals recovery, may accumulate F006 waste on-site for more than 90 days, but not more than 270 days without a permit or without having interim status if the generator complies with the requirements of subsection (j)(1) - (4) of this section.

(l) A generator accumulating F006 waste in accordance with subsection (j) or (k) of this section who accumulates F006 waste on-site for more than 180 days (or for more than 270 days if the generator must transport this waste, or offer this waste for transportation, over a distance of 200 miles or more), or who accumulates more than 20,000 kilograms of F006 waste on-site is an operator of a hazardous waste storage facility and is subject to the requirements of this chapter and Chapter 305 of this title applicable to such owners and operators, unless the generator has been granted an extension to the 180-day (or 270-day if applicable) period or an exception to the 20,000 kilogram accumulation limit. Such extensions and exceptions may be granted by the executive director if F006 waste must remain on-site for longer than 180 days (or 270 days if applicable) or if more than 20,000 kilograms of F006 waste must remain on-site due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days or an exception to the accumulation limit may be granted at the discretion of the executive director on a case-by-case basis.

(m) A generator who sends a shipment of hazardous waste to a designated facility with the understanding that the designated facility can accept and manage the waste and later receives that shipment

back as a rejected load or residue in accordance with the manifest discrepancy provisions of §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) may accumulate the returned waste on-site in accordance with subsections (a) and (b) or (f) - (h) of this section depending on the amount of hazardous waste on-site in that calendar month. Upon receipt of the returned shipment, the generator must:

(1) Sign Item 18c of the manifest, if the transporter returned the shipment using the original manifest; or

(2) Sign Item 20 of the manifest, if the transporter returned the shipment using a new manifest.

(n) A generator who sends a shipment of Class 1 waste to a designated facility with the understanding that the designated facility can accept and manage the waste and later receives that shipment back as a rejected load or residue in accordance with the manifest discrepancy provisions of §335.10 of this title may accumulate the returned waste on-site. Upon receipt of the returned shipment, the generator must:

(1) Sign Item 18c of the manifest, if the transporter returned the shipment using the original manifest; or

(2) Sign Item 20 of the manifest, if the transporter returned the shipment using a new manifest.

§335.76. Additional Requirements Applicable to International Shipments.

(a) Any person who exports hazardous waste to a foreign country or imports hazardous waste from a foreign country into the state must comply with the requirements of this title and with the special requirements of this section. Except to the extent the regulations contained in 40 Code of Federal Regulations (CFR) §262.58 as amended through January 8, 2010 (75 FR 1236) [~~July 14, 2006 (71 FR 40254)~~], a primary exporter of hazardous waste must comply with the special requirements of this section as they apply to primary exporters, and a transporter transporting hazardous waste for export must comply with applicable requirements of §335.11 of this title (relating to Shipping Requirements for Transporters of Hazardous Waste or Class 1 Waste) and §335.14 of this title (relating to Recordkeeping Requirements Applicable to Transporters of Hazardous Waste or Class 1 Waste) and Subchapter D of this chapter (relating to Standards Applicable to Transporters of Hazardous Waste). 40 CFR §262.58 sets forth the requirements of international agreements between the United States and receiving countries which establish different notice, export, and enforcement procedures for the transportation, processing, storage, and disposal of hazardous waste for shipments between the United States and those countries.

(b) Exports of hazardous waste are prohibited except in compliance with the applicable requirements of this subchapter, the special requirements of this section, and §335.11 of this title and §335.14 of this title and Subchapter D of this chapter. Exports of hazardous waste are prohibited unless:

(1) notification in accordance with the regulations contained in 40 CFR §262.53, as amended and adopted through April 12, 1996 (61 FR 16290) has been provided;

(2) the receiving country has consented to accept the hazardous waste;

(3) a copy of the United States Environmental Protection Agency (EPA) acknowledgment of consent to the shipment accompanies the hazardous waste shipment and, unless exported by rail, is attached to the manifest (or shipping paper for exports by water (bulk shipment));

(4) the hazardous waste shipment conforms to the terms of the receiving country's written consent as reflected in the EPA acknowledgment of consent; and

(5) the primary exporter complies with the manifest requirements of §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) except that:

(A) the primary exporter must attach a copy of the EPA acknowledgment of consent to the shipment to the manifest which must accompany the hazardous waste shipment. For exports by rail or water (bulk shipment), the primary exporter must provide the transporter with an EPA acknowledgment of consent which must accompany the hazardous waste but which need not be attached to the manifest except that for exports by water (bulk shipment) the primary exporter must attach the copy of the EPA acknowledgment of consent to the shipping paper; and

(B) the primary exporter may obtain the manifest from any source that is registered with the EPA as a supplier of manifests.

(c) A primary exporter [~~exportor~~] must submit an exception report to the executive director if:

(1) he has not received a copy of the manifest signed by the transporter stating the date and place of departure from the United States within 45 days from the date it was accepted by the initial transporter;

(2) within 90 days from the date the waste was accepted by the initial transporter, the primary exporter [~~exportor~~] has not received written confirmation from the foreign consignee that the hazardous waste was received; or

(3) the waste was returned to the United States.

(d) When importing hazardous waste into the state from a foreign country, a person must prepare a manifest in accordance with the requirements of §335.10 of this title and 40 CFR §262.60. [~~for the manifest except:~~]

[~~(1) in place of the generator's name, address, and EPA identification number, the name and address of the foreign generator and the importer's name, address, and EPA identification number must be used;~~]

[~~(2) in place of the generator's signature on the certification statement, the United States importer or his agent must sign and date the certification and obtain the signature of the initial transporter; and~~]

[~~(3) a person who imports hazardous waste may obtain the Uniform Hazardous Waste Manifest from any source that is registered with the EPA as a supplier of manifests.~~]

(e) Any person exporting hazardous waste shall file an annual report with the executive director as required in §335.9 of this title (relating to Recordkeeping and Annual Reporting Procedures Applicable to Generators) summarizing the types, quantities, frequency, and ultimate destination of all such hazardous waste exported during the previous calendar year.

(f) Any person who exports hazardous waste to a foreign country or imports hazardous waste from a foreign country into the state must comply with the requirements of the regulations contained in 40 CFR §262.58 (International Agreements), as amended and adopted through January 8, 2010 (75 FR 1236) [~~April 12, 1996 (61 FR 16290)~~].

(g) Except to the extent that they are clearly inconsistent with Texas Health and Safety Code, Chapter 361, or the rules of the commission, primary exporters must comply with the regulations contained in 40 CFR §262.57, which are in effect as of November 8, 1986.

(h) Transfrontier shipments of hazardous waste for recovery within countries belonging to the Organization for Economic Cooperation and Development are subject to 40 CFR Part 262, Subpart H, which is adopted by reference as amended and adopted in the CFR through January 8, 2010 (75 FR 1236) [~~July 14, 2006 (71 FR 40254)~~].

§335.78. Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators.

(a) A generator is a conditionally exempt small quantity generator in a calendar month if he generates no more than 100 kilograms of hazardous waste in that month.

(b) Except for those wastes identified in subsections (e) - (g) and (j) of this section, a conditionally exempt small quantity generator's hazardous wastes are not subject to regulation under Subchapters C - H and O of this chapter (relating to Standards Applicable to Generators of Hazardous Waste; Standards Applicable to Transporters of Hazardous Waste; Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities; Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities; Location Standards for Hazardous Waste Storage, Processing, or Disposal; Standards for the Management of Specific Wastes and Specific Types of Facilities; and Land Disposal Restrictions); Chapter 1 of this title (relating to Purpose of Rules, General Provisions); Chapter 3 of this title (relating to Definitions); Chapter 10 of this title (relating to Commission Meetings); Chapter 20 of this title (relating to Rulemaking); Chapter 37 of this title (relating to Financial Assurance); Chapter 39 of this title (relating to Public Notice); Chapter 40 of this title (relating to Alternative Dispute Resolution Procedure); Chapter 50 of this title (relating to Action [~~Actions~~] on Applications and Other Authorizations); Chapter 55 of this title (relating to Requests [~~Request~~] for Reconsideration and Contested Case Hearings; Public Comment); Chapter 70 of this title (relating to Enforcement); Chapter 80 of this title (relating to Contested Case Hearings); Chapter 86 of this title (relating to Special Provisions for Contested Case Hearings; [~~Chapter 261 of this title (relating to Introductory Provisions); Chapter 277 of this title (relating to Use Determinations for Tax Exemption for Pollution Control Property);~~] Chapter 305 of this title (relating to Consolidated Permits); or the notification requirements of the Resource Conservation and Recovery Act, §3010, provided the generator complies with the requirements of subsections (f), (g), and (j) of this section.

(c) When making the quantity determinations of Subchapters A - C of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste in General; Hazardous Waste Management General Provisions; and Standards Applicable to Generators of Hazardous Waste), the generator must include all hazardous waste it generates, except hazardous waste that:

(1) is exempt from regulation under 40 Code of Federal Regulations (CFR) §261.4(c) - (f), §335.24(c) of this title (relating to Requirements For Recyclable Materials and Nonhazardous Recyclable Materials), §335.41(f)(1) of this title (relating to Purpose, Scope and Applicability), or 40 CFR §261.8;

(2) is managed immediately upon generation only in on-site elementary neutralization units, wastewater treatment units, or totally enclosed treatment facilities as defined in §335.1 of this title (relating to Definitions);

(3) is recycled, without prior storage or accumulation, only in an on-site process subject to regulation under §335.24(f) of this title [~~(relating to Requirements For Recyclable Materials and Nonhazardous Recyclable Materials)~~];

(4) is used oil managed under the requirements of §335.24(j) of this title and Chapter 324 of this title (relating to Used Oil);

(5) are spent lead-acid batteries managed under the requirements of §335.251 of this title (relating to Applicability and Requirements); [~~or~~]

(6) is universal waste managed under §335.41(j) of this title [~~(relating to Purpose, Scope and Applicability)~~] and Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule); or[~~.~~]

(7) is an unused commercial chemical product (listed in 40 CFR Part 261, Subpart D or exhibiting one or more characteristics in 40 CFR Part 261, Subpart C) that is generated solely as a result of a laboratory clean-out conducted at an eligible academic entity consistent with 40 CFR §262.213. For purposes of this provision, the phrase "eligible academic entity" shall have the meaning as defined in 40 CFR §262.200.

(d) In determining the quantity of hazardous waste generated, a generator need not include:

(1) hazardous waste when it is removed from on-site storage provided that the waste was counted at the time it was generated;

(2) hazardous waste which is generated or collected for the purpose of treatability studies;

(3) hazardous waste produced by on-site processing (including reclamation) of his hazardous waste, so long as the hazardous waste that is processed was counted once; or

(4) spent materials that are generated, reclaimed, and subsequently reused on-site, so long as such spent materials have been counted once.

(e) If a generator generates acute hazardous waste in a calendar month in quantities greater than set forth in paragraphs (1) or (2) of this subsection, all quantities of that acute hazardous waste are subject to full regulation under Subchapters C - H and O of this chapter [~~(relating to Standards Applicable to Generators of Hazardous Waste; Standards Applicable to Transporters of Hazardous Waste; Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; Location Standards for Hazardous Waste Storage, Processing, or Disposal; and Standards for the Management of Specific Wastes and Specific Types of Facilities; and Land Disposal Restrictions)~~]; Chapter 1 of this title [~~(relating to Purpose of Rules, General Provisions)~~]; Chapter 3 of this title [~~(relating to Definitions)~~]; Chapter 10 of this title [~~(relating to Commission Meetings)~~]; Chapter 20 of this title [~~(relating to Rulemaking)~~]; Chapter 37 of this title [~~(relating to Financial Assurance)~~]; Chapter 39 of this title [~~(relating to Public Notice)~~]; Chapter 40 of this title [~~(relating to Alternative Dispute Resolution)~~]; Chapter 50 of this title [~~(relating to Actions on Applications)~~]; Chapter 55 of this title [~~(relating to Request for Contested Case Hearings)~~]; Chapter 70 of this title [~~(relating to Enforcement)~~]; Chapter 80 of this title [~~(relating to Contested Case Hearings)~~]; Chapter 86 of this title [~~(relating to Special Provisions for Contested Case Hearings; Chapter 261 of this title (relating to Introductory Provisions); Chapter 277 of this title (relating to Use Determinations for Tax Exemption for Pollution Control Property)~~]; Chapter 305 of this title [~~(relating to Consolidated Permits)~~]; and the notification requirements of the Resource Conservation and Recovery Act, §3010:

(1) a total of one kilogram of acute hazardous waste listed in 40 CFR §§261.31, 261.32, or 261.33(e); or

(2) a total of 100 kilograms of any residue or contaminated soil, waste, or other debris resulting from the clean-up of a spill, into or on any land or water, of any acute hazardous wastes listed in 40 CFR §§261.31, 261.32, or 261.33(e).

(f) In order for acute hazardous wastes generated by a generator of acute hazardous wastes in quantities equal to or less than those set forth in subsection (e)(1) or (2) of this section to be excluded from full regulation under this section, the generator must comply with the following requirements:

(1) The generator must comply with the requirements in §335.62 of this title (relating to Hazardous Waste Determination and Waste Classification).

(2) The generator may accumulate acute hazardous waste on-site. If the generator accumulates at any time acute hazardous wastes in quantities greater than those set forth in subsection (e)(1) or (2) of this section, all of those accumulated wastes are subject to regulation under Subchapters C - H and O of this chapter [~~(relating to Standards Applicable to Generators of Hazardous Waste; Standards Applicable to Transporters of Hazardous Waste; Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; Location Standards for Hazardous Waste Storage, Processing, or Disposal; Standards for the Management of Specific Wastes and Specific Types of Facilities; and Land Disposal Restrictions)~~]; Chapter 1 of this title [~~(relating to Purpose of Rules, General Provisions)~~]; Chapter 3 of this title [~~(relating to Definitions)~~]; Chapter 10 of this title [~~(relating to Commission Meetings)~~]; Chapter 20 of this title [~~(relating to Rulemaking)~~]; Chapter 37 of this title [~~(relating to Financial Assurance)~~]; Chapter 39 of this title [~~(relating to Public Notice)~~]; Chapter 40 of this title [~~(relating to Alternative Dispute Resolution)~~]; Chapter 50 of this title [~~(relating to Actions on Applications)~~]; Chapter 55 of this title [~~(relating to Request for Contested Case Hearings)~~]; Chapter 70 of this title [~~(relating to Enforcement)~~]; Chapter 80 of this title [~~(relating to Contested Case Hearings)~~]; Chapter 86 of this title [~~(relating to Special Provisions for Contested Case Hearings; Chapter 261 of this title (relating to Introductory Provisions); Chapter 277 of this title (relating to Use Determinations for Tax Exemption for Pollution Control Property)~~]; Chapter 305 of this title [~~(relating to Consolidated Permits)~~]; and the notification requirements of the Resource Conservation and Recovery Act, §3010. The time period of §335.69(f) of this title (relating to Accumulation Time) for accumulation of wastes on-site begins when the accumulated wastes exceed the applicable exclusion limit.

(3) A conditionally exempt small quantity generator may either process or dispose of its acute hazardous waste in an on-site facility, or ensure delivery to an off-site storage, processing or disposal facility, either of which, if located in the United States, is:

(A) permitted by the United States Environmental Protection Agency (EPA) [~~EPA~~] under 40 CFR Part 270;

(B) in interim status under 40 CFR Parts 270 and 265;

(C) authorized to manage hazardous waste by a state with a hazardous waste management program approved under 40 CFR Part 271;

(D) permitted, licensed, or registered by a state to manage municipal solid waste and, if managed in a municipal solid waste landfill, is subject to 40 CFR Part 258;

(E) permitted, licensed, or registered by a state to manage non-municipal non-hazardous waste and, if managed in a non-municipal non-hazardous waste disposal unit after January 1, 1998, is subject to the requirements in 40 CFR §§257.5 - 257.30;

(F) a facility which:

(i) beneficially uses or reuses, or legitimately recycles or reclaims its waste; or

(ii) processes its waste prior to beneficial use or reuse, or legitimate recycling or reclamation; or

(G) for universal waste managed under Subchapter H, Division 5 of this chapter, a universal waste handler or destination facility subject to the requirements of Subchapter H, Division 5 of this chapter.

(g) In order for hazardous waste generated by a conditionally exempt small quantity generator in quantities of less than 100 kilograms of hazardous waste during a calendar month to be excluded from full regulation under this section, the generator must comply with the following requirements:

(1) The conditionally exempt small quantity generator must comply with §335.62 of this title.

(2) The conditionally exempt small quantity generator may accumulate hazardous waste on-site. If such generator accumulates at any time more than a total of 1000 kilograms of its hazardous wastes, all of those accumulated wastes are subject to regulation under the special provisions of this subchapter applicable to generators of between 100 kilograms and 1000 kilograms of hazardous waste in a calendar month as well as the requirements of Subchapters D - H and O of this chapter [~~(relating to Standards Applicable to Transporters of Hazardous Waste; Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; Location Standards for Hazardous Waste Storage, Processing, or Disposal; Standards for the Management of Specific Wastes and Specific Types of Facilities; and Land Disposal Restrictions)~~]; Chapter 1 of this title [~~(relating to Purpose of Rules, General Provisions)~~]; Chapter 3 of this title [~~(relating to Definitions)~~]; Chapter 10 of this title [~~(relating to Commission Meetings)~~]; Chapter 20 of this title [~~(relating to Rulemaking)~~]; Chapter 37 of this title [~~(relating to Financial Assurance)~~]; Chapter 39 of this title [~~(relating to Public Notice)~~]; Chapter 40 of this title [~~(relating to Alternative Dispute Resolution)~~]; Chapter 50 of this title [~~(relating to Actions on Applications)~~]; Chapter 55 of this title [~~(relating to Request for Contested Case Hearings)~~]; Chapter 70 of this title [~~(relating to Enforcement)~~]; Chapter 80 of this title [~~(relating to Contested Case Hearings)~~]; Chapter 86 of this title [~~(relating to Special Provisions for Contested Case Hearings~~]; [~~Chapter 261 of this title [(relating to Introductory Provisions); Chapter 277 of this title (relating to Use Determinations for Tax Exemption for Pollution Control Property);~~] Chapter 305 of this title [~~(relating to Consolidated Permits)~~]; and the notification requirements of the Resource Conservation and Recovery Act, §3010. The time period of §335.69(f) of this title [~~(relating to Accumulation Time)~~] for accumulation of wastes on-site begins for a conditionally exempt small quantity generator when the accumulated wastes exceed 1,000 [~~1000~~] kilograms;

(3) A conditionally exempt small quantity generator may either process or dispose of its hazardous waste in an on-site facility, or ensure delivery to an off-site storage, processing or disposal facility, either of which, if located in the United States, is:

(A) permitted by the EPA under 40 CFR Part 270;

(B) in interim status under 40 CFR Parts 270 and 265;

(C) authorized to manage hazardous waste by a state with a hazardous waste management program approved under 40 CFR Part 271;

(D) permitted, licensed, or registered by a state to manage municipal solid waste and, if managed in a municipal solid waste landfill, is subject to 40 CFR Part 258 or equivalent or more stringent rules under Chapter 330 of this title (relating to Municipal Solid Waste);

(E) permitted, licensed, or registered by a state to manage non-municipal or industrial non-hazardous waste and, if managed in a non-municipal or industrial non-hazardous waste disposal unit after January 1, 1998, is subject to the requirements in 40 CFR §§257.5 - 257.30 or equivalent or more stringent counterpart rules that may be adopted by the commission relating to additional requirements for industrial non-hazardous waste disposal units that may receive hazardous waste from conditionally exempt small quantity generators;

(F) a facility which:

(i) beneficially uses or reuses, or legitimately recycles or reclaims its waste; or

(ii) processes its waste prior to beneficial use or reuse, or legitimate recycling or reclamation; or

(G) for universal waste managed under Subchapter H, Division 5 of this chapter, a universal waste handler or destination facility subject to the requirements of Subchapter H, Division 5 of this chapter.

(h) Hazardous waste subject to the reduced requirements of this section may be mixed with non-hazardous waste and remain subject to these reduced requirements even though the resultant mixture exceeds the quantity limitations identified in this section, unless the mixture meets any of the characteristics of hazardous waste identified in 40 CFR Part 261, Subpart C.

(i) If any person mixes a solid waste with a hazardous waste that exceeds a quantity exclusion level of this section, the mixture is subject to full regulation under this chapter.

(j) If a conditionally exempt small quantity generator's wastes are mixed with used oil, the mixture is subject to Chapter 324 of this title (relating to Used Oil Standards) and 40 CFR Part 279 [~~if it is destined to be burned for energy recovery~~]. Any material produced from such a mixture by processing, blending, or other treatment is also so regulated [~~if it is destined to be burned for energy recovery~~].

§335.79. Alternative Requirements for Hazardous Waste Determination and Accumulation of Unwanted Material for Laboratories Owned by Eligible Academic Entities.

This section incorporates by reference the federal Alternative Requirements for Hazardous Waste Determination and Accumulation of Unwanted Material for Laboratories Owned by Eligible Academic Entities in 40 Code of Federal Regulations Part 262, Subpart K, §§262.200 - 262.216 (known as the "Academic Laboratories rule"), as amended through December 20, 2010 (75 FR 79304).

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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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER E. INTERIM STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITIES

30 TAC §335.111, §335.112

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§335.111. Purpose, Scope, and Applicability.

(a) The purpose of this subchapter is to establish minimum requirements that define the acceptable management of hazardous waste prior to the issuance or denial of a hazardous waste permit and until certification of final closure or, if the facility is subject to post-closure requirements, until post-closure responsibilities are fulfilled. Except as provided in 40 Code of Federal Regulations (CFR) §265.1080(b), this subchapter and the standards of 40 CFR §§264.552, 264.553, and 264.554 apply to owners and operators of hazardous waste storage, processing, or disposal facilities who have fully complied with the requirements for interim status under the Resource Conservation and Recovery Act (RCRA) [~~RCRA~~], §3005(e), except as specifically provided for in §335.41 of this title (relating to Purpose, Scope and Applicability).

(b) United States Environmental Protection Agency (EPA) [~~EPA~~] Hazardous Waste Numbers F020, F021, F022, F023, F026, or F027 must not be managed at facilities subject to regulation under this subchapter, unless:

(1) the wastewater treatment sludge is generated in a surface impoundment as part of the plant's wastewater treatment system;

(2) the waste is stored in tanks or containers;

(3) the waste is stored or processed in waste piles that meet the requirements of 40 CFR §264.250(c) as well as all other applicable requirements of 40 CFR Part 265, Subpart L, and §335.120 of this title (relating to Containment for Waste Piles);

(4) the waste is burned in incinerators that are certified pursuant to the standards and procedures in 40 CFR §265.352; or

(5) the waste is burned in facilities that thermally process the waste in a device other than an incinerator and that are certified pursuant to the standards and procedures in 40 CFR §265.383.

(c) The requirements of this section apply to owners or operators of all facilities which process, store or dispose of hazardous waste referred to in 40 CFR Part 268, and the 40 CFR Part 268 standards are considered material conditions or requirements of the Part 265 interim status standards incorporated by reference in §335.112 of this title (relating to Standards).

(d) Owners and operators who are subject to the requirements to obtain a post-closure permit under §335.2 and §335.43 of this title (relating to Permit Required), but who obtain a post-closure order in lieu of a post-closure permit as provided in §335.2(m) of this title, must:

(1) submit information about the facility listed in §305.50(b) of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order);

(2) comply with facility-wide corrective action requirements of §335.167 of this title (relating to Corrective Action for Solid Waste Management Units);

(3) comply with the groundwater monitoring requirements of §§335.156 - 335.166 of this title (relating to Applicability of Groundwater Monitoring and Response; Required Programs; Groundwater Protection Standard; Hazardous Constituents; Concentration Limits; Point of Compliance; Compliance Period; General Groundwater Monitoring Requirements; Detection Monitoring Program; Compliance Monitoring Program; and Corrective Action Program); and

(4) comply with the financial assurance requirements of Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities).

(e) The commission may replace all or part of the closure requirements of 40 CFR Part 265, Subpart G (relating to Closure and Post-Closure), as amended and adopted in §335.112(a)(6) of this title and the unit specific standards in §335.123 of this title (relating [~~related~~] to Closure and Post-Closure (Land Treatment Facilities)) applying to a regulated unit with alternative requirements for closure set out in a permit or a post-closure order where the commission determines that:

(1) a regulated unit is situated among solid waste management units or area of concern, a release has occurred, and both the regulated unit and one or more solid waste management unit(s) or area of concern are likely to have contributed to the release; and

(2) it is not necessary to apply the closure requirement of this subchapter because the alternative requirements will be protective of human health and the environment and will satisfy the closure performance standards of §335.8 of this title (relating [~~related~~] to Closure and Remediation) and §335.167 of this title.

§335.112. Standards.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 265 (including all appendices to Part 265) (except as otherwise specified herein) are adopted by reference as amended and adopted in the CFR through June 1, 1990 (55 FR 22685) and as further amended as indicated in each paragraph of this subsection:

(1) Subpart B - General Facility Standards (as amended through January 8, 2010 (75 FR 1236)) [~~July 14, 2006 (71 FR 40254))~~];

(2) Subpart C - Preparedness and Prevention;

(3) Subpart D - Contingency Plan and Emergency Procedures (as amended through March 18, 2010 (75 FR 12989)) [~~July 14, 2006 (71 FR 40254))~~], except 40 CFR §265.56(d);

(4) Subpart E - Manifest System, Recordkeeping and Reporting (as amended through March 18, 2010 (75 FR 12989)), except 40 CFR §§265.71, 265.72, 265.75, 265.76, and 265.77 [~~April 4, 2006 (71 FR 16862))~~];

(5) Subpart F - Groundwater Monitoring (as amended through April 4, 2006 (71 FR 16862)), except 40 CFR §265.90 and §265.94;

(6) Subpart G - Closure and Post-Closure (as amended through July 14, 2006 (71 FR 40254)); except 40 CFR §265.112(d)(3) and (4) and §265.118(e) and (f);

(7) Subpart H - Financial Requirements (as amended through September 16, 1992 (57 FR 42832)); except 40 CFR §§265.140, 265.141, 265.142(a)(2), 265.142(b) and (c), 265.143(a) - (g), 265.144(b) and (c), 265.145(a) - (g), 264.146, 265.147(a) - (d), 265.147(f) - (k), and 265.148 - 265.150;

(8) Subpart I - Use and Management of Containers (as amended through July 14, 2006 (71 FR 40254));

(9) Subpart J - Tank Systems (as amended through July 14, 2006 (71 FR 40254));

(10) Subpart K - Surface Impoundments (as amended through July 14, 2006 (71 FR 40254));

(11) Subpart L - Waste Piles (as amended through July 14, 2006 (71 FR 40254)), except 40 CFR §265.253;

(12) Subpart M - Land Treatment (as amended through July 14, 2006 (71 FR 40254)) except, 40 CFR §§265.272, 265.279, and 265.280;

(13) Subpart N - Landfills (as amended through March 18, 2010 (75 FR 12989)) [~~July 14, 2006 (71 FR 40254))~~], except 40 CFR §§265.301(f) - (i), 265.314, and 265.315;

(14) Subpart O - Incinerators (as amended through October 12, 2005 (70 FR 59402)) [~~September 30, 1999 (64 FR 52828))~~];

(15) Subpart P - Thermal Treatment (as amended through July 17, 1991 (56 FR 32692));

(16) Subpart Q - Chemical, Physical, and Biological Treatment (as amended through July 14, 2006 (71 FR 40254));

(17) Subpart R - Underground Injection;

(18) Subpart W - Drip Pads (as amended through July 14, 2006 (71 FR 40254));

(19) Subpart AA - Air Emission Standards for Process Vents (as amended through July 14, 2006 (71 FR 40254));

(20) Subpart BB - Air Emission Standards for Equipment Leaks (as amended through April 4, 2006 (71 FR 16862));

(21) Subpart CC - Air Emission Standards for Tanks, Surface Impoundments, and Containers (as amended through July 14, 2006 (71 FR 40254));

(22) Subpart DD - Containment Buildings (as amended through July 14, 2006 (71 FR 40254));

(23) Subpart EE - Hazardous Waste Munitions and Explosives Storage (as amended through February 12, 1997 (62 FR 6622)); and

(24) the following appendices contained in 40 CFR Part 265:

(A) Appendix I - Recordkeeping Instructions (as amended through March 24, 1994 (59 FR 13891));

(B) Appendix III - EPA Interim Primary Drinking Water Standards;

(C) Appendix IV - Tests for Significance;

(D) Appendix V - Examples of Potentially Incompatible Waste; and

(E) Appendix VI - Compounds With Henry's Law Constant Less Than 0.1 Y/X.

(b) The regulations of the United States Environmental Protection Agency (EPA) that are adopted by reference in this section are adopted subject to the following changes.

(1) The term "regional administrator" is changed to the "executive director" of the Texas Commission on Environmental Quality or to the commission, consistent with the organization of the commission as set out in Texas Water Code, Chapter 5, Subchapter B.

(2) The term "treatment" is changed to "processing."

(3) Reference to Resource Conservation and Recovery Act, §3008(h) is changed to Texas Water Code, §7.031(c) - (e) (Corrective Action Relating to Hazardous Waste).

(4) Reference to:

(A) 40 CFR §260.10 is changed to §335.1 of this title (relating to Definitions);

(B) 40 CFR §264.90 is changed to §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response);

(C) 40 CFR §264.101 is changed to §335.167 of this title (relating to Corrective Action for Solid Waste Management Units);

(D) 40 CFR §264.310 is changed to §335.174 of this title (relating to Closure and Post-Closure Care (Landfills));

(E) 40 CFR §265.1 is changed to §335.111 of this title (relating to Purpose, Scope, and Applicability);

(F) 40 CFR §265.90 is changed to §335.116 of this title (relating to Applicability of Groundwater Monitoring Requirements);

(G) 40 CFR §265.94 is changed to §335.117 of this title (relating to Recordkeeping and Reporting);

(H) 40 CFR §265.314 is changed to §335.125 of this title (relating to Special Requirements for Bulk and Containerized Waste);

(I) 40 CFR §270.1 is changed to §335.2 of this title (relating to Permit Required);

(J) 40 CFR §270.28 is changed to §305.50 of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order);

(K) 40 CFR §270.41 is changed to §305.62 of this title (relating to Amendments [~~Amendment~~]);

(L) 40 CFR §270.42 is changed to §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee); and

(M) Qualified professional engineer is changed to Texas licensed professional engineer.

(5) 40 CFR Parts 260 - 270 means the commission's rules including, but not limited to, Chapters 50, 305, and 335 of this title (relating to Action on Applications and Other Authorizations; Consolidated Permits; and Industrial Solid Waste and Municipal Hazardous Waste), as applicable.

(6) Reference to 40 CFR Part 265, Subpart D (Contingency Plan and Emergency Procedures) is changed to §335.112(a)(3) of this title (relating to Standards) and §335.113 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator).

(7) Reference to 40 CFR §§265.71, 265.72, 265.76, and 265.77 is changed to §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities), §335.12(a) [~~§335.12(c)(1) and (2)~~] of this title, §335.15(3) of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities), and §335.115 of this title (relating to Additional Reports), respectively.

(8) Reference to 40 CFR Part 264, Subpart F is changed to §335.156 of this title, §335.157 of this title (relating to Required Programs), §335.158 of this title (relating to Groundwater Protection Standard), §335.159 of this title (relating to Hazardous Constituents), §335.160 of this title (relating to Concentration Limits), §335.161 of this title (relating to Point of Compliance), §335.162 of this title (relating to Compliance Period), §335.163 of this title (relating to General Groundwater Monitoring Requirements), §335.164 of this title (relating to Detection Monitoring Program), §335.165 of this title (relating to Compliance Monitoring Program), §335.166 of this title (relating to Corrective Action Program), and §335.167 of this title.

(9) Reference to 40 CFR Part 265, Subpart F is changed to include §335.116 and §335.117 of this title, in addition to the reference to 40 CFR Part 265, Subpart F, except §265.90 and §265.94.

(10) Reference to the EPA is changed to the Texas Commission on Environmental Quality.

(c) A copy of 40 CFR Part 265 is available for inspection at the library of the Texas Commission on Environmental Quality, located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

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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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER F. PERMITTING STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITIES

30 TAC §§335.151, 335.152, 335.155, 335.168, 335.170

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and un-

der Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§335.151. Purpose, Scope, and Applicability.

(a) The purpose of this subchapter is to establish minimum standards to define the acceptable management of hazardous waste. These standards are to be applied in the evaluation of an application for a permit to manage hazardous waste, in accordance with Texas Solid Waste Disposal Act [~~TSWDA~~], and in the evaluation of an investigation report to implement groundwater protection requirements relating to compliance monitoring and corrective action; and in the evaluation of corrective action measures to be instituted in accordance with §335.167 of this title (relating to Corrective Action for Solid Waste Management Units). For facilities that store, process, or dispose of industrial solid waste, in addition to hazardous waste, nothing herein shall be construed to restrict or abridge the commission's authority to implement the provisions of Texas Water Code, Chapter 26, and §335.4 of this title (relating to General Prohibitions), with respect to those activities.

(b) The standards in this subchapter apply to owners and operators of all facilities which process, store, or dispose of hazardous waste, except as specifically provided for in §335.41 of this title (relating to Purpose, Scope, and Applicability).

(c) A facility owner or operator who has fully complied with the requirements for interim status, as defined in the Resource Conservation and Recovery Act (RCRA) [~~RCRA~~], §3005(e), and §335.2 and §335.43 of this title (relating to Permit Required), must comply with the requirements of Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities) in lieu of the requirements of this subchapter, until final administrative disposition of his permit application is made, except as provided under 40 Code of Federal Regulations (CFR) Part 264, Subpart S.

(d) The regulations of this subchapter apply to all owners and operators subject to the requirements of §335.2(m) of this title when the commission issues either a post-closure permit or a post-closure order at the facility. When the commission issues a post-closure order, references in this subchapter to "in the permit" also mean "in the order."

(e) The commission may replace all or part of the requirements of 40 CFR Part 264 Subpart G (relating [~~related~~] to Closure and Post-Closure), as amended and adopted in §335.152(a)(5) of this title (relating to Standards) and the unit specific standards in §§335.169, 335.172, and 335.174 of this title (relating to Closure and Post-Closure Care (Surface Impoundments); Closure and Post-Closure Care (Land Treatment Units), and Closure and Post-Closure Care (Landfills)) applying to regulated units, with alternative requirements as set out in a permit or order where the commission determines that:

(1) a regulated unit is situated among solid waste management units or area of concern, a release has occurred, and both the regulated unit and one or more solid waste management unit(s) or area of concern are likely to have contributed to the release; and

(2) it is not necessary to apply the closure requirements of this subchapter (and those referenced herein) because the alternative requirements will be protective of human health and the environment and will satisfy the performance standards of §335.8 of this title (relating to Closure and Remediation) and §335.167 of this title [~~(relating to Corrective Action for Solid Waste Management Units)~~].

(f) If a permitted facility obtains an order setting out alternative requirements provided in subsection (e) of this section, then the alternative requirements shall also be referenced in the facility's permit.

§335.152. Standards.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 264 (including all appendices to Part 264) are adopted by reference as amended and adopted in the CFR through June 1, 1990 (55 FR 22685) and as further amended and adopted as indicated in each paragraph of this subsection:

(1) Subpart B--General Facility Standards (as amended through January 8, 2010 (75 FR 1236)) [~~July 14, 2006 (71 FR 40254))~~]; in addition, the facilities which are subject to 40 CFR Part 264, Subpart X, are subject to regulation under 40 CFR §264.15(b)(4) and §264.18(b)(1)(ii);

(2) Subpart C--Preparedness and Prevention;

(3) Subpart D--Contingency Plan and Emergency Procedures (as amended through March 18, 2010 (75 FR 12989)) [~~April 4, 2006 (71 FR 16862))~~], except 40 CFR §264.56(d);

(4) Subpart E--Manifest System, Recordkeeping and Reporting (as amended through March 18, 2010 (75 FR 12989)), except 40 CFR §§264.71, 264.72, 264.76, and 264.77 [~~April 4, 2006 (71 FR 16862))~~]; facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §264.73(b)(6);

(5) Subpart G--Closure and Post-Closure (as amended through July 14, 2006 (71 FR 40254)); facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §§264.90(d), 264.111(c), 264.112(a)(2), 264.114, 264.117(a)(1)(i) and (ii), and 264.118(b)(1) and (2)(i) and (ii);

(6) Subpart H--Financial Requirements (as amended through April 4, 2006 (71 FR 16862)); except 40 CFR §§264.140, 264.141, 264.142(a)(2), 264.142(b) and (c), 264.143(a) - (h), 264.144(b) and (c), 264.145(a) - (h), 264.146, 264.147(a) - (d), 264.147(f) - (k), and 264.148 - 264.151; and subject to the following limitations: facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §§264.142(a), 264.144(a), and §37.6031(c) of this title (relating to Financial Assurance Requirements for Liability);

(7) Subpart I--Use and Management of Containers (as amended through July 14, 2006 (71 FR 40254));

(8) Subpart J--Tank Systems (as amended through July 14, 2006 (71 FR 40254));

(9) Subpart K--Surface Impoundments (as amended through July 14, 2006 (71 FR 40254)) [~~August 1, 2005 (70 FR 44150))~~], except 40 CFR §264.221 and §264.228:

(A) reference to 40 CFR §264.221 is changed to §335.168 of this title (relating to Design and Operating Requirements (Surface Impoundments));

(B) reference to 40 CFR §264.228 is changed to §335.169 of this title (relating to Closure and Post-Closure Care (Surface Impoundments));

(10) Subpart L--Waste Piles (as amended and adopted through July 14, 2006 (71 FR 40254)), except 40 CFR §264.251;

(11) Subpart M--Land Treatment (as amended and adopted through July 14, 2006 (71 FR 40254)), except 40 CFR §264.273 and §264.280;

(12) Subpart N--Landfills (as amended through March 18, 2010 (75 FR 12989)) [~~July 14, 2006 (71 FR 40254))~~], except 40 CFR §§264.301, 264.310, 264.314, and 264.315;

(13) Subpart O--Incinerators (as amended through April 8, 2008 (73 FR 18970));

(14) Subpart S--Special Provisions for Cleanup (as amended through March 18, 2010 (75 FR 12989)) [~~(July 14, 2006 (71 FR 40254))~~];

(15) Subpart W--Drip Pads (as amended through July 14, 2006 (71 FR 40254));

(16) Subpart X--Miscellaneous Units (as amended through July 14, 2006 (71 FR 40254));

(17) Subpart AA--Air Emission Standards for Process Vents (as amended through July 14, 2006 (71 FR 40254));

(18) Subpart BB--Air Emission Standards for Equipment Leaks (as amended through July 14, 2006 (71 FR 40254));

(19) Subpart CC--Air Emission Standards for Tanks, Surface Impoundments, and Containers (as amended through July 14, 2006 (71 FR 40254));

(20) Subpart DD--Containment Buildings (as amended through July 14, 2006 (71 FR 40254));

(21) Subpart EE--Hazardous Waste Munitions and Explosives Storage (as amended through August 1, 2005 (70 FR 44150)); and

(22) the following appendices contained in 40 CFR Part 264:

(A) Appendix I--Recordkeeping Instructions (as amended through March 24, 1994 (59 FR 13891));

(B) Appendix IV--Cochron's Approximation to the Behrens-Fisher Students' T-Test;

(C) Appendix V--Examples of Potentially Incompatible Waste;

(D) Appendix VI--Political Jurisdictions in Which Compliance With §264.18(a) Must Be Demonstrated; and

(E) Appendix IX--Ground-Water Monitoring List (as amended through June 13, 1997 (62 FR 32451)).

(b) The provisions of 40 CFR §264.18(b) are applicable to owners and operators of hazardous waste management facilities, for which a permit is being sought, which are not subject to the requirements of §§335.201 - 335.206 of this title (relating to Purpose, Scope, and Applicability; Definitions; Site Selection to Protect Groundwater or Surface Water; Unsuitable Site Characteristics; Prohibition of Permit Issuance; and Petitions for Rulemaking). A copy of 40 CFR §264.18(b) is available for inspection at the library of the Texas Commission on Environmental Quality, located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

(c) The regulations of the United States Environmental Protection Agency (EPA) that are adopted by reference in this section are adopted subject to the following changes.

(1) The term "regional administrator" is changed to the "executive director" of the Texas Commission on Environmental Quality or to the commission, consistent with the organization of the commission as set out in Texas Water Code, Chapter 5, Subchapter B.

(2) The term "treatment" is changed to "processing."

(3) Reference to Resource Conservation and Recovery Act, §3008(h) is changed to Texas Water Code, §7.031(c) - (e) (relating to Corrective Action Relating to Hazardous Waste).

(4) Reference to:

(A) 40 CFR §260.10 is changed to §335.1 of this title (relating to Definitions);

(B) 40 CFR §264.1 is changed to §335.151 of this title (relating to Purpose, Scope, and Applicability);

(C) 40 CFR §264.280 is changed to §335.172 of this title (relating to Closure and Post-Closure Care (Land Treatment Units));

(D) 40 CFR §264.90 is changed to §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response);

(E) 40 CFR §264.101 is changed to §335.167 of this title (relating to Corrective Action for Solid Waste Management Units);

(F) 40 CFR §264.310 is changed to §335.174 of this title (relating to Closure and Post-Closure Care (Landfills));

(G) 40 CFR §270.41 is changed to §305.62 of this title (relating to Amendments); and

(H) 40 CFR §270.42 is changed to §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee).

(5) 40 CFR Parts 260 - 270 means the commission's rules including, but not limited to, Chapters 50, 305, and 335 of this title (relating to Action on Applications and Other Authorizations; Consolidated Permits; and Industrial Solid Waste and Municipal Hazardous Waste), as applicable.

(6) Reference to 40 CFR Part 264, Subpart D is changed to §335.152(a)(3) of this title (relating to Standards) and §335.153 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator).

(7) Reference to 40 CFR §§264.71, 264.72, 264.76, and 264.77 is changed to §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities), §335.12(a) [~~§335.12(c)(1) and (2)~~] of this title, §335.15(3) of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities), and §335.155 of this title (relating to Additional Reports), respectively.

(8) Reference to 40 CFR Part 264, Subpart F is changed to §335.156 of this title, §335.157 of this title (relating to Required Programs), §335.158 of this title (relating to Groundwater Protection Standard), §335.159 of this title (relating to Hazardous Constituents), §335.160 of this title (relating to Concentration Limits), §335.161 of this title (relating to Point of Compliance), §335.162 of this title (relating to Compliance Period), §335.163 of this title (relating to General Groundwater Monitoring Requirements), §335.164 of this title (relating to Detection Monitoring Program), §335.165 of this title (relating to Compliance Monitoring Program), §335.166 of this title (relating to Corrective Action Program), and §335.167 of this title.

(9) Reference to 40 CFR Part 265, Subpart F is changed to include §335.116 of this title (relating to Applicability of Groundwater Monitoring Requirements) and §335.117 of this title (relating to

Recordkeeping and Reporting), in addition to the reference to 40 CFR Part 265, Subpart F, except §265.90 and §265.94.

(10) Reference to the EPA is changed to the Texas Commission on Environmental Quality.

(11) Reference to qualified professional engineer is changed to Texas licensed professional engineer.

(d) A copy of 40 CFR Part 264 is available for inspection at the library of the Texas Commission on Environmental Quality, located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

§335.155. Additional Reports.

In addition to submitting the waste reports described in §335.15 of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners or [~~and~~] Operators of Treatment, Storage, [~~Processing,~~] or Disposal Facilities), the owner or operator must also report to the executive director:

(1) releases, fires, and explosions as specified in 40 Code of Federal Regulations (CFR) §264.56(j);

(2) facility closure as specified in 40 CFR §264.115;

(3) as otherwise required by 40 CFR Part 264, Subparts F, K - N, X, AA, [~~and~~] BB, and CC.

§335.168. Design and Operating Requirements (Surface Impoundments).

(a) Any surface impoundment that is not covered by subsection (c) of this section or 40 Code of Federal Regulations (CFR) §265.221 must have a liner for all portions of the impoundment (except for existing portions of such impoundments). The liner must be designed, constructed, and installed to prevent any migration of wastes out of the impoundment to the adjacent subsurface soil or groundwater or surface water at any time during the active life (including the closure period) of the impoundment. The liner may be constructed of materials that may allow wastes to migrate into the liner (but not into the adjacent subsurface soil or groundwater or surface water) during the active life of the facility, provided that the impoundment is closed in accordance with §335.169(a)(1) of this title (relating to Closure and Post-Closure Care (Surface Impoundments)). For impoundments that will be closed in accordance with §335.169(a)(2) of this title, the liner must be constructed of materials that can prevent wastes from migrating into the liner during the active life of the facility. The liner must be:

(1) constructed of materials that have appropriate chemical properties and sufficient strength and thickness to prevent failure due to pressure gradients (including static head and external hydrogeologic forces), physical contact with the waste or leachate to which they are exposed, climatic conditions, the stress of installation, and the stress of daily operation;

(2) placed upon a foundation or base capable of providing support to the liner and resistance to pressure gradients above and below the liner to prevent failure of the liner due to settlement, compression, or uplift; and

(3) installed to cover all surrounding earth likely to be in contact with the waste or leachate.

(b) The owner or operator will be exempted from the requirements of subsections (a) and (j) of this section if the commission finds, based on a demonstration by the owner or operator, that alternate design and operating practices, together with location characteristics, will prevent the migration of any hazardous constituents (see §335.159 of this title (relating to Hazardous Constituents)) into the groundwater or surface water at any future time. In deciding whether to grant an exemption, the commission will consider:

(1) the nature and quantity of the wastes;

(2) the adopted alternate design and operation;

(3) the hydrogeologic setting of the facility, including the attenuative capacity and thickness of the liners and soils present between the impoundment and groundwater or surface water; and

(4) all other factors which would influence the quality and mobility of the leachate produced and the potential for it to migrate to groundwater or surface water.

(c) The owner or operator of each new surface impoundment unit on which construction commences after January 29, 1992, each lateral expansion of a surface impoundment unit on which construction commences after July 29, 1992, and each replacement of an existing surface impoundment unit that is to commence reuse after July 29, 1992, must meet the requirements of 40 CFR §264.221(c), as amended through July 14, 2006 (71 FR 40254) [~~January 29, 1992 (57 FR 3487)~~].

(d) The executive director may approve alternative design or operating practices to those specified in subsection (c) of this section if the owner or operator demonstrates to the executive director that he meets the requirements of 40 CFR §264.221(d), as amended through January 29, 1992 (57 FR 3462).

(e) The double liner requirement set forth in subsection (c) of this section may be waived by the commission for any monofill which contains only hazardous wastes from foundry furnace emission controls or metal casting molding sand, and such wastes do not contain constituents which would render the wastes hazardous for reasons other than the toxicity characteristics in 40 CFR §261.24, and is in compliance with either of the following requirements:

(1) the monofill:

(A) has at least one liner for which there is no evidence that such liner is leaking. For the purposes of this subsection, the term "liner" means a liner designed, constructed, installed, and operated to prevent hazardous waste from passing into the liner at any time during the active life of the facility, or a liner designed, constructed, installed, and operated to prevent hazardous waste from migrating beyond the liner to adjacent subsurface soil, groundwater, or surface water at any time during the active life of the facility. In the case of any surface impoundment which has been exempted from the requirements of subsection (c) of this section on the basis of a liner designed, constructed, installed, and operated to prevent hazardous waste from passing beyond the liner, at the closure of such impoundment, the owner or operator must remove or decontaminate all waste residues, all contaminated liner material, and contaminated soil to the extent practicable. If all contaminated soil is not removed or decontaminated, the owner or operator of such impoundment will comply with appropriate post-closure requirements, including, but not limited to, groundwater monitoring and corrective action;

(B) is located more than 1/4 mile from an underground source of drinking water (as that term is defined in §331.2 of this title (relating to Definitions)); and

(C) is in compliance with groundwater monitoring requirements of this subchapter; or

(2) the owner or operator demonstrates that the monofill is located, designed, and operated so as to assure that there will be no migration of any hazardous constituent into groundwater or surface water at any future time.

(f) The owner or operator of any replacement surface impoundment unit is exempt from subsection (c) of this section if:

(1) The existing unit was constructed in compliance with the design standards of Resource Conservation and Recovery Act, §3004(o)(1)(A)(i) and (o)(5); and

(2) There is no reason to believe that the liner is not functioning as designed.

(g) A surface impoundment must be designed, constructed, maintained, and operated to prevent overtopping resulting from normal or abnormal operations, overfilling, wind, and wave action; rainfall; run-off, malfunctions of level controllers, alarms, and other equipment; and human error.

(h) A surface impoundment must have dikes that are designed, constructed, and maintained with sufficient structural integrity to prevent massive failure of the dikes. In ensuring structural integrity, it must not be presumed that the liner system will function without leakage during the active life of the unit.

(i) The commission will specify in the permit all design and operating practices that are necessary to ensure that the requirements of this section are satisfied.

(j) A surface impoundment (except for an existing portion of a surface impoundment) that will be closed in accordance with §335.169(a)(2) of this title must have an additional liner to that required in subsection (a) of this section which:

(1) prevents any migration of wastes out of the impoundment to the adjacent subsurface soil or groundwater or surface water at any time prior to the end of the post-closure care period; and

(2) minimizes the rate of migration of wastes out of the impoundment to the adjacent subsurface soil or groundwater or surface water so as not to pose a substantial present or potential hazard to human health and the environment.

§335.170. Design and Operating Requirements (Waste Piles).

(a) A waste pile (except for an existing portion of a waste pile) must have:

(1) a liner that is designed, constructed, and installed to prevent any migration of wastes out of the pile into the adjacent subsurface soil or groundwater or surface water at any time during the active life (including the closure period) of the waste pile. The liner may be constructed of materials that may allow waste to migrate into the liner itself (but not into the adjacent subsurface soil or groundwater or surface water) during the active life of the facility. The liner must be:

(A) constructed of materials that have appropriate chemical properties and sufficient strength and thickness to prevent failure due to pressure gradients (including static head and external hydrogeologic forces), physical contact with the waste or leachate to which they are exposed, climatic conditions, the stress of installation, and the stress of daily operation;

(B) placed upon a foundation or base capable of providing support to the liner and resistance to pressure gradients above and below the liner to prevent failure of the liner due to settlement, compression, or uplift; and

(C) installed to cover all surrounding earth likely to be in contact with the waste or leachate; and

(2) a leachate collection and removal system immediately above the liner that is designed, constructed, maintained, and operated to collect and remove leachate from the pile. The commission will specify design and operating conditions in the permit to ensure that the leachate depth over the liner does not exceed 30 centimeters (one foot). The leachate collection and removal system must be:

(A) constructed of materials that are:

(i) chemically resistant to the waste managed in the pile and the leachate expected to be generated; and

(ii) of sufficient strength and thickness to prevent collapse under the pressures exerted by overlaying wastes, waste cover materials, and by any equipment used at the pile; and

(B) designed and operated to function without clogging through the scheduled closure of the waste pile.

(b) The owner or operator will be exempted from the requirements of subsection (a) of this section if the commission finds, based on a demonstration by the owner or operator, the alternate design and operating practices, together with location characteristics, will prevent the migration of any hazardous constituents into the groundwater or surface water at any future time. In deciding whether to grant an exemption, the commission will consider:

(1) the nature and quantity of the wastes;

(2) the proposed alternate design and operation;

(3) the hydrogeologic setting of the facility, including attenuative capacity and thickness of the liners and soils present between the pile and groundwater or surface water; and

(4) all other factors which would influence the quality and mobility of the leachate produced and the potential for it to migrate to groundwater or surface water.

(c) The owner and operator of each new waste pile unit [~~on which construction commences after January 29, 1992~~], each lateral expansion of a waste pile unit [~~on which construction commences after July 29, 1992~~], and each replacement of an existing waste pile unit [~~that is to commence reuse after July 29, 1992~~], must comply with the requirements of 40 CFR §264.251(c), as amended through April 4, 2006 (71 FR 16862) [~~January 29, 1992, at 57 FedReg 3488~~].

(d) The executive director may approve alternative design or operating practices to those specified in subsection (c) of this section if the owner or operator demonstrates to the executive director that such design and operating practices, together with location characteristics:

(1) will prevent the migration of any hazardous constituent into the groundwater or surface water at least as effectively as the liners and leachate collection and removal systems specified in subsection (c) of this section; and

(2) will allow detection of leaks of hazardous constituents through the top liner at least as effectively.

(e) Subsection (c) of this section does not apply to monofills that are granted a waiver by the Commission in accordance with §335.168(e) of this title (relating to Design and Operating Requirements (Surface Impoundments)).

(f) The owner or operator of any replacement waste pile unit is exempt from subsection (c) of this section if:

(1) The existing unit was constructed in compliance with the design standards of §3004(o)(1)(A)(i) and (o)(5) of the Resource Conservation and Recovery Act; and

(2) There is no reason to believe that the liner is not functioning as designed.

(g) The owner or operator must design, construct, operate, and maintain a run-on control system capable of preventing flow onto the

active portion of the pile during peak discharge from at least a 100-year storm.

(h) The owner or operator must design, construct, operate, and maintain a run-off management system to collect and control at least the water volume from active portions resulting from a 24-hour, 100-year storm.

(i) Collection and holding facilities (e.g., tanks or basins) associated with run-on and run-off control systems must be emptied or otherwise managed expeditiously after storms to maintain design capacity of the system.

(j) If the pile contains any particulate matter which may be subject to wind dispersal, the owner or operator must cover or otherwise manage the pile to control wind dispersal.

(k) The commission will specify in the permit all design and operating practices that are necessary to ensure that the requirements of this section are satisfied.

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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SUBCHAPTER H. STANDARDS FOR THE MANAGEMENT OF SPECIFIC WASTES AND SPECIFIC TYPES OF FACILITIES
DIVISION 1. RECYCLABLE MATERIALS USED IN A MANNER CONSTITUTING DISPOSAL

30 TAC §335.213

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendment implements THSC, Chapter 361.

§335.213. Standards Applicable to Storers of Materials That Are To Be Used in a Manner That Constitutes Disposal Who Are Not the Ultimate Users.

Owners or operators of facilities that store recyclable materials that are to be used in a manner that constitutes disposal, but who are not the ultimate users of the materials, are regulated under all applicable provisions of Subchapter A of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste [~~Management~~] in General), Subchapter B of this chapter (relating to Hazardous Waste Management-General Provisions), Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities), Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities), Subchapter U of this chapter (relating to Standards for Owners and Operators of Hazardous Waste Facilities Operating under a Standard Permit); Chapter 1 of this title (relating to Purpose of Rules, General Provisions); Chapter 3 of this title (relating to Definitions); Chapter 10 of this title (relating to Commission Meetings); Chapter 20 of this title (relating to Rulemaking); Chapter 37 of this title (relating to Financial Assurance); Chapter 39 of this title (relating to Public Notice); Chapter 40 of this title (relating to Alternative Dispute Resolution Procedure); Chapter 50 of this title (relating to Action [~~Actions~~] on Applications and Other Authorizations); Chapter 55 of this title (relating to Requests [~~Request~~] for Reconsideration and Contested Case Hearings; Public Comment); Chapter 70 of this title (relating to Enforcement); Chapter 80 of this title (relating to Contested Case Hearings); Chapter 86 of this title (relating to Special Provisions for Contested Case Hearings); [~~Chapter 261 of this title (relating to Introductory Provisions); Chapter 277 of this title (relating to Use Determinations for Tax Exemption for Pollution Control Property);~~] Chapter 305 of this title (relating to Consolidated Permits), and the notification requirement under §335.6 of this title (relating to Notification Requirements).

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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DIVISION 2. HAZARDOUS WASTE BURNED FOR ENERGY RECOVERY

30 TAC §335.222

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial

solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendment implements THSC, Chapter 361.

§335.222. Management Prior to Burning.

(a) Generators. Generators of hazardous waste that is burned in a boiler or industrial furnace are subject to the requirements of Subchapter C of this chapter (relating to Standards Applicable to Generators of Hazardous Waste).

(b) Transporters. Transporters of hazardous waste that is burned in a boiler or industrial furnace are subject to the requirements of Subchapter D of this chapter (relating to Standards Applicable to Transporters of Hazardous Waste).

(c) Storage and processing facilities. The provisions listed under paragraph (1) of this subsection apply to storage or processing by burners and by intermediaries such as processors, blenders, and distributors between the generator and the burner.

(1) Owners and operators of facilities that store or process hazardous waste that is burned in a boiler or industrial furnace are subject to the applicable provisions of the following, except as provided by paragraph (2) of this subsection:

(A) Subchapter A of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste [~~Management~~] in General);

(B) Subchapter B of this chapter (relating to Hazardous Waste Management General Provisions);

(C) Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities), except §335.112(a)(12) - (19) of this title (relating to Standards);

(D) Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities), except §335.152(11) - (16) of this title (relating to Standards);

(E) Subchapter U of this chapter (relating to Standards for Owners and Operators of Hazardous Waste Facilities Operating under a Standard Permit); and

(F) [~~(E)~~] Chapter 305 of this title (relating to Consolidated Permits).

(2) Owners and operators of facilities that burn, in an on-site boiler or industrial furnace exempt from regulations under the small quantity burner provisions of 40 Code of Federal Regulations §266.108, only hazardous waste that they generate are exempt from regulation under the provisions listed above in paragraph (1) of this subsection applicable to storage units for those units that store mixtures of hazardous waste and the primary fuel to the boiler or industrial furnace in tanks that feed the fuel mixture directly to the burner. Storage or processing of hazardous waste by such owners and operators prior to mixing with the primary fuel is subject to regulation as prescribed in paragraph (1) of this subsection.

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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DIVISION 4. SPENT LEAD-ACID BATTERIES BEING RECLAIMED

30 TAC §335.251

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendment implements THSC, Chapter 361.

§335.251. Applicability and Requirements.

(a) The regulations of this section adopt by reference 40 Code of Federal Regulations (CFR) Part 266, Subpart G as amended through January 8, 2010 (75 FR 1236). This section applies [~~apply~~] to persons who reclaim (including regeneration) spent lead-acid batteries that are recyclable materials (spent batteries). Persons who generate, transport, or collect spent batteries, who regenerate spent batteries, who store spent batteries that are to be regenerated, [~~or~~] who store spent batteries but do not reclaim them (other than spent batteries that are to be regenerated), who transport spent batteries in the United States to export them for reclamation in a foreign country or who export spent batteries for reclamation in a foreign country are not subject to regulation under this chapter, except that §335.24(h) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials) applies; and are not subject to regulation under Chapter 1 of this title (relating to Purpose of Rules, General Provisions); Chapter 3 of this title (relating to Definitions); Chapter 10 of this title (relating to Commission Meetings); Chapter 20 of this title (relating to Rulemaking); Chapter 37 of this title (relating to Financial Assurance); Chapter 39 of this title (relating to Public Notice); Chapter 40 of this title (relating to Alternative Dispute Resolution Procedure); Chapter 50 of this title (relating to Action [~~Actions~~] on Applications and Other Authorizations); Chapter 55 of this title (relating to Requests [~~Request~~] for Contested Case Hearings; Public Comment); Chapter 70 of this title (relating to Enforcement); Chapter 80 of this title (relating to Contested Case Hearings); Chapter 86 of this title (relating to Special Provisions for Contested Case Hearings); [~~Chapter 261 of this title (relating to Introductory Provisions); Chapter 277 of this title (relating to Use Determinations for Tax Exemption for Pollution Control Property);~~] or Chapter 305 of this title (relating to Consolidated Permits). Such persons, however, remain subject to the requirements of the Texas Water Code, Chapter 26.

(b) Owners or operators of facilities that store spent lead-acid batteries before reclaiming them (other than spent batteries that are to be regenerated) are subject to the following requirements:

(1) all applicable provisions in Subchapter A of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste [~~Management~~] in General), Subchapter B of this chapter (relating to Hazardous Waste Management-General Provisions), Subchapter E of this chapter (relating to Interim Standards of Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities), [~~and~~] Subchapter F of this chapter (relating to Permitting Standards of Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities), and Subchapter U of this chapter (relating to Standards for Owners and Operators of Hazardous Waste Facilities Operating under a Standard Permit), except for the requirements in §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, [~~Processing,~~] or Disposal Facilities) and 40 CFR [~~Code of Federal Regulations~~] §265.13; and

(2) all applicable provisions in Chapter 1 of this title [~~(relating to Purpose of Rules, General Provisions)~~]; Chapter 3 of this title [~~(relating to Definitions)~~]; Chapter 10 of this title [~~(relating to Commission Meetings)~~]; Chapter 20 of this title [~~(relating to Rulemaking)~~]; Chapter 37 of this title [~~(relating to Financial Assurance)~~]; Chapter 39 of this title [~~(relating to Public Notice)~~]; Chapter 40 of this title [~~(relating to Alternative Dispute Resolution)~~]; Chapter 50 of this title [~~(relating to Actions on Applications)~~]; Chapter 55 of this title [~~(relating to Request for Contested Case Hearings)~~]; Chapter 70 of this title [~~(relating to Enforcement)~~]; Chapter 80 of this title [~~(relating to Contested Case Hearings)~~]; Chapter 86 of this title [~~(relating to Special Provisions for Contested Case Hearings)~~]; [~~Chapter 261 of this title (relating to Introductory Provisions); Chapter 277 of this title (relating to Use Determinations for Tax Exemption for Pollution Control Property);~~] and Chapter 305 of this title [~~(relating to Consolidated Permits)~~].

(c) In addition to the regulations in this section, persons who transport spent batteries in the United States to export them for reclamation in a foreign country or who export spent batteries for reclamation in a foreign country are subject to the requirements of §335.13 and §335.76(h) of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste; and Additional Requirements Applicable to International Shipments, respectively).

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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SUBCHAPTER O. LAND DISPOSAL RESTRICTIONS

30 TAC §335.431

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC) §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendment implements THSC, Chapter 361.

§335.431. Purpose, Scope, and Applicability.

(a) Purpose. The purpose of this subchapter is to identify hazardous wastes that are restricted from land disposal and define those limited circumstances under which an otherwise prohibited waste may continue to be land disposed.

(b) Scope and Applicability.

(1) Except as provided in paragraph (2) of this subsection, the requirements of this subchapter apply to persons who generate or transport hazardous waste and owners and operators of hazardous waste treatment, storage, and disposal facilities.

(2) The requirements of this subchapter do not apply to any entity that is either specifically excluded from coverage by this subchapter or would be excluded from the coverage of 40 Code of Federal Regulations (CFR)[,] Part 268 by 40 CFR[,] Part 261, if those parts applied.

(3) Universal waste handlers and universal waste transporters, as defined in and subject to regulation under Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule) are exempt from 40 CFR §268.7 and §268.50.

(c) Adoption by Reference.

(1) except as provided in paragraph (2) of this subsection, and subject to the changes indicated in subsection (d) of this section, the regulations contained in 40 CFR Part 268, as amended through March 18, 2010 (75 FR 12989) [~~July 14, 2006 (71 FR 40254)~~] are adopted by reference.

(2) The following sections of 40 CFR Part 268 are excluded from the sections adopted in paragraph (1) of this subsection: §§268.1(f), 268.5, 268.6, 268.7(a)(10), 268.13, 268.42(b), and 268.44.

(3) Appendices IV, VI - IX, and XI of 40 CFR Part 268 are adopted by reference as amended through July 14, 2006 (71 FR 40254).

(d) Changes to Adopted Parts. The parts of the CFR that are adopted by reference in subsection (c) of this section are changed as follows:

(1) The words "Administrator" or "Regional Administrator" are changed to "Executive Director;"

(2) The word "treatment" is changed to "processing;"

(3) The words "Federal Register," when they appear in the text of the regulation, are changed to "Texas Register;"

(4) In 40 CFR §268.7(a)(6) and (a)(7), the applicable definition of hazardous waste and solid waste is the one that is set out in this chapter rather than the definition of hazardous waste and solid waste that is set out in 40 CFR Part 261.

(5) In 40 CFR §268.50(a)(1), the citation to "§262.34" is changed to "§335.69."

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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SUBCHAPTER R. WASTE CLASSIFICATION

30 TAC §335.504

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste); THSC, §361.024 (relating to Rules and Standards); and THSC, §361.036 (relating to Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendment implements THSC, Chapter 361.

§335.504. Hazardous Waste Determination.

A person who generates a solid waste must determine if that waste is hazardous using the following method:

(1) Determine if the material is excluded or exempted from being a solid waste or hazardous waste per §335.1 of this title (relating to Definitions) or identified in 40 Code of Federal Regulations (CFR) Part 261, Subpart A, as amended through March 18, 2010 (75 FR 12989), or identified in 40 CFR Part 261, Subpart E, as amended through July 28, 2006 (71 FR 42928) [~~January 2, 2008 (73 FR 57)~~].

(2) If the material is a solid waste, determine if the waste is listed as, or mixed with, or derived from a listed hazardous waste identified in 40 CFR Part 261, Subpart D, as amended through March 18, 2010 (75 FR 12989) [~~June 4, 2008 (73 FR 31756)~~].

(3) If the material is a solid waste, determine whether the waste exhibits any characteristics of a hazardous waste as identified in 40 CFR Part 261, Subpart C, as amended through March 18, 2010 (75 FR 12989) [~~July 14, 2006 (71 FR 40254)~~].

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 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 51. EXECUTIVE

The Texas Parks and Wildlife Department proposes the repeal of §§51.621 - 51.624, 51.632, 51.643, 51.644, 51.661, 51.662, 51.673, and 51.674 and amendments to §§51.3, 51.70, 51.71, 51.151, 51.201, 51.204, 51.300, 51.303, 51.304, and 51.601. The proposed repeals and amendments are a result of the department's review of its regulations under the provisions of Government Code, §2001.039, which requires a state agency to review each of its regulations no less frequently than every four years and to re-adopt, adopt with changes, or repeal each rule as a result of the review.

Parks and Wildlife Code, §11.0162, authorizes the Chairman of the Texas Parks and Wildlife Commission to "appoint committees to advise the commission on issues under its jurisdiction." Government Code, Chapter 2110, requires that rules be adopted regarding each state agency advisory committee. Unless otherwise provided by specific statute, the rules must (1) state the purpose of the committee; (2) describe the manner in which the committee will report to the agency; and (3) establish the date on which the committee will automatically be abolished, unless the advisory committee has a specific duration established by statute. Under the provisions of 31 TAC §51.601(d), all advisory committees expired on October 1, 2010 unless otherwise provided by law. In 2010, the department amended rules regarding several advisory committees to extend the expiration of those committees until October 2014 (October 15, 2010, issue (35 TexReg 9321)). The advisory committees that were not extended expired in October 2010 pursuant to §51.601. The proposed repeal of §§51.621 - 51.624, 51.632, 51.643, 51.644, 51.661, 51.662, 51.673, and 51.674 would eliminate advisory groups that have expired and which the department has determined are no longer necessary, either because they have served their purpose and become superfluous or because their function has been subsumed within another advisory group. Sections 51.621 (Artificial Reef Advisory Committee), 51.622 (Blue Crab Advisory Committee), 51.623 (Oyster Advisory Committee), and 51.624 (Shrimp Advisory Committee) are being repealed because they have expired and the Coastal Resources Advisory Committee can perform the advisory functions regarding those coastal fisheries resources. Section 51.632 (Texas Rivers Conservation Advisory Board) is being repealed because the term of the committee has expired and the Freshwater Fisheries Advisory Committee can perform the advisory functions regarding freshwater fisheries resources in Texas rivers. Section 51.643, concerning Historic Sites Advisory Committee and §51.644, concerning Big Bend Ranch State Park Task Force, are being repealed because the term of the Historic Sites Advisory Committee has expired and the Big Bend Ranch State Park

Task Force has completed its duties, although the State Parks Advisory Committee can perform advisory functions concerning historic sites and Big Bend Ranch State Park issues. Section 51.661, regarding Expo Advisory Committee, is being repealed because the term of the committee has expired and the department has discontinued the Texas Wildlife Expo. The remaining sections (§51.662, concerning Outreach, Interpretation, and Education Advisory Committee, §51.673 concerning Land Resources Advisory Committee and §51.674, concerning Aquatic Resources Advisory Committee) are being repealed because no membership was ever appointed and the committees were never assembled.

The department notes that although the proposed rules eliminate certain advisory committees, the commission has the authority to reconstitute or create an advisory committee to assist the department on any issue as circumstances warrant.

The proposed amendment to §51.3 concerning Consideration and Disposition, would change the title of the section to "Consideration and Disposition of Petitions for Rulemaking" to more accurately describe the section. The proposed amendment would also increase the amount of time for staff to submit a recommendation to the department's executive director regarding a petition for rulemaking. Under the provisions of Government Code, §2001.021, an interested person by petition may request that a state agency adopt a rule, and each state agency is required to prescribe by rule the form for such petitions and the procedure for the submission, consideration, and disposition of petitions. The statute also stipulates that not later than the 60th day after the date of submission of a petition for rulemaking, a state agency shall either deny the petition in writing, stating its reasons for the denial, or initiate rulemaking. Under current §51.3, after staff has prepared a recommendation regarding a petition for rulemaking, the petition is forwarded to each member of the commission, accompanied by the staff recommendation. If the staff recommendation is to deny the petition for rulemaking, and if within 50 days after the date the department received the petition no commissioner requests that the department initiate rulemaking, the petition is considered denied. Under current §51.3, staff must provide a recommendation to the department's executive director within 10 days after receiving the petition for rulemaking. The department recently has been presented with petitions of some complexity and consequently has concluded that 10 days is an insufficient amount of time for staff to thoroughly analyze the impacts of suggested regulatory changes. The department therefore proposes to amend §51.3(a) to increase the time period to 15 days. The department also proposes to amend §51.3(f) to update cross references to hunting and fishing regulations.

The proposed amendment to §51.70, concerning Gifts to the Department, would clarify and streamline the department's process for accepting gifts. Under Government Code, §575.003, a state agency that has a governing board may accept a gift of cash or property valued at greater than $500 only if the agency has the authority to accept the gift and a majority of the board, in an open meeting, acknowledges the acceptance of the gift not later than the 90th day after the date the gift is accepted. Under Parks and Wildlife Code, §11.026, the department may accept gifts of property or money in support of any department purpose authorized by the Parks and Wildlife Code. Under Parks and Wildlife Code, §11.0182, the commission is required to adopt policies by rule to govern fund-raising activities by department employees on behalf of the department with respect to gifts of greater than $500. Current §51.70 allows the department's executive director or his or her designee to contingently accept gifts of money or property of more than $500, in accordance with the commission's budget policy, prior to the formal acknowledgment of such gifts by the commission "upon approval by the presiding officer of the commission and the Chair of the commission's finance committee in accordance with the commission's budget policy." The commission meets five times per year. The rule allows the department to more efficiently and immediately utilize gifts in support of agency functions between commission meetings. The proposed amendment would replace the requirement that the acceptance of gifts of more than $500 be approved by both the chair of the commission and the chair of finance committee with a requirement that the acceptance of such gifts be approved by the chair or vice-chair of the commission or a commissioner authorized to approve the acceptance of gifts under the commission's budget policy. The commission is moving away from an organizational structure that consists of several standing committees. As a result, the position of financial committee chair will no longer exist. In addition, by providing various options for approving the acceptance of gifts, the proposed amendment would enhance the department's ability to more immediately utilize gifts in support of agency functions.

The proposed amendment to §51.71, concerning Employee Fundraising Activities, would alter paragraph (1) to acknowledge that the acceptance of gifts and donations is governed by Chapter 51, Subchapter C, and not solely by §51.71. The proposed amendment also would replace the plural possessive "their" with the singular possessive "the employee's" to correct a grammatical error.

The proposed amendment to §51.151, concerning Use of Uninscribed Vehicles, would change the title of the section to "Vehicle Inscriptions." The proposed amendment would also delegate authority to the executive director to allow inscriptions on state vehicles that do not obscure any required inscriptions, have been approved in advance by the executive director, are in the best interest of the department and do not conflict with the department's mission or goals, and are not more prominent than and do not overshadow the role of the department. Transportation Code, §721.002, requires certain markings on state-owned motor vehicles. However, Transportation Code, §721.003, allows the governing body of certain state agencies, including the department, to exempt an agency's motor vehicle from the marking requirements by rule. Current §51.151 delegates to the executive director the authority to approve the use of certain uninscribed vehicles. The proposed amendment would also delegate to the executive director the authority to approve inscriptions on department vehicles other those required by Transportation Code, Chapter 721, so long as the inscriptions meet the requirements of the amendment. The proposed amendment would, for example, allow department vehicles to bear messaging that acknowledges the sponsorship contributions that assist the department in furthering its mission.

The proposed amendment to §51.201, concerning Definitions, would remove references to Government Code, Chapter 2166, from the definitions of "contract" and "project" since Government Code, §2166.003(a)(4) specifically exempts the department from the applicability of Chapter 2166. However, the amendment does not alter the applicability of Subchapter J to disputes involving construction contracts.

The proposed amendment to §51.204 would delete the requirement in §51.204(d) that a contract claim pending before August

30, 1999 be delivered by February 26, 2000. The provision is obsolete and no longer necessary.

The proposed amendment to §51.300, concerning Definitions, would delete the definition of "commercial customer information" in §51.300(2) and replace it with "nonrecreational customer information" in §51.300(7). Provisions of Subchapter K address the handling of certain types of customer information. The reference to department customers who are not recreational customers as "nonrecreational" customers is more accurate than "commercial customers."

The proposed amendment to §51.303 would replace the term "commercial customer information" with "nonrecreational customer information" to conform this section to the terminology change described in connection with the proposed change to §51.300.

The proposed amendment to §51.304, concerning Exceptions, would alter subsection (b)(4)(D), which addresses the confidentiality of commercial customer and magazine subscriber information. Under the current rule, a commercial customer or Texas Parks and Wildlife Magazine subscriber may elect to exclude his or her customer information from disclosure or "opt out" of the disclosure provisions. The proposed amendment would eliminate the "opt out" mechanism. However, it continues to be the department's intent to follow magazine industry standards (such as the Audit Bureau of Circulation) regarding disclosure of magazine customer information. The proposed amendment is intended to enhance transparency in the handling of agency information. The department notes that the proposed amendment does not affect the confidentiality of information collected from purchasers of recreational licenses and permits or any other personal information that is required to be kept confidential by law.

The proposed amendment to §51.601, concerning General Requirements, would alter subsection (d) to remove the universal expiration date applicable to all department advisory committees. The department intends to establish or reauthorize advisory committees as necessary on a case-by-case basis within the regulation governing each specific department advisory committee establishing the expiration date of the advisory committee.

Mr. Robert Macdonald, Regulations Coordinator, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state and local governments as a result of enforcing or administering the rules.

Mr. Macdonald also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be clearer, better organized, and more effective regulations governing the processes and entities administered under the provisions of Chapter 51.

There will be no adverse economic effect on persons required to comply with the rules as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect affect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose record-keeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that the rules as proposed will not have an adverse on small businesses or microbusinesses; therefore, the department has determined that a regulatory flexibility analysis under Government Code, Chapter 2006, is not necessary.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposed rule may be submitted to Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 (e-mail: robert.macdonald@tpwd.state.tx.us).

SUBCHAPTER A. PROCEDURES FOR THE ADOPTION OF RULES

31 TAC §51.3

The amendments are proposed under Government Code, §2001.021, which requires each state agency to prescribe by rule the form for petitions for adoption of rules and the procedure for submission, consideration, and disposition of such petitions.

The proposed amendment affects Government Code, Chapters 2001.

§51.3. Consideration and Disposition <u>of Petitions for Rulemaking</u>.

(a) (No change.)

(b) Within <u>15</u> [~~10~~] days of receiving a petition, agency personnel shall make a recommendation to the executive director to either deny the petition or initiate rulemaking, and shall include reasons for the recommendation.

(c) - (e) (No change.)

(f) In the event that rulemaking is to be initiated as a result of a petition involving any portion of Chapter 65, Subchapter A of this title (relating to Statewide Hunting [~~and Fishing~~] Proclamation) <u>or Chapter 57, Subchapter N of this title (relating to Statewide Recreational and Commercial Fishing Proclamation)</u>, the department may defer the rulemaking activity until such time as it initiates other rulemaking activity involving Chapter 65, Subchapter A of this title <u>or Chapter 57, Subchapter N of this title</u>.

(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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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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SUBCHAPTER C. EMPLOYEE FUNDRAISING AND SPONSORSHIPS

31 TAC §51.70, §51.71

The amendments are proposed under Parks and Wildlife Code, §11.0182, which requires the commission to adopt policies by rule to govern fund-raising activities by department employees on behalf of the department with respect to gifts of greater than $500.

The proposed amendments affect Parks and Wildlife Code, Chapter 11.

§51.70 Gifts to the Department.

(a) Gifts of money or property $500 or more may be accepted by the executive director or his or her designee contingent upon approval by the Chair or Vice Chair of the commission or a commissioner authorized to approve such gifts pursuant to [~~presiding officer of the commission and the Chair of the Commission's finance committee in accordance with~~] the commission's budget policy. The department may not accept or receive gifts or bequests from any source until such gifts or bequests have been approved for acceptance by the executive director or his or her designee. Acceptance of gifts is hereby delegated as follows.

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

(b) - (c) (No change.)

§51.71. Employee Fundraising Activities.

This section applies only to the solicitation or acceptance of a gift equal to or greater than $500 in value by a person employed by the Texas Parks and Wildlife Department.

(1) An employee may solicit and accept a donation or gift in accordance with this subchapter [~~section~~] as a part of the employee's [~~their~~] officially authorized duties.

(2) - (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.

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SUBCHAPTER F. VEHICLES

31 TAC §51.151

The amendment is proposed Transportation Code, §721.003, which authorizes the department by rule to create exemptions from the applicability of the chapter with respect to uninscribed vehicles.

The proposed amendment affects Transportation Code, Chapter 721.

§51.151. Vehicle Inscriptions [~~Use of Uninscribed Vehicle~~].

(a) The commission authorizes [~~It is the policy of the commission to authorize~~] the executive director to assign any law enforcement or headquarters staff employee to operate departmental vehicles without inscriptions.

(b) Uninscribed [~~Such~~] vehicles will be other than those operated for routine patrol duty or which are normally used to conduct ordinary public business of the department.

(c) Uninscribed vehicles will be used primarily to conduct law enforcement investigations and to carry out special assignments made by the executive director when it is advantageous for successful enforcement of the law and to reach goals of the department as established by the legislature and the commission.

(d) The commission authorizes the executive director to approve inscriptions other than those described in Transportation Code, Chapter 721, so long as such inscriptions:

(1) do not obscure any required inscriptions;

(2) have been approved in writing in advance by the department's executive director or designee;

(3) are in the best interest of the department and do not conflict with the department's mission and goals; and

(4) are not more prominent than and do not overshadow the role of the department.

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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SUBCHAPTER J. CONTRACT DISPUTE RESOLUTION

31 TAC §51.201, §51.204

The amendments are proposed under the authority of Government Code, §2260.052(c), which requires each unit of state government with rulemaking authority to develop rules to govern the negotiation and mediation of contract claims against the state, and Parks and Wildlife Code, §11.0171, which requires the commission to adopt by rule policies and procedures for soliciting and awarding contracts.

The proposed amendments affect Government Code, Chapter 2260.

§51.201. Definitions.

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

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

(3) Contract--A written contract between the department and a contractor by the terms of which the contractor agrees either:

(A) to provide goods or services, by sale or lease, to or for the department; or

(B) to perform a Project [~~project as defined by Government Code,~~ §~~2166.001~~].

(4) - (10) (No change.)

(11) Project--A [~~As defined in Government Code, §2166.001, a~~] building construction project that is financed wholly or partly by a specific appropriation, bond issue or federal money, including the construction of:

(A) a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishing; and

(B) an addition to, or alteration, modification, rehabilitation or repair of an existing building, structure, or appurtenant facility or utility.

(12) (No change.)

§51.204. Notice of Claim of Breach of Contract.

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

(d) The notice of claim shall be delivered no later than 180 days after the date of the event that the contractor asserts as the basis of the claim[~~; provided, however, that a contractor shall deliver notice of a claim that was pending before the department on August 30, 1999, to the unit no later than February 26, 2000~~].

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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SUBCHAPTER K. DISCLOSURE OF CUSTOMER INFORMATION

31 TAC §§51.300, 51.303, 51.304

The amendments are proposed under Parks and Wildlife Code, §11.030, which requires the commission to adopt policies by rule relating to the release of the customer information; the use of the customer information by the department; and the sale of a mailing list consisting of the names and addresses of persons who purchase customer products, licenses, or services.

The proposed amendments affect Parks and Wildlife Code, Chapter 11.

§51.300. Definitions.

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

(1) Boat customer information--customer information regarding the holder of or applicant for a marine dealer license or for a title or registration issued by the department for a vessel or motor.

[~~(2) Commercial customer information--customer information regarding an individual who is the holder of a commercial fishing, hunting or other commercial license issued by the department. Commercial customer information does not include boat customer information.~~]

(2) [~~(3)~~] Confidential customer information--customer information made confidential by law, including, but not limited to, information made confidential by the Motor Vehicle Records Disclosure Act, Chapter 730, Texas Transportation Code.

(3) [~~(4)~~] Customer information--the name, address and telephone number of a department customer. For purposes of this subchapter, customer information does not include personal information.

(4) [~~(5)~~] Department customer--a person who purchases a product, license, permit or service from the department. For purposes of this subchapter, a department customer does not include a corporation, partnership or other commercial enterprise.

(5) [~~(6)~~] Magazine customer information--customer information about a person who subscribes to the Texas Parks and Wildlife Magazine.

(6) [~~(7)~~] Mailing list--a list containing the name and address for more than one department customer.

(7) Nonrecreational customer information--Customer information regarding an individual who is not a recreational customer. Nonrecreational customer information does not include boat customer information.

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

§51.303. Disclosure of Information.

(a) (No change.)

(b) Except as provided in this subchapter, the department will disclose, sell, rent or trade the following information, unless the information is also confidential customer information or disclosure is otherwise prohibited by law:

(1) nonrecreational [~~commercial~~] customer information; and

(2) magazine customer information.

(c) (No change.)

§51.304. Exceptions.

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

(d) The department may follow industry standards, including, but not limited to standards regarding the exclusion or inclusion of magazine customer information on a list of magazine customers that is rented or sold. [~~A commercial customer or magazine customer may elect to exclude his or her customer information from disclosure. In the event that a commercial customer or magazine customer elects to exclude his or her customer information from disclosure, his or her customer information will be treated as confidential information under this subchapter.~~]

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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SUBCHAPTER O. ADVISORY COMMITTEES
DIVISION 1. GENERAL REQUIREMENTS

31 TAC §51.601

The amendment is proposed under Parks and Wildlife Code, §11.062, which authorizes the chairman of the commission to appoint committees to advise the commission on issues under its jurisdiction; and Government Code, Chapter 2110, which requires that rules be adopted regarding each state agency advisory committee.

The proposed amendment affects Parks and Wildlife Code, Chapter 11.

§51.601. General Requirements.

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

(d) Expiration of advisory committee. Unless expressly provided in this subchapter or other law, each department advisory committee will expire on the expiration date established for each advisory committee [~~October 1, 2010~~].

(e) - (m) (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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DIVISION 3. COASTAL FISHERIES

31 TAC §§51.621 - 51.624

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under Parks and Wildlife Code, §11.062, which authorizes the chairman of the commission to appoint committees to advise the Commission on issues under its jurisdiction; and Government Code, Chapter 2110, which requires that rules be adopted regarding each state agency advisory committee.

The proposed repeals affect Parks and Wildlife Code, Chapter 11 and Government Code, Chapter 2110.

§51.621. Artificial Reef Advisory Committee (ARAC).

§51.622. Blue Crab Advisory Committee (BCAC).

§51.623. Oyster Advisory Committee (OAC).

§51.624. Shrimp Advisory Committee (SAC).

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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DIVISION 4. INLAND FISHERIES

31 TAC §51.632

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

The repeal is proposed under Parks and Wildlife Code, §11.062, which authorizes the chairman of the commission to appoint committees to advise the Commission on issues under its jurisdiction; and Government Code, Chapter 2110, which requires that rules be adopted regarding each state agency advisory committee.

The proposed repeal affects Parks and Wildlife Code, Chapter 11 and Government Code, Chapter 2110.

§51.632. Texas Rivers Conservation Advisory Board (TRCAB).

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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DIVISION 5. STATE PARKS

31 TAC §51.643, §51.644

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under Parks and Wildlife Code, §11.062, which authorizes the chairman of the commission to appoint committees to advise the Commission on issues under its jurisdiction; and Government Code, Chapter 2110, which requires that rules be adopted regarding each state agency advisory committee.

The proposed repeals affect Parks and Wildlife Code, Chapter 11 and Government Code, Chapter 2110.

§51.643. Historic Sites Advisory Committee (HSAC).

§51.644. Big Bend Ranch State Park Task Force.

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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DIVISION 7. COMMUNICATIONS

31 TAC §51.661, §51.662

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under Parks and Wildlife Code, §11.062, which authorizes the chairman of the commission to appoint committees to advise the Commission on issues under its jurisdiction; and Government Code, Chapter 2110, which requires that rules be adopted regarding each state agency advisory committee.

The proposed repeals affect Parks and Wildlife Code, Chapter 11 and Government Code, Chapter 2110.

§51.661. Expo Advisory Committee (EAC).

§51.662. Outreach, Interpretation, and Education Advisory Committee (OIEAC).

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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DIVISION 8. COMMITTEES OF THE COMMISSION

31 TAC §51.673, §51.674

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under Parks and Wildlife Code, §11.062, which authorizes the chairman of the commission to appoint committees to advise the Commission on issues under its jurisdiction; and Government Code, Chapter 2110, which requires that rules be adopted regarding each state agency advisory committee.

The proposed repeals affect Parks and Wildlife Code, Chapter 11 and Government Code, Chapter 2110.

§51.673. Land Resources Advisory Committee (LRAC).

§51.674. Aquatic Resources Advisory Committee (ARAC).

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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SUBCHAPTER D. EDUCATION

31 TAC §51.81

The Texas Parks and Wildlife Department proposes an amendment to §51.81, concerning Mandatory Boater Education.

In 1997, the 75th Texas Legislature enacted House Bill (H.B.) 966, which amended Parks and Wildlife Code, Chapter 31 (commonly referred to as the Texas Water Safety Act) by adding §31.109, which required all boat operators born after September 1, 1984 to successfully complete an approved boater education course before operating certain vessels (vessels powered by a motor of 10 horsepower or more, windblown vessels of over 14 feet in length, and personal watercraft) on public waters. H.B. 966 also amended the Water Safety Act by adding §31.110, which stipulated that a person is not required to comply with the mandatory boater education requirements of §31.109 if, among other things, that person is at least 18 years of age or was exempt by rule of the commission.

In 2009 the 81st Texas Legislature enacted H.B. 3108, which mandated the creation of an advisory panel to "study the current state of recreation safety on public waters in Texas and to make recommendations to the governor, the lieutenant governor, and the speaker of the house of representatives for improving safety." In 2010 the advisory panel submitted the required report. In this report, the panel found, among other things, that watercraft operator education will help to better prepare the operator to have a safe and successful experience on the water, that education will improve the safety of all passengers in the craft, and that with a more educated operator, passengers will be more directed to safety by the informed operator. The panel also recommended that the legislature "continue the current Texas mandatory program," but "remove the 18 years of age exemption" and "reset the born-on-date to September 1, 1993, which permits an ongoing phase-in corresponding to the current 17-year-old cap, and avoids significant state expenditures to catch up previously exempted age groups." In addition, the panel recommended that the legislature grant authority to the department to "establish an integrated temporary free deferral program for liveries, new boat sales, and dealer business purposes (show, demonstrate, and test)."

Following the submission of the interim report, the 82nd Texas Legislature in 2011 enacted H.B. 1395, which amended several provisions of the Water Safety Act. Section 31.109, as amended by H.B. 1395, provides that no person born on or after September 1, 1993 may operate a personal watercraft or motorboat powered by a motor of greater than 15 horsepower, or a windblown vessel over 14 feet in length on public waters unless that person possesses evidence of successful completion of a boater education course approved by the department or "proof of completion of the requirements to obtain a vessel operator's license issued by the United States Coast Guard." H.B. 1395 also eliminated the exemption from the boater education requirements for persons who are at least 18 years of age. Persons born prior to September 1, 1993 (generally persons who are older than 19 year of age as of September 1, 2012) would not be subject to the boater education requirements of §31.110.

H.B. 1395 also amended §31.110 to list five situations in which a person who would otherwise be subject to the mandatory boater education requirement is not required to comply with the mandatory boater education requirements of §31.109. Two of the five situations in which a person is exempt from the boater education requirements apply only if authorized by a rule enacted by the Texas Parks and Wildlife Commission (the Commission). Specifically, a person may be exempt from the boater education requirements if that person is exempt by rules of the commission as a customer of a business engaged in renting, showing, demonstrating, or testing boats, or if that person is otherwise exempt by rule of the commission.

H.B. 1395 also amended §31.110 to require the department by rule to establish a boater education deferral program. The boater education deferral program must be available at no cost to boat dealers, manufacturers, and distributors. Therefore, the proposed rules establish a deferral program and a temporary exemption from the boater education requirements for persons who have obtained the boater education deferral, and provide an exemption for persons engaged in showing, testing, or demonstrating a boat, which will result in an exemption for boat dealers, manufacturers, and distributors.

The proposed amendment would establish a one-time, 15-consecutive-day (from the day of purchase through midnight of the fifteenth day following purchase) deferral of the boater education requirements of Parks and Wildlife Code, §31.109 (regarding mandatory boater education), available for a fee of $10, to persons who are 18 years of age or older. The proposed rulemaking to establish the fee is published elsewhere in this issue of the *Texas Register.* The department intends to make the deferral available for purchase through the department's license sales system. As a result, a deferral could be purchased at any of approximately 1,700 locations statewide or through the TPWD website (www.tpwd.state.tx.us). In addition, a deferral could be purchased by telephone during business hours or at any time via the department's website.

In developing the proposed rule, the department considered that the word "deferral" means a delay or postponement, as opposed to an exemption. The panel recommendation also referenced a "temporary" deferral program. In addition, the department considered that the purpose of boater education is to make public waters safer for all persons who use them. On that basis, the department is proposing a boater education deferral that is a one-time opportunity that will extend for no more than 15 days. The proposal is designed to provide a deferral program while also preserving the public safety benefits of boater education.

The proposed amendment would make the deferral available only to persons who are 18 years of age or older. The age requirement is intended to provide for a minimum level of maturity for persons who obtain the boater education deferral. A person who is 18 years of age is considered an adult for most purposes.

Additionally, the proposed amendment would prohibit a person who has purchased a boater-education deferral from supervising the operation of a vessel by another person. Under Parks and Wildlife Code, §31.110(2), a person who meets certain criteria may supervise another person who has not completed boater education. The department does not believe that a person who is required to complete boater education, but is authorized to operate a vessel as a result of the deferral, should be allowed to supervise another operator.

The proposed amendment also provides an exception from the mandatory boater education requirement for persons on a vessel that is being shown, tested, or demonstrated under a dealer's, distributor's, or manufacturer's license. As noted above, Parks and Wildlife Code, §31.110(a)(4) provides that a person may be exempt from the boater education requirements if that person is exempt by rule of the commission as a customer of a business engaged in renting, showing, demonstrating, or testing boats. Under the proposed rule, a person who is renting a boat would not be exempt from the boater education requirements, but would be able to purchase a deferral. However, under the proposed rule, a person who is a customer of a business engaged in showing, demonstrating, or testing boats would be exempt from the mandatory boater education requirements.

Parks and Wildlife Code, §31.041(d) provides for the use of the license of a boat dealer, distributor and/or manufacturer when showing, demonstrating or testing a boat. Since a customer of a business who is showing, testing or demonstrating a boat is generally under the supervision of a representative of the dealer, distributor or manufacturer, there are fewer safety concerns. Department boating accident records indicate that during the period from 2007 to the current time, there were 12 accidents involving vessels with an "AA" registration. (Vessels being shown, tested, or demonstrated have a special registration, which is also valid for 15 days following the sale of a vessel by a dealer.) These 12 accidents resulted in 13 injuries and one fatality. The de-

partment has determined that because of the low accident rate, customers involved in the show, test, or demonstration of boats should therefore be exempt from boater education requirements while engaged in those activities.

The proposed rule requires all persons other than those involved in the show, test, or demonstration of vessels to either complete the mandatory boater education course or obtain the one-time deferral. This includes persons who rent vessels from a vessel livery. The department has determined, based on water safety data, that to be consistent with the legislative directive to improve boating safety, it is necessary to require persons who rent vessels to either have obtained boater education certification or the one-time boater education deferral. There are 602,729 registered vessels in Texas, 940 of which are registered as livery (rental) vessels; therefore, rental vessels comprise .155% of all registered vessels in the state. Boating safety statistics indicate that during the period from 2007 to the current time, rented vessels were involved in 263 of 1220 (22%) of reported boating accidents, 126 of 665 (19%) of reported accident-related injuries, and 11 of 225 (5%) of boating-accident fatalities. Department statistics for the last five years also indicate that out of 263 boating accidents involving rented vessels, only three (1%) involved operators who had completed a department-approved boating education class. Although Parks and Wildlife Code, §31.111, requires vessel liveries to provide some safety instruction to customers (to include the provisions of the Water Safety Act, the operational characteristics of the rented vessel, and boating regulations that apply in the area where the rented or leased vessel will be operated), the department concludes that requiring persons who rent vessels to either complete a department-approved boater education class or obtain the proposed deferral would result in increased water safety. The proposed 15-day duration of the boater education deferral will cover the period of a standard two-week vacation and is also consistent with the time frame for a person to transfer the registration of a boat purchased from a dealer, distributor, or manufacturer.

Mr. Tim Spice, Boater Education Coordinator, has determined that for each of the first five years that the rule as proposed is in effect, there will be fiscal implications to state government as a result of enforcing or administering the rule. Those implications will be positive for the state, since the proposed rule in conjunction with the proposed rulemaking to establish the fee, published elsewhere in this issue of the *Texas Register,* requires anyone who wishes to obtain a boater education deferral to purchase it at a cost of $10. The $10 fee amount was selected because it is identical to the fee amount for hunter education deferral provided in 31 TAC §53.50(b)(2).

Since the boater education deferral program is a new program, the department is unable to accurately predict the number of persons who will purchase the boater education deferral in each of the next five years. As a result, the department is unable to accurately predict the revenue increase associated with the proposed rule. Over the previous five fiscal years (FY7-FY11), between 8,200 and 10,900 persons per year have taken boater education courses in Texas, with a five-year average of 9,573 persons per year. Not all persons who took boater education courses were required to take the courses in order to operate a vessel. Also, not all persons who took boater education courses would be eligible for the deferral.

By comparison, the hunter education deferral has been available since 2004. During that period, the number of persons who have obtained the hunter education deferral represents about 34% of the persons who have taken hunter education. Applying that ratio to the average number of person who have taken boater education (34% of 9,573), would result in an estimate of 3,255. If 3,255 persons obtain a boater education deferral at a cost of $10 each, the total revenue to the state would be $32,550. However, as noted above, it is impossible to accurately predict the number of persons who will obtain a boater education deferral. A number of factors may also influence this number, including but not limited to weather conditions.

There will be no fiscal implications for other units of state or local government.

Mr. Spice also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be rules that are in compliance with the requirements of Parks and Wildlife Code.

There will be an adverse economic effect on persons required to comply with the rule as proposed; namely, the fee of $10 for the purchase of a boater education deferral.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. The proposal impacts individuals who may wish to operate a motor boat or personal water craft, but would not have a direct impact on small or microbusinesses, although businesses that sell or rent motor boats and personal watercraft could see an indirect positive impact since the proposal could result in more persons being eligible to operate vessels. Since the proposed rule does not directly affect small businesses or microbusinesses, the department has determined that the proposed amendment will not impose any direct adverse economic effects on small businesses or microbusinesses. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006. There will be no fiscal implications for persons required to comply with the rule as proposed.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rules may be submitted to Tim Spice, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8141 (e-mail: tim.spice@tpwd.state.tx.us).

The amendment is proposed under the authority of Parks and Wildlife Code, §11.027, which authorizes the commission to by rule establish and provide for the collection of a fee to cover costs associated with the review of an application for a permit required by the code, and §31.110, which requires the commission to establish a boater education deferral program by rule and allows the commission to exempt from the boater education requirement a customer of a business engaged in testing, showing, or demonstrating boats.

The proposed amendment affects Parks and Wildlife Code, Chapters 11 and 31.

§51.81. Mandatory Boater Education.

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

(h) A person 18 years of age or older may obtain a one-time deferral from the boater-education requirements of Parks and Wildlife Code, §31.109, after paying the fee established in §53.50 of this title (relating to Training and Certification Fees) to the department.

(1) A deferral under this subsection does not authorize any person to supervise the operation of a vessel by any other person.

(2) A boater education deferral is valid for 15 consecutive days beginning on the date of purchase and ending at midnight of the 15th day following purchase.

(i) A person engaged in showing, testing, or demonstrating boats under Parks and Wildlife Code, §31.041(d), is exempt from the boater education course requirement while showing, testing, or demonstrating a boat.

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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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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SUBCHAPTER P. OFFICIAL CORPORATE PARTNERS

31 TAC §51.701, §51.704

The Texas Parks and Wildlife Department proposes amendments to §51.701 and §51.704, concerning Official Corporate Partners. House Bill 1300 (HB 1300), enacted by the 82nd Texas Legislature, amended Parks and Wildlife Code, Chapter 11, by adding Subchapter J-1 to address the use of private contributions, partnerships, licensing and commercial advertising to provide additional funding for department programs, projects, and sites. Parks and Wildlife Code, §11.225, as added by HB 1300, requires the Texas Parks and Wildlife Commission (commission) to adopt rules to implement the provisions of Subchapter J-1, including rules that establish guidelines or best practices for official corporate partners.

Earlier this year, the commission adopted 31 TAC §§51.700 - 51.704 to implement HB 1300. The rules went into effect in May 2012. On July 24, 2012, in accordance with the rules, the department issued a Request for Proposals (RFP) to solicit proposals from commercial entities seeking to be designated as department-wide official corporate partners (OCP-Ds). The department notified more than 3,000 companies and publicized the issuance of the RFP through a press release and a number of interviews with various media outlets. The deadline for response to the RFP was August 30, 2012. In spite of the department's efforts to generate interest, the department received no proposals in response to the RFP.

However, the department continues to receive inquiries from commercial entities wishing to engage in joint promotions or other arrangements to provide much needed financial support to the department. Such support may involve the licensing of department brands or designation as an official corporate sponsor. Current §51.701 requires that the OCP-D designation be awarded through a competitive process. Similarly, current §51.704 requires that the opportunity to license department brands be awarded through a competitive process. To enable the department to take full advantage of potential opportunities, the department proposes to amend §51.701 and §51.704 to allow the department's executive director or designee to waive the competitive process requirement for the designation of an OCP-D and for the licensing of department brands when such waiver is determined to be in the best interest of the department.

The proposed amendment to §51.701(a) would provide that "except as otherwise provided" in the rules, OCP-Ds will be selected through a fair and competitive process. The proposed amendment goes on to authorize the department's executive director to waive the competitive process requirement for designation of an OCP-D if such a waiver is determined to be in the best interest of the department. Although the department continues to believe that the OCP-D designation should be reserved for companies offering a significant financial benefit to the department, the recent lack of responses to the department's RFP suggests that a means other than a competitive RFP process may be a more appropriate means of selecting an OCP-D in some circumstances.

The proposed amendment to §51.704(c) would provide that "except as otherwise provided" in the rules, the department will use a competitive process to award the licensing rights for one or more department's brands. In addition, the proposed amendment authorizes the department's executive director to waive the competitive process requirement for awarding licensing rights. Although the use of a competitive process may continue to be an appropriate mechanism for awarding the right to license department brands in some circumstances, the amendment would provide additional flexibility when the award of licensing rights would be in the department's best interest.

Darcy Bontempo, Director of Marketing Services, has determined that for each of the first five years that the rules as proposed are in effect, there will be fiscal implications to state government as a result of enforcing or administering the rules. Those implications are expected to be positive, since the purpose of the rules is to enhance fundraising activities; however, there is no historical data upon which to base an estimate.

There will be no fiscal implications for other units of state or local government as a result of enforcing or administering the rules.

Ms. Bontempo also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be the enhancement of the department's abil-

ity to raise funds to provide and maintain department programs, projects, and sites.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic affect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, commission considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that there will be no adverse economic effects on small businesses, microbusinesses, or persons required to comply with the rules as proposed. The rules set forth the guidelines for the selection of official corporate sponsors. The rules as proposed do not require any person or entity be an official corporate sponsor of the department, and any relationship between a person or entity and the department under the proposed rules would be strictly voluntary and set forth by contract. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposed rules may be submitted to Ms. Darcy Bontempo, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4574 (e-mail: darcy.bontempo@tpwd.state.tx.us).

The amendments are proposed under the authority of Parks and Wildlife Code, §11.225, as added by House Bill 1300, enacted by the 82nd Texas Legislature, Regular Session (2011), which requires the commission to adopt rules to implement the provisions of Parks and Wildlife Code, Chapter 11, Subchapter J-1, and under Parks and Wildlife Code, §13.303, as added by House Bill 1300, enacted by the 82nd Texas Legislature, Regular Session (2011), which requires the commission to adopt rules to prohibit inappropriate commercial advertising in state parks, natural areas, historic sites, or other sites under the jurisdiction of the department.

The proposed amendments affect Parks and Wildlife Code, Chapter 11.

§51.701. Designation of OCPs.

(a) Except as otherwise provided herein, [~~All~~] OCP-Ds shall be selected through a fair and competitive process that takes into consideration the amount of support being offered and the needs of the department. Provided, however, the department's executive director, or designee may waive competitive process requirement if such a waiver is in the best interest of the department.

(b) - (n) (No change.)

§51.704. Licensing of the Department Brands.

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

(c) Except as otherwise provided herein, the [~~The~~] department shall use a competitive process to award the licensing rights for one or more department's brands. Provided, however, the department's executive director, or designee may waive competitive process requirement if such a waiver is in the best interest of the department.

(d) - (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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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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CHAPTER 53. FINANCE
SUBCHAPTER A. FEES
DIVISION 3. TRAINING AND CERTIFICATION FEES

31 TAC §53.50

The Texas Parks and Wildlife Department proposes an amendment to §53.50, concerning Training and Certification Fees. The proposed amendment would establish a fee of $10 for a one-time deferral of boater education course requirements.

Under Parks and Wildlife Code, §31.109, no person born on or after September 1, 1993 may operate a personal watercraft or motorboat powered by a motor of greater than 15 horsepower or a windblown vessel over 14 feet in length on public waters unless that person possesses evidence of successful completion of a boater education course approved by the department or "proof of completion of the requirements to obtain a vessel operator's license issued by the United States Coast Guard." Under the provisions of House Bill 1395, enacted by the 82nd Texas Legislature, Regular Session (2011), Parks and Wildlife Code, §31.110 was amended to require the department to establish a boater education deferral program by rule. The proposed rulemaking to establish the boater education deferral program, published elsewhere in this issue of the *Texas Register,* would allow a person to purchase a deferral of boater education requirements. This proposed amendment would establish the fee of $10 for the deferral. The department intends to make the deferral available for purchase through the department's license sales system. As a result, a deferral could be purchased at any of approximately 1,700 locations statewide, or through the TPWD website (www.tpwd.state.tx.us). In addition, a deferral could be purchased by telephone during business hours.

Tim Spice, Boater Education Coordinator, has determined that for each of the first five years that the rule as proposed is in effect, there will be fiscal implications to state government as a result of enforcing or administering the rule. Those implications will be positive for the state, since the proposed rule in conjunction with the proposed rulemaking to establish the deferral option, published elsewhere in this issue of the *Texas Register,* requires anyone who wishes to obtain a boater education deferral to purchase it at a cost of $10. The $10 fee amount was selected because it is identical to the fee amount for hunter education deferral provided in subsection (b)(2). In addition, a fee in the amount of $10 is a minimal fee to cover department costs in administering the boater education deferral program.

Since the boater education deferral program is a new program, the department is unable to accurately predict the number of persons who will purchase the boater education deferral in each of the next five years. As a result, the department is unable to accurately predict the revenue increase associated with the proposed rule. Over the previous five fiscal years (FY7-FY11), between 8,200 and 10,900 persons per year have taken boater education courses in Texas, with a five-year average of 9,573 persons per year. Not all persons who took boater education courses were required to take the courses in order to operate a vessel. Also, not all persons who took boater education courses would be eligible for the deferral.

By comparison, the hunter education deferral has been available since 2004. During that period, the number of persons who have obtained the hunter education deferral represents about 34% of the persons who have taken hunter education. Applying that ratio to the average number of person who have taken boater education (34% of 9,573), would result in an estimate of 3,255. If 3,255 persons obtain a boater education deferral at a cost of $10/each, the total revenue to the state would be $32,550. However, as noted above, it is impossible to accurately predict the number of persons who will obtain a boater education deferral. A number of factors may also influence this number, including but not limited to weather conditions.

There will be no fiscal implications for other units of state or local government.

Mr. Spice also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be accurate rules with respect to fee amounts.

There will be an adverse economic effect on persons required to comply with the rule as proposed; namely, the fee of $10 for the purchase of a boater education deferral.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. The proposal impacts individuals who may wish to operate a motor boat or personal water craft, but would not have a direct impact on small or microbusinesses, although businesses that sell or rent motor boats and personal watercraft could see an indirect positive since the proposal could result in more persons being eligible to operate vessels. Since the proposed rule does not adversely affect small businesses or microbusinesses, the department has determined that the proposed amendment will not impose any direct adverse economic effects on small businesses or micro-businesses. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006. There will be no fiscal implications for persons required to comply with the rule as proposed.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to Tim Spice, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8141 (e-mail: tim.spice@tpwd.state.tx.us).

The amendment is proposed under the authority of Parks and Wildlife Code, §11.027, which authorizes the commission to by rule establish and provide for the collection of a fee to cover costs associated with the review of an application for a permit required by the code, and §31.110, which requires the commission to establish a boater education deferral program by rule.

The proposed amendment affects Parks and Wildlife Code, Chapter 11 and Chapter 31.

§53.50. Training and Certification Fees.

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

(c) Boater education fees.

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

(6) The fee for obtaining a boater education deferral is $10.

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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Ann Bright
General Counsel
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CHAPTER 57. FISHERIES
SUBCHAPTER N. STATEWIDE RECREATIONAL AND COMMERCIAL FISHING PROCLAMATION

DIVISION 1. GENERAL PROVISIONS

31 TAC §57.972

The Texas Parks and Wildlife Department proposes an amendment to §57.972, concerning General Rules. The proposed amendment would add Lake Ray Roberts and Lake Lewisville to the list of water bodies where special regulations intended to control the spread of zebra mussels *(Dreissena polymorpha)* are in effect.

The zebra mussel is a small, non-native mussel originally found in Eurasia. It has spread throughout Europe, where it is considered to be a major environmental and industrial menace. The animal appeared in North America in the late 1980s and within ten years had colonized in all five Great Lakes and the Mississippi, Tennessee, Hudson, and Ohio river basins. Since then, they have spread to additional lakes and river systems.

Zebra mussels live and feed in many different aquatic habitats, breed prolifically, and cannot be controlled by natural predators. Adult zebra mussels colonize all types of living and non-living surfaces including boats, water-intake pipes, buoys, docks, piers, plants, and slow-moving animals such as native clams, crayfish, and turtles. The U.S. Fish and Wildlife Service has estimated the potential economic impact of zebra mussels to be in the billions of dollars.

Zebra mussels affect natural ecosystems both directly and indirectly. The greatest direct impact relates to the mussel's feeding behavior. Zebra mussels are filter feeders and each mussel can process up to one liter of water per day. During this process, particles in the water column are removed and either eaten by the mussels or coated in mucus and ejected. Unfortunately, the material removed from the water consists of other live animals and algae that supply food for larval fish and other invertebrates. In response to this changing food supply, indigenous populations of some animals decline and food webs are disturbed or eliminated. Once zebra mussels become established in a water body, they are impossible to eradicate with the technology available today.

What makes zebra mussels particularly difficult to control is that they have a free-floating, microscopic larval stage called a veliger. Because young zebra mussels are so small, they are spread easily by water currents and can drift for miles before settling. After settling, the mussels attach to hard objects and remain stationary as they grow. They often attach to objects involved in human activities, such as boats and boat trailers, and are inadvertently moved from one water body to another by people. Any water collected from waterbodies where zebra mussels are present could contain veligers; thus, water transported from waterbodies with known zebra mussel populations is a vector for the spread of zebra mussels.

The department earlier this year amended §57.972 to implement special regulations to control the spread of zebra mussels from the Red River and Lake Lavon. The adopted amendment appeared in the May 11, 2012, issue of the *Texas Register* (37 TexReg 3602). Zebra mussels were confirmed in Lake Ray Roberts on July 17, 2012 and in the Elm Fork of the Trinity River upstream of Lake Lewisville on July 18, 2012. On July 30, 2012, the department filed an emergency rule to rule to address the discovery of zebra mussels in Lake Ray Roberts and the Elm Fork of the Trinity River. The emergency rule added those water bodies to the applicability of existing rules to control the spread of zebra mussels. The proposed amendment would supplant the emergency rule on a permanent basis.

Under ordinary circumstances, the department would consider any person in possession of zebra mussels (including veligers) to be in violation of Chapter 57, Subchapter A, which prohibits the possession of exotic aquatic shellfish, including zebra mussels. The proposed amendment would provide that the department will not consider a person in possession of veligers to be in violation of the exotic species rules, provided all live wells, bilges, and other receptacles or systems capable of retaining or holding water as a consequence of being immersed in a waterbody have been completely drained prior to the use of a public roadway. The proposed amendment also would provide that a person traveling on a public roadway via the most direct route to another access point located on the same body of water would not be required to drain or empty water.

Ken Kurzawski, Program Director for Regulations and Information in the Inland Fisheries Division, has determined that for each of the first five years that the proposed rule is in effect there will be no fiscal implications for the department as a result of enforcing or administering the rule.

Mr. Kurzawski also has determined that for each of the first five years that the proposed rule is in effect, the public benefit anticipated as a result of enforcing or administering the proposed rule will be the protection of an important ecosystem enjoyed by the public.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect affect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose record-keeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. The department has determined that there will be no adverse economic impacts on small businesses or micro-businesses as a result of the proposed rule. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The proposed rule will not result in negative economic impacts to persons required to comply.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Texas Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule, as the rule would not affect private real property.

Comments on the proposed rule may be submitted to Ken Kurzawski, Texas Parks and Wildlife Department, 4200 Smith School

Road, Austin, Texas 78744; (512) 389-4591 (e-mail: ken.kurzawski@tpwd.state.tx.us).

The amendment is proposed under Parks and Wildlife Code, §66.007, which prohibits the possession or placement into public waters of exotic fish or shellfish except as authorized by rule or permit issued by the department.

The proposed amendment affects Parks and Wildlife Code, Chapter 66.

§57.972. General Rules.

(a) - (j) (No change.)

(k) A person who leaves a water body listed in this subsection while in possession of a harmful or potentially harmful species listed in §57.111 of this title (relating to Definitions) that is invisible to the unaided human eye is not in violation of §57.112 of this title (relating to General Rules), provided that:

(1) all live wells, bilges, and other similar receptacles and systems that are capable of retaining or holding water as a consequence of being immersed in a water body have been drained prior to the use of a public roadway; or

(2) the person is travelling on a public roadway via the most direct route to another access point located on the same body of water.

(3) This subsection applies to the following bodies of water:

(A) the Red River from the I-44 bridge in Wichita County to the Texas/Arkansas border, including the Texas waters of Lake Texoma; [~~and~~]

(B) Lake Lavon; and[~~.~~]

(C) all impounded and tributary waters of the Elm Fork of the Trinity River above the Lewisville Dam, including Lake Lewisville and Lake Ray Roberts.

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 September 24, 2012.

TRD-201205061
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 389-4775

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CHAPTER 61. DESIGN AND CONSTRUCTION SUBCHAPTER A. CONTRACTS FOR PUBLIC WORKS

The Texas Parks and Wildlife Department proposes the repeal of §§61.21 - 61.26 and new §61.21, concerning Contracts for Public Works. The proposed repeal and new section are a result of the department's review of its regulations under the provisions of Government Code, §2001.039, which requires a state agency to review each of its regulations no less frequently than every four years and to re-adopt, adopt with changes, or repeal each rule as a result of the review.

Under Parks and Wildlife Code, §11.0171, the executive director or executive director's designee may negotiate, contract, or enter an agreement relating to a project of the department, including professional services agreements relating to a department project, consistent with Subchapter A, Chapter 2254, Government Code (the Professional Services Procurement Act). Section 11.0171 also requires the commission to adopt by rule policies and procedures consistent with applicable state procurement practices for soliciting and awarding contracts.

In reviewing Chapter 61, Design and Construction, the department determined that the existing rules governing construction contracts do not reflect all of the options for modern construction contract award and management. In addition, the current rules contain provisions that are more appropriately addressed in solicitation documents, such as a request for proposals. Therefore, the department proposes to replace the existing rules with a single, flexible regulation that enables the department to deal effectively with the multiplicity of possible conditions and circumstances affecting the various construction projects undertaken by the department.

Proposed new §61.21(a) would require the department to solicit, evaluate, negotiate, select, and award contracts for construction projects by means of a fair and impartial method, including but not limited to competitive bidding, competitive sealed proposal, construction manager-agent, construction manager-at-risk, design-build method, and single source.

Proposed new §61.21(b) would require the department to ensure that any method used to solicit, evaluate, select, and award a contract for construction results in the best value for the department. In addition to the obvious importance of ensuring that construction contracting occur in compliance with state law and by means of a fair and impartial process, the department believes it is important that the proposed regulation acknowledge that as a public agency, the department's goal in all cases is to make sure that the interest of the people of the state is served by striving to obtain the best value when contracting for construction.

Ms. Teresa Rodgers-Curtis, Contracting Branch Manager, Infrastructure Division, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state and local governments as a result of enforcing or administering the rule.

Ms. Rodgers-Curtis also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be rules that enable the department to contract for construction projects in the quickest, most effective, and most economical manner.

There will be no adverse economic effect on persons required to comply with the rule as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose,

the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. Since the proposed rule does not impose any direct adverse economic effects on small businesses or micro-businesses, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 (e-mail: robert.macdonald@tpwd.state.tx.us).

31 TAC §§61.21 - 61.26

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

The repeals are proposed under the authority of Parks and Wildlife Code, §11.0171, which requires the commission to adopt by rule policies and procedures consistent with applicable state procurement practices for soliciting and awarding contracts.

The proposed repeals affect Parks and Wildlife Code, Chapter 11.

§61.21. General.

§61.22. Soliciting Bids.

§61.23. Submission and Receipts of Bids.

§61.24. Award of Bids.

§61.25. Solicitation, Evaluation, and Selection of Proposals.

§61.26. Award in Response to Proposals.

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 September 24, 2012.

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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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31 TAC §61.21

The new rule is proposed under the authority of Parks and Wildlife Code, §11.0171, which requires the commission to adopt by rule policies and procedures consistent with applicable state procurement practices for soliciting and awarding contracts.

The proposed new rule affects Parks and Wildlife Code, Chapter 11.

§61.21. Contracts for Public Works.

(a) The department shall solicit, evaluate, negotiate, select, and award contracts for construction projects by means of a fair and impartial method, including but not limited to:

(1) competitive bidding;

(2) competitive sealed proposal;

(3) construction manager-agent;

(4) construction manager-at-risk;

(5) design-build method; and

(6) single source.

(b) The department shall ensure that any method used to solicit, evaluate, select, and award a contract for construction results in the best value for the department.

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 September 24, 2012.

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CHAPTER 65. WILDLIFE

SUBCHAPTER B. DISEASE DETECTION AND RESPONSE

DIVISION 1. CHRONIC WASTING DISEASE (CWD)

31 TAC §§65.80 - 65.88

The Texas Parks and Wildlife Department (the department) proposes new §§65.80 - 65.88, concerning Chronic Wasting Disease. The proposed new rules, if adopted, will be in new Subchapter B, concerning Disease Detection and Response, within Chapter 65. On July 10, 2012, the department confirmed the first known cases of wildlife infected with Chronic Wasting Disease (CWD) in Texas. Texas now joins 20 other states and two Canadian provinces where CWD has been detected in free-ranging or captive environments. The proposed new rules are a result of cooperation between the department and the Texas Animal Health Commission (TAHC) to protect susceptible species of exotic and native wildlife from CWD. TAHC is the state agency charged with disease management in livestock and exotic species. The

rules proposed by TAHC regarding CWD in livestock and exotic species were published in the July 6, 2012, issue of the *Texas Register* (37 TexReg 5061).

In general, to minimize the risk of CWD expanding beyond the area(s) in which it currently exists, the department's proposed new rules: (1) define geographic areas the department has determined, using the best available science and data, where the detection of CWD in Texas has occurred or is probable (Containment Zones), where the presence of CWD could reasonably be expected (High Risk Zones), and where there is an elevated probability of discovering CWD (Buffer Zones); (2) increase disease monitoring requirements and/or restrict activities conducted under any permits authorizing the capture, release, or possession of live cervid species (cervids are a family of animals including deer, elk, moose, and caribou) regulated by the department (white-tailed deer and mule deer) in a CZ, HRZ, or BZ; and (3) authorize the department's executive director to declare other geographic areas that meet the regulatory definition as a CZ, HRZ, or BZ.

CWD is a fatal neurodegenerative disorder that affects cervid species such as white-tailed deer, mule deer, elk, and others (susceptible species). It is classified as a transmissible spongiform encephalopathy, a family of diseases that includes scrapie (found in sheep) and Bovine Spongiform Encephalopathy (BSE, found in cattle and commonly known as Mad Cow Disease). Much remains unknown about CWD. The peculiarities of its transmission (how it is passed from animal to animal), infection rate (the frequency of occurrence through time or other comparative standard), incubation period (the time from exposure to clinical manifestation), and potential for transmission to other species are still being investigated. What is known is that CWD is invariably fatal and is transmitted directly through deer-to-deer contact and indirectly through environmental contamination. Moreover, a high prevalence of the disease in wild populations correlates with significant deer population declines and there is evidence that hunters tend to avoid areas of high CWD prevalence. The implications of CWD for Texas and its multi-billion dollar ranching, hunting, and wildlife management economies are significant.

The department has been concerned for over a decade about the possible emergence of CWD in wild and captive deer populations in Texas. Since 2002, more than 26,500 "not detected" CWD test results were obtained from "free ranging" deer in Texas. Additionally, deer breeders have submitted more than 7,400 "not detected" test results to the department. The department closed the Texas border in 2005 to the entry of out-of-state captive white-tailed and mule deer and has increased regulatory requirements regarding disease monitoring and recordkeeping (31 TAC §65.604). (In 2010, TPWD clarified that the border closure was also to prevent the spread of other diseases, including bluetongue virus, Epizootic Hemorrhagic Disease Virus, Malignant Catarrhal Fever, and Adenovirus Hemorrhagic Disease (January 8, 2010, issue, 35 TexReg 252).)

In February of 2012, the department's concern about the emergence of CWD in Texas escalated when the New Mexico Game and Fish Department notified the department that CWD had been detected in three mule deer taken by hunters in the Hueco Mountains within two miles of the Texas border. Mule deer movements in the Trans Pecos area of Texas can be 25-30 linear miles or more for an individual animal, creating the possibility that the CWD-positive mule deer reported by New Mexico may have been in Texas or had contact with mule deer now in Texas. Therefore, the department and TAHC reconstituted the CWD Task Force, comprised of wildlife-health professionals and cervid producers.

Concurrent with the reconstitution of the CWD Task Force, the department, with the assistance and cooperation of landowners and other governmental entities, including TAHC, increased CWD surveillance and detection efforts, including the collection of 31 mule deer samples along the Texas side of the New Mexico border. On July 10, 2012, the department confirmed that two mule deer taken in the Texas portion of the Hueco Mountains tested positive for CWD.

As a result of the discovery of CWD in the Hueco Mountains of New Mexico and Texas, the CWD Task Force recommended that the department take specific actions, including the designation of a CZ, HRZ, and BZ surrounding the geographical points where CWD has been detected or where the elevated probability of discovering CWD exists, requiring increased disease monitoring, and the restriction of department-permitted deer-management practices within those zones. The department and TAHC concurred. TAHC developed rules regarding livestock and exotic species, and the department developed the proposed rules regarding native wildlife. The department will also implement mandatory check stations in the proposed CZ and voluntary check stations in HRZs for hunter-harvested deer under authority of 31 TAC §65.33, concerning Mandatory Check Stations.

Under Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1, the department regulates the possession of white-tailed deer and mule deer for various purposes by permit. Subchapter C governs permits for scientific research, zoological collection, rehabilitation and educational display of protected wildlife which may include deer. Subchapter E governs Triple T activities (trap, transport and transplant), in which game animals or game birds are captured and relocated to adjust populations. Subchapter E also governs Urban White-tailed Deer Removal Permits and Permits to Trap, Transport, and Process Surplus White-tailed Deer. The permits issued under authority of Subchapter E are collectively referred to as "Triple T" permits. Subchapter L governs Deer Breeder Permit (DBP) activities, which include, among other things, retention of captive-raised deer within a facility for breeding purposes and release of such deer into the wild. Subchapters R and R-1 govern Deer Management Permit (DMP) activities for white-tailed deer and mule deer, respectively, in which free-ranging deer may be captured and temporarily retained for breeding purposes. (The department notes that although DMPs for mule deer were authorized by the legislature in 2011, no DMPs for mule deer have been issued because the department has deferred promulgation of regulations pending acquisition of requisite data to develop biologically defensible rules and address disease threats, including CWD.)

Triple T, DBP and DMP all authorize release of deer into the wild under certain circumstances following some period of confinement, and the regulations governing Triple T and DBP contain requirements for disease monitoring that must be met before deer can be acquired, transported, or released. Additionally, Parks and Wildlife Code, Chapter 43, Subchapter C, governs the issuance of permits for scientific research, zoological collection, rehabilitation, and educational display of protected wildlife (including cervids), any of which can include permit conditions for release to the wild.

From an epidemiological point of view, the higher the density of susceptible organisms, the more likely disease transmission is to occur. Obviously, deer kept in circumstances (facilities, pens, trailers, etc.) in which densities are many times higher than what occurs naturally are more likely to both manifest and spread communicable diseases at a higher rate or in greater numbers than would occur in a free-ranging populations. Therefore, the proposed new rules are designed and intended to provide reasonable assurance that once CWD is detected it is quickly isolated and not spread as a result of increased concentration of deer or the movement of live deer under permits issued by the department.

Proposed new §65.80, concerning Definitions, sets forth the meanings of words and terms used in the subchapter, which is necessary to ensure that specialized terms are unambiguously defined for purposes of compliance and enforcement.

Proposed new §65.80(1) would define the term "adult deer." The testing requirements set forth in proposed new §65.83, concerning Buffer Zone (BZ) would condition the department's approval of a permit to trap deer within a BZ on the submission and "not detected" results of CWD tests. Similarly, under proposed new §65.82 and §65.83, certain activities under a DBP would require the permittee to comply with certain disease testing requirements. Current CWD testing is most accurate in deer older than 16 months of age. Therefore, for ease of reference, the term "adult deer" is defined as deer older than 16 months of age. The term "adult deer" is also used in the definition of "eligible mortality" in §65.80(4).

Proposed new §65.80(2) would define the term "buffer zone" or "BZ" as a "department-defined geographic area in this state adjoining or surrounding an HRZ (high risk zone), within which the department, using the best available science and data, has determined that an elevated probability of discovering CWD exists." The department has determined that the most efficacious response to either the detection of CWD or a heightened expectation of detection of CWD would be the creation of a three-tiered geographical area around the detection site (the specific geographical location where CWD is detected). The area immediately surrounding or in closest proximity to the detection site would be a "containment zone (CZ)," within which the department would restrict the movement and release of susceptible species held under permits administered by the department. The CZ would be surrounded by a HRZ, within which movement requirements would be less restricted. The HRZ, in turn, would be adjoined by the BZ, within which deer movement under department permits would be allowed to take place under monitoring requirements not as stringent as those within an HRZ but more stringent than the normal regulatory requirements. The extent of a BZ represents an epidemiological assessment of the possibility of CWD emergence in areas where there is not an immediate concern but, given the biological parameters of susceptible species (to include both natural movement and movement as a result of permit activities), there is not sufficient confidence to believe there is not an elevated concern. As explained in the discussion of proposed new §§65.81 - 65.84, the proposed rules would establish an initial CZ, HRZ, and BZ and would authorize the department's executive director to establish additional CZs, HRZs, or BZs and modify existing zones.

Proposed new §65.80(3) would define "Containment Zone" as a "department-defined geographic area in this state within which CWD has been detected or the department has determined, using the best available science and data, CWD detection is probable." The extent of a CZ is determined by considering the best available science and data including the behavior and life history of the particular susceptible species, geography, travel corridors, population parameters, and CWD testing history in that area. For example, as noted previously, in February 2012, CWD was detected in New Mexico, just across the Texas-New Mexico border. Since CWD-infected mule deer were known to exist in the Hueco Mountains in New Mexico, there was more than strong scientific possibility that CWD-infected mule deer were present in Texas because the Hueco Mountains straddle the Texas-New Mexico border and desert mule deer can move as much as 25-30 linear miles. The department notes that any future CZ, HRZ, or BZ created in response to a "detected" CWD test result in Texas would be based on the best available science and data correlated to the particular susceptible species infected, which could be white-tailed deer, whose behavior and life history are different than mule deer.

Proposed new §65.80(4) would define "eligible mortality" as "any lawfully possessed adult deer that has died." As noted previously, an "adult deer" is defined as a deer older than 16 months of age. Under the provisions of proposed new §65.82 and §65.83, the department would condition the acquisition, movement, transfer, or release of deer under a DBP by requiring the permittee to comply with certain disease testing requirements and upon the results. Because of the long incubation period of the CWD infectious agent, deer in a DBP facility must be monitored for an extended period of time to determine if CWD is present. For the same reason, there is a low probability that CWD will be detected in deer of less than 16 months in age, even though such deer could be infected. Therefore, the department's disease testing requirements for DBP facilities require that only adult deer mortalities be tested.

Proposed new §65.80(5) would define the term "High Risk Zone" as a "department-defined geographic area in this state surrounding or adjacent to a CZ, within which the department has determined, using the best available science and data, that the presence of CWD could reasonably be expected." As noted earlier in the discussion of proposed new §65.80(2), regarding the definition of "buffer zone", and §65.80(3), regarding the definition of "containment zone," the department has determined that the most efficacious response to either the detection of CWD or a heightened expectation of detection of CWD would be the creation of a three-tiered geographical area around the detection site or area of heightened expectation of discovery. The area immediately surrounding the detection site would be a "containment zone," which would in turn be contiguous with a "high risk zone," within which the department would restrict the movement and release of susceptible species held under permits administered by the department. In the same fashion as used in the determination of a CZ, the department would determine the extent of a HRZ by using the best science and data available correlated to the particular susceptible species.

Proposed new §65.80(6) would define "susceptible species" as "any species of wildlife resource that is susceptible to CWD." The definition is necessary to provide a convenient term for ease of reference, rather than repeating the list of susceptible species throughout the rules. As noted previously, known susceptible species include white-tailed deer, mule deer, elk, and others.

Proposed new §65.81, concerning Containment Zones; Restrictions, would establish the physical boundaries of the initial CZ and articulate the specific restrictions on permit holders within a CZ. The proposed new section would create an initial CZ in

portions of Culberson, El Paso, and Hudspeth counties in West Texas (where CWD has been discovered and additional CWD detection is probable). Additional CZs may be added elsewhere in the state if necessary, and existing CZs may be modified.

Proposed new §65.81(2) sets forth the restrictions that apply within the CZ to holders of permits issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1.

Proposed new §65.81(2)(A) would prohibit any person within a CZ from conducting any activity involving the movement of a susceptible species under a permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, or R-1 within a CZ. For instance, Triple T permits authorize the trapping of deer for transplantation elsewhere. In a CZ, where the probability of CWD is highest, allowing the trapping and movement of deer to other areas of the state could result in the further spread of CWD. Similarly, allowing the release of Triple T deer or rehabilitated deer or allowing the concentration of wild deer in close confinement as a result of DMP activities also carries elevated risks.

Proposed new §65.81(2)(B) would stipulate that if the department receives an application for a DBP for a new facility that is to be located within an area designated as a CZ, the department will issue the permit but will not authorize the possession of deer within the facility so long as the CZ designation exists. Parks and Wildlife Code, §43.352, requires the department to issue a DBP to an applicant who meets the statutory and regulatory requirements for permit issuance; however, the commission's rulemaking authority under Parks and Wildlife Code, §43.357(b) authorizes the promulgation of rules governing the possession of breeder deer. The department recognizes that the likelihood that a person will desire to locate a new DBP facility in an area where CWD has been confirmed is remote; however, the possibility must be addressed. CWD is transmitted not only by direct contact but also indirectly through environmental contamination. Thus, the area within a CZ must itself be treated as if it were a vehicle for transmission of CWD. It follows that if a deer breeder facility were to be built in a CZ, any deer introduced into the facility would become potential reservoirs for CWD, a situation that should be avoided.

Proposed new §65.81(2)(C) would prohibit the recapture of breeder deer that escape from a DBP facility located within a CZ. Under current rule (31 TAC §65.602) a DBP holder may recapture deer that have escaped from a DBP facility. However, within a CZ the possibility that an escaped deer could come into contact with CWD-infected deer or contaminated environmental media is probable. An escaped deer that is recaptured and returned to a DBP facility could transmit CWD to deer within the DBP facility, making the DBP facility a CWD reservoir; therefore, the department has determined that it is prudent to prohibit the recapture of escaped breeder deer with a CZ.

Proposed new §65.82, concerning High Risk Zones; Restrictions, would establish the physical boundaries of the initial HRZ and articulate the specific requirements regarding activities of permit holders within an HRZ. Proposed new §65.82(1) would create an initial HRZ in portions of Culberson, Hudspeth, Jeff Davis, and Reeves counties. HRZs may be added or modified as necessary. The HRZ created by the proposed new section comprises an area that surrounds the CZ. The department, using the best available science and data, has determined that the presence of CWD could reasonably be expected within the HRZ.

Proposed new §65.82(2) would set forth the restrictions that apply within the HRZ to holders of permits issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1. Following the recommendation of the CWD Task Force and in concurrence with the TAHC, proposed new §65.82(2)(A) would prohibit any activity involving movement of a susceptible species under a permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter C, E, L, R, or R-1 within an HRZ, except as provided in subparagraph (B), which addresses DBPs specifically. The reasons for this restriction are as set forth in the discussion of proposed new §65.81(2)(A). Except for certain activities conducted pursuant to a DBP, described in §65.82(2)(B), the restrictions in the HRZ are the same as those in the CZ regarding the permits issued pursuant to Chapter 43, Subchapter C, E, L, R, or R-1.

With respect to DBP activities in the HRZ, proposed new §65.82(2)(B)(i) would prohibit any person from introducing, removing, authorizing the introduction or removal, or causing the introduction or removal of a live breeder deer into or from a facility permitted under Parks and Wildlife Code, Chapter 43, Subchapter L, that is located within an HRZ unless the facility has a record of test results of "not detected" for all eligible mortalities within the facility in the immediately preceding five-year period, the facility holds at least a Level C herd status with the TAHC, and the department has confirmed that the herd inventory maintained by the department is accurate. As noted earlier in the discussion of CZs, allowing deer held under a DBP at a facility within an HRZ to be moved outside of the HRZ creates a potential for spreading CWD. However, the department recognizes that a DBP facility that has tested 100% of eligible mortalities with results of "not detected," has achieved a Level C status from TAHC, and for which the department is able to verify the physical presence of each animal recorded on the inventory is, from an epidemiological point of view, not a likely reservoir for CWD. TAHC designates Level C status for herds that have a minimum of four years of test results indicating the absence of CWD, which is less stringent than the standard established in proposed new §65.82(2)(B)(i), which requires five years of test results, but requires an inventory verification to be performed annually by an accredited veterinarian and stipulates that additions of animals from lower herd-certification statuses causes an equivalent lowering for the receiving herd. Therefore, the effect of the proposed new provisions is to ensure that for a deer to be moved from a DBP facility within an HRZ, the department will have sufficient confidence that no deer within the facility have been infected with CWD. Such facilities would therefore be authorized to conduct normal activities under the DBP except for transport of a deer to a location other than a permitted deer breeder facility, which essentially prohibits the liberation from a deer breeder facility to the wild within the HRZ. Proposed new §65.82(2)(C) would expressly prohibit the liberation of deer held under any permit into the wild within an HRZ, which is necessary to avoid creating additional disease reservoirs.

Proposed new §65.82(2)(D) would prohibit the recapture of breeder deer that escape from a DBP facility located within an HRZ. Under current rule (31 TAC §65.602) a DBP holder may recapture deer that have escaped from a DBP facility. However, within an HRZ there is the possibility that an escaped deer could come into contact with CWD-infected cervids or contaminated environmental media, which could then be transmitted to deer within the DBP facility and possibly to other DBP facilities (as deer are transferred among deer breeders); therefore, the

department has determined that it is prudent to prohibit the recapture of escaped breeder deer within an HRZ.

Proposed new §65.83, concerning Buffer Zones (BZs), would establish the physical boundaries of BZs and articulate the specific requirements regarding activities of permit holders within the BZ. The proposed new section would create an initial BZ in the area of West Texas where an elevated but not immediate concern regarding the discovery of CWD exists. Specifically, the proposed initial BZ would include all of Jeff Davis, Crane, Ward, Loving, Winkler, Ector, Andrews, Gaines, Yoakum, Cochran, and Bailey counties and portions of Presidio, Brewster, Pecos, Reeves, Parmer, Midland, Upton, Martin, Dawson, Terry, Hockley, Lamb, and Castro counties. Additional BZs may be added elsewhere in the state if necessary, and existing BZs may be modified.

Proposed new §65.83(2) would set forth the restrictions that apply within the BZ to holders of permits issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1. Following the recommendation of the CWD Task Force and in concurrence with the TAHC, proposed new §65.83(2)(A) would prohibit the introduction or removal of a live susceptible species from a deer breeder facility permitted under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter L, that is located in a BZ unless the facility is "movement qualified" under the provisions of §65.604 of this title (relating to Disease Monitoring); CWD test results of "not detected" have been returned from an accredited test facility on at least 50% of all eligible mortalities that occurred within the facility on or after January 1, 2013; zero CWD test results of "detected" have been returned from an accredited test facility; and the department has confirmed that the herd inventory record maintained by the department is accurate.

As noted earlier in the discussion of HRZs, allowing deer held under a DBP at a facility within an HRZ to be moved outside of the HRZ creates a potential for spreading CWD. A similar, though reduced, concern exists for deer held in a DBP facility in a BZ. However, the department recognizes that a DBP facility that is "movement qualified," has tested 50% of eligible mortalities with results of "not detected" and no results of "detected," and within which the department is able to verify the physical presence of each animal recorded on the inventory, is, from an epidemiological point of view, not a likely reservoir for CWD. The requirement set forth in proposed new paragraph (2)(A)(ii) that establishes a date certain (January 1, 2013) for test histories is necessary to avoid the inadvertent creation of a differential standard for disease testing.

Proposed new §65.83(2)(B) would authorize the trapping of susceptible species within a BZ, provided a minimum of 30 test results of "not detected" and no "detected" results have been returned from an accredited test facility for adult deer of the species to be trapped, obtained from the trap site. Under current rules governing Triple T (31 TAC §65.102), a sample size equivalent to 10% of the number of deer to be transported (which may not be less than 10 nor more than 40 animals) must be tested for CWD with results of "not detected" in order to trap and move deer. Because the BZ is an area in which the department believes there is an elevated possibility of CWD discovery but CWD testing is not as robust, the department recommended that the sample size should be three times greater than the minimum sample currently required by current rule. The CWD Task Force also advised that current CWD testing requirements are inadequate to provide enough confidence that CWD does not exist in a population where deer may be trapped in the BZ; therefore, the proposal increases the minimum sample size within the BZ.

Proposed new §65.83(2)(C) would clarify that the department would regulate activities involving susceptible species under permits issued under Parks and Wildlife Code, Chapter 43, Subchapter C (scientific collection, educational display, zoological, rehabilitation) by stipulating disease-control parameters as a condition of the permit.

Figure: 31 TAC Chapter 65 - Preamble

Proposed new §65.84, concerning Powers and Duties of the Executive Director, would set forth the obligations and limitations of the executive director with respect to the subchapter. Proposed new §65.84(a) would authorize the executive director to designate any geographic area of this state meeting the definition of a CZ, HRZ, or BZ as a CZ, HRZ, or BZ. The proposed new provision is intended to provide the department with a method of responding quickly to scientific information indicating that CWD is present, expected to be found, or there is an elevated possibility of detection. Being able to immediately impose movement and release restrictions is critical to preventing the spread of CWD. Proposed new §65.84(b) would require the executive director to notify the presiding officer of the commission prior to taking any action under the provisions of proposed new subsection (a). Proposed new subsection (c) would set forth public notice provisions, which is necessary because of the importance of letting landowners, hunters, permit holders, and other interested or affected persons know about department actions that might affect them. Proposed new subsection (d) would establish that designations of CZs, HRZs, and BZs are effective immediately and applicable to all permits issued under the provisions of Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1. In order to provide the greatest possible protection to native wildlife, it is imperative that the department be able to act immediately to isolate CWD and prevent it from being spread by any department-permitted activity. Proposed new subsection (e) would require the department to initiate rulemaking to adopt all CZs, HRZs, and BZs by rule as soon as practicable. Although the department believes that being able to make CZs, HRZs, and BZs immediately effective is crucial to being able to contain CWD, it also believes that there should be an additional rulemaking process following the provisions of the Administrative Procedure Act to add CZs, HRZs, and BZs to the department's codified rules.

Proposed new §65.85, concerning Mandatory Check Stations, would set forth requirements for the presentation of susceptible species harvested by hunters within a CZ, HRZ, or BZ to the department for CWD testing. Following the recommendation of the CWD Task Force and with the concurrence of the TAHC, the department has determined that a key component of the CWD management and response strategy is a maximized surveillance effort in areas of the state where CWD has been confirmed, is suspected to exist, or there is an elevated likelihood that it could be found. Therefore, in addition to the testing regime proposed for persons in possession of susceptible species under department permits and sampling efforts undertaken by the department and other entities, the department proposes to establish check stations for the purpose of testing hunter-harvested susceptible species. Although under current rule (31 TAC §65.33), the department may establish mandatory check stations, the inclusion of specific check station requirements in this subchapter is prudent in order to have all regulations regarding CWD detection and management in one place for ease of reference and to reduce confusion for purposes of compliance and enforcement. In addition, certain additional requirements relating the check stations are necessary to address matters specific to CWD. Within a

CZ, HRZ, or BZ where check stations have been established, the proposed new rule would require the intact and unfrozen head of any susceptible species to be presented to a designated check station within 24 hours of take by the person or representative of the person who killed the susceptible species. The proposed rule would also provide that the department will issue documentation for each specimen presented at the check station and that the documentation must remain with the specimen until the specimen reaches the possessor's final destination.

Proposed new §65.86, concerning Preemption, would make it clear that to the extent that a provision of the proposed new subchapter conflicts with a provision of another subchapter of in Chapter 65, the provisions of Subchapter B would control. The proposed new section is necessary to eliminate potential regulatory confusion.

Proposed new 65.87, concerning Exception, would allow the waiver of any provision of the proposed new subchapter as necessary for the holder of a scientific research permit issued under Parks and Wildlife Code, Chapter 43, Subchapter C when the proposed research is determined to be of use in advancing an understanding of CWD with respect to susceptible species. The department considers that CWD is of interest to the scientific community, and that scientific research proposals concerning the investigation of CWD could be received. Therefore, the proposed new rules accommodate that possibility.

Proposed new §65.88, concerning Penalties, would state the statutory penalties for violations of the proposed new rules for ease of reference.

Mr. Mitch Lockwood, Big Game Program Director, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state and local governments as a result of enforcing or administering the rules as proposed, as department personnel currently allocated to the administration and enforcement of the permit programs affected will administer and enforce the rules as part of their current job duties.

Mr. Lockwood also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be the protection of free-ranging, native deer from communicable diseases, thus ensuring the public of continued enjoyment of the resource and also ensuring the continued beneficial economic impacts of hunting in Texas. Additionally, the protection of free-ranging deer herds will have the simultaneous collateral benefit of protecting captive herds and maintaining the economic viability of deer breeding operations.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), in April 2008, the Office of the Attorney General issued guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. These guidelines state that "[g]enerally, there is no need to examine the indirect effects of a proposed rule on entities outside of an agency's regulatory jurisdiction." The guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. The guidelines also list examples of the types of costs that may result in a "direct economic impact." Such costs may include costs associated with additional recordkeeping or reporting requirements; new taxes or fees; lost sales or profits; changes in market competition; or the need to purchase or modify equipment or services. As explained in more detail below, the department has determined that except for DBPs, the proposed rules will not have an adverse impact on small or micro-businesses.

The department recognizes that Triple T and DMP holders in many cases obtain such permits as part of an effort to enhance the quality of a deer herd located on a specific property. In turn, such landowners may seek to obtain a higher fee for hunting opportunities based on the perception of a higher quality hunting experience. However, adverse economic impacts to the pricing structure of hunting opportunity as a result of the proposed new rules, if they occur, are indirect at best. The rule does not directly impact a landowner's ability to charge a fee for a hunting opportunity on the landowner's property. In addition, any deer that are introduced to a property as a result of a Triple T or DMP continue to be a public resource.

Scientific Educational, Zoological, and Rehabilitation Permits

There will be no adverse economic impacts to persons holding permits issued under Parks and Wildlife Code, Chapter 43, Subchapter C (permits for rehabilitation, scientific collection, educational display, and zoological display). Current rules (31 TAC §69.44(b) and §69.302) prohibit the sale of protected wildlife held under those permits. Since persons possessing these permits undertake permitted activities on a non-profit basis, any person or entity involved in permitted activities would not be engaged in such activities for the purpose of making a profit and would thus not be considered a small or micro-business as defined in Government Code, §2006.001.

Triple T Permits

There will be no adverse economic effects to holders of Triple T permits. Triple T permits authorize only the trapping, transporting, and transplantation of a public resource. As a result, wildlife trapped under a Triple T may not be sold, bartered, or exchanged for anything of value. (Parks and Wildlife Code, §1.011; 31 TAC §69.117(a)(6).) Therefore, persons engaged in such activities would not suffer a direct adverse economic impact from the proposed rules. Current department rules governing Triple T permit issuance provide for the denial of a permit if the department determines that release of a game animal or game bird may detrimentally affect existing populations or systems (31 TAC §65.103(c)(3)). The rules as proposed would further clarify this authority by prohibiting the trapping of susceptible species from within a CZ or HRZ since trapping and moving susceptible species from within a CZ or HRZ would have the potential to detrimentally affect other populations of deer by exposure to animals possibly infected with CWD. The proposed new rules would allow the trapping of deer from a BZ if disease-testing requirements have been met.

Deer Management Permits

There will be no adverse economic impact to holders of DMPs. As noted previously, the department has not promulgated rules governing DMPs for mule deer; therefore, the only DMP activities affected by the proposed new rules would be DMPs issued for white-tailed deer. The purpose of the DMP is to allow landowners and land managers to conduct selective breeding of wild deer trapped under a department-approved deer management plan. A DMP authorizes the permittee to temporarily detain wild white-tailed deer for breeding purposes, including deer in-

troduced to the DMP pen via Triple T permit and/or DBP. (A discussion of the impact of the proposed rules on DMP and Triple T permits is contained elsewhere in this preamble.) Except for DBP deer, which may normally be returned to a DBP facility, deer held pursuant to a DMP must be released into the wild following breeding activities in a DMP pen and may not be sold (Parks and Wildlife Code, §1.011, §43.621; 31 TAC §65.133(g)). As a result, persons engaged in such activities would not suffer a direct small or micro-business adverse economic effect from the proposed rules.

Deer Breeder Permits

Parks and Wildlife Code, §43.357(a), authorizes a person to whom a DBP has been issued to "engage in the business of breeding breeder deer in the immediate locality for which the permit was issued" and to "sell, transfer to another person, or hold in captivity live breeder deer for the purpose of propagation." As a result, unlike the other permits impacted by the proposed rules, DBPs authorize persons to engage in business activities.

Government Code, §2006.001(1), defines a small or micro-business as a legal entity "formed for the purpose of making a profit" and "independently owned and operated." A micro-business is a business with 20 or fewer employees. A small business is defined as a business with fewer than 100 employees, or less than $6 million in annual gross receipts. Although the department does not require holders of DBPs to file financial information with the department, the department believes that many persons holding DBPs would qualify as a small or micro-business. Since the rules as proposed would impact the ability of a DBP to engage in certain activities undertaken to generate a profit, the proposed rules may have an adverse impact on persons with DBPs.

The department has determined that if adopted, the proposed new rules would result in immediate adverse economic impacts to one permittee, who holds a DBP for a facility within the proposed HRZ. No other small or microbusinesses or persons required to comply would incur any immediate direct adverse economic impacts; however, if additional CZs, HRZs, or BZs are created, additional small and microbusinesses could be affected. Therefore, this analysis will address the potential fiscal impacts to all deer breeders in the state should additional CZs, HRZs, or BZs be necessary.

The proposed new rules would prohibit the introduction to or removal of deer from DBP facilities within a CZ, which would result in an adverse economic impact to DBP holders with facilities located within a CZ and who liberate deer for commercial hunting or sell deer to other DBP holders. The extent of such adverse economic impact would consist of loss of revenue as a result of being unable to introduce or remove deer from the DBP facility and thus being unable to deliver or accept deer that have been bought or sold. The dollar value of the adverse economic impact is dependent on the volume of deer produced or acquired by any given permittee, which can vary from a few deer to hundreds of deer. The department notes that the designation of a CZ is not necessarily permanent and that the department can change the size and shape of a CZ depending on assessments of prevalence and extent of CWD within a CZ. Therefore, adverse economic impacts to DBP as a result of CZ designations could be temporary.

The proposed new rules would allow DBP activities to continue in an HRZ only if certain disease-testing requirements have been met. Department records indicate that there are currently 1,252 persons who hold a DBP in the state, and 36 of them have both TAHC Level C herd status or higher and a five-year history of CWD test results of "not detected" and no CWD results of "detected." These 36 permittees, assuming they are able to accurately reconcile their herd with the inventory record on file with the department and remain in compliance, would not be affected by the proposed new rules if an HRZ were to be declared around their facilities, because they meet the movement requirements of the proposed new rules.

The proposed new rules could, however, result in adverse economic impacts for DBP holders in HRZs who do not have a five-year history of "not detected" results, are not Level C status or higher from TAHC, or do not have an accurate herd inventory. Likewise, the proposed new rules could result in adverse economic impacts for DBP holders in BZs who do not have a history of testing 50% of all eligible mortalities from January 1, 2013, do not have all test results of "not detected," are not movement qualified under department rules, or do not have an accurate herd inventory. There are currently 1,216 DBP holders who do not meet the movement requirements of the proposed new rules and could be directly impacted by proposed new rules, depending on the location of any future HRZs or BZs. However, it should be noted that this number assumes that the entire state would be designated as an HRZ, or BZ, which is not likely. In addition, the variety of business models utilized by permittees makes meaningful estimates of potential adverse economic impacts difficult. Although a DBP gives the DBP holder the privilege to buy and sell breeder deer and many DBP holders participate in a market for breeder deer, other DBP holders are interested only in breeding and liberating deer on their own property for hunting opportunity. Once a breeder deer is liberated, it cannot be returned to a DBP facility and assumes the same legal status as all other "wild" deer. Thus, if the DBP holder is engaged primarily in buying and selling deer, the potential adverse economic impact is greater than that for a DBP holder who engages in DBP activities primarily for purposes of release onto that person's property. The department does not require DBP holders to report the buying or selling prices of deer. However, publicly available information indicates that sale prices, especially for buck deer, may be significant. The sale price for a single deer may range from hundreds of dollars to many thousands of dollars.

Although the rules as proposed would cause an adverse economic impact to DBP holders in HRZs or BZs who do not meet the disease-testing and TAHC herd level requirements to continue otherwise permitted activities, the rules do provide for DBP holders to continue permitted activities in an HRZ or BZ if they have met the disease-testing and herd-status requirements of the rules. As a result, DBP holders in compliance with the proposed new rules may incur costs related to testing and monitoring.

Under the proposed rules, for a DBP holder to move deer from a deer breeder facility within the BZ, the facility must be "movement qualified," among other things. Under current rules (31 TAC Chapter 65, Subchapter T), a DBP facility is not considered "movement qualified" unless the facility is certified by TAHC as having a CWD Monitored Herd Status of Level A or higher; less than five eligible breeder deer mortalities have occurred within the facility as of May 23, 2006; or CWD test results of "not detected" have been returned from an accredited test facility on a minimum of 20% of all eligible breeder deer mortalities occurring within the facility as of May 23, 2006. Under TAHC rules (4 TAC §40.4), Level A herd status is achieved with one full year of participation without CWD being confirmed.

Under the proposed rules, certain activities under a DBP in an HRZ require, among other things, the achievement of Level C status as defined in TAHC rules. Under current TAHC rules at 4 TAC §40.3, Level C status is achieved with "four to five" years of herd monitoring with no confirmation of CWD. In addition, the herd must be inspected annually by an accredited veterinarian. If animals from a source with a lower or no herd status are added, the herd status reverts to the level of the source herd.

Therefore, for any given DBP within an HRZ or BZ that is currently qualified to move or release deer, compliance with the proposed new rules could be achieved in five years or less and at the additional direct economic cost of CWD testing of all eligible mortalities and the cost of the annual inventory by an accredited veterinarian.

The department cannot predict the number of mortalities that will occur in any given facility in a year; however, mortality data annually reported to the department for the last five years indicate that the average number of eligible mortalities per DBP facility per year is 4.256. The cost of a CWD test administered by the Texas Veterinary Medicine Diagnostic Lab (TVMDL) on a sample collected and submitted by the DBP holder is a minimum of $42, consisting of a $36 test fee per prepared sample plus a $6 submission fee (which may cover multiple samples submitted at the same time). The CWD test fee for a sample collected and prepared by the TVMDL is $82, consisting of $36 per unprepared sample, a $6 submission fee, a $20 fee to remove the sample from the head, and a $20 head-disposal fee. The cost of an annual inventory by an accredited veterinarian is estimated by TAHC to be approximately $250.

Using the eligible mortality data (rounded up from 4.256 to five eligible mortalities per facility per year), the department estimates that the direct economic impact of testing in order become "movement qualified" under the proposed new rules would be between $460 and $660 per year for each permittee who desires to meet to criteria for moving deer under the proposed new rules. If the sample is collected, fixed, and submitted by a private veterinarian, the cost could be higher.

For a DBP holder in an HRZ, the difference between the current rules and the proposed new rules would be the requirement to test all eligible mortalities (rather than 20%, as currently required) for whatever additional time is required in order to achieve the TAHC Level C status, and the cost of an annual inventory conducted by an accredited veterinarian (which is required by TAHC regulations (4 TAC §40.3)). For a DBP holder in a BZ, the difference between the current rules and proposed new rules would be the requirement to test 50% of all eligible mortalities (rather than 20%, as currently required). Such costs would be necessary only if a DBP holder wishes to engage in activities involving movement of deer described in the proposed rule.

The department notes that because CWD has been proven to be transmissible by direct contact (including through fences) and via environmental contamination, there may be adverse economic impacts unrelated to the proposed new rules in the event that CWD is confirmed near a DBP facility due to the possible reluctance of potential customers to purchase deer from a facility in an area where CWD has been confirmed. Additionally, in the absence of the proposed new rules, if CWD is detected within a DBP facility, there could be lost revenue to the permittee since potential purchasers who are aware of the potential of CWD would likely refrain from purchasing deer from such a facility. Therefore, the proposed new rules, by providing a mechanism to minimize the spread of CWD, could also protect the economic interests of the regulated community.

The department considered several alternatives to achieve the goals of the proposed new rules while reducing potential adverse impacts on small and micro-businesses and persons required to comply. The department considered proposing no rules. The department recognizes that many of the restrictions imposed by the rules could be achieved under current rules and statutes. This alternative was rejected because a regulation that clearly sets out the restrictions on the regulated community is more likely to achieve the desired result of stemming the spread of CWD. The department concluded that the need to protect the wildlife resources that sustain the state's multi-billion-dollar hunting industry outweighs the temporary adverse impacts to small and micro-businesses and persons required to comply.

The department also considered, in lieu of a regulatory response, the alternative of attempting to eliminate CWD in an area by conducting a depopulation event, that is, killing every deer possible inside a certain perimeter in the hopes of eliminating the reservoir for the disease. This alternative was rejected at this time because to be effective, the geographical extent of the disease must be known. Furthermore, removing every animal that exists within an affected area does not remove prions (the infectious agent believed to cause CWD), which can be shed by an infected animal and remain in the environment and which in turn can infect susceptible animals introduced to or inhabiting the environment. The department notes that depopulation is believed to have been successful in rare instances; however, in most circumstances, removal of all animals, even when the distribution of the disease is known, has proven to be difficult or impossible to achieve in free-ranging populations.

The department also considered imposing less stringent testing requirements in order to allow DBP holders to continue moving and/or releasing breeder deer. This alternative was rejected because the testing requirements in the proposed new rules reflect mathematical models aimed at producing high confidence that CWD is or is not present. Less stringent testing requirements would reduce confidence and therefore frustrate the ability of the department to respond in the event that CWD actually is present. The department also believes that rigorous testing assures the hunting public and the regulated community that wildlife resources are safe and reliable.

Another alternative considered was a CZ, HRZ, and BZ that are more narrowly drawn. This alternative was rejected because the size of a CZ, HRZ, or BZ is biologically determined by using the best science and data available correlated to the susceptible species. If the department chose to implement a smaller CZ, HRZ, or BZ area, it would increase the risk of spreading CWD and introduce regulatory confusion.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule. Any impacts resulting from the discovery of CWD in or near private real property would be the result of the discovery of CWD and not the proposed rules.

Comments on the proposed rule may be submitted to Mitch Lockwood, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (830) 792-9677 (e-mail:

mitch.lockwood@tpwd.state.tx.us); or via the department's website at www.tpwd.state.tx.us.

The new rules are proposed under the authority of Parks and Wildlife Code, Chapter 43, Subchapter C, which requires the commission to adopt rules to govern the collecting, holding, possession, propagation, release, display, or transport of protected wildlife for scientific research, educational display, zoological collection, or rehabilitation; Subchapter E, which requires the commission to adopt rules for the trapping, transporting, and transplanting of game animals and game birds, urban white-tailed deer removal, and trapping and transporting surplus white-tailed deer; Subchapter L, which authorizes the commission to make regulations governing the possession of breeder deer held under the authority of the subchapter; Subchapter R, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that white-tailed deer may be temporarily detained in an enclosure; Subchapter R-1, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that mule deer may be temporarily detained in an enclosure (although as noted previously, the department has not yet established the DMP program for mule deer authorized by Subchapter R-1); and §61.021, which provides that no person may possess a game animal at any time or in any place except as permitted under a proclamation of the commission.

The proposed new rules affect Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1 and Chapter 61.

§65.80. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. All other words in this subchapter shall have the meanings assigned by Parks and Wildlife Code.

(1) Adult deer--A white-tailed deer or mule deer that is 16 months of age or older.

(2) Buffer Zone (BZ)--A department-defined geographic area in this state adjacent to or surrounding a HRZ, within which the department, using the best available science and data, has determined that an elevated probability of discovering CWD exists.

(3) Containment Zone (CZ)--A department-defined geographic area in this state within which CWD has been detected or the department has determined, using the best available science and data, CWD detection is probable.

(4) Eligible mortality--Any lawfully possessed adult deer that has died.

(5) High-Risk Zone (HRZ)--A department-defined geographic area in this state adjacent to or surrounding a CZ, within which the department has determined, using the best available science and data, that the presence of CWD could reasonably be expected.

(6) Susceptible species--Any species of wildlife resource that is susceptible to CWD.

§65.81. Containment Zones; Restrictions.

The areas described in paragraph (1) of this section are CZs.

(1) Containment Zones.

(A) Containment Zone 1: That portion of the state within the boundaries of a line beginning in Culberson County where U.S. Highway (U.S.) 62-180 enters from the State of New Mexico; thence southwest along U.S. 62-180 to the intersection with State Highway (S.H.) 54; thence south along S.H. 54 to Interstate Highway (I.H.) 10; thence west along I.H. 10 to S.H. 20; thence northwest along to S.H. 20 to Farm-to Market Road (F.M.) 1088; thence south along F.M. 1088 to the Rio Grande; thence northwest along the Rio Grande to the Texas-New Mexico border.

(B) Existing CZs may be modified and additional CZs may be designated as necessary by the executive director as provided in §65.84 of this title (relating to Powers and Duties of the Executive Director).

(2) Restrictions.

(A) Except as provided in §65.87 of this title (relating to Exception), no person within a CZ shall conduct, authorize or cause any activity involving the movement of a susceptible species under a permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter C, E, L, R, or R-1. Such prohibited activity, includes, but is not limited to transportation, introduction, removal, authorizing the transportation, introduction or removal of, or causing the transportation, introduction or removal of a live susceptible species into, out of, or within a CZ.

(B) If the department receives an application for a deer breeder permit for a new facility that is to be located within an area designated as a CZ, the department will issue the permit but will not authorize the possession of susceptible species within the facility so long as the CZ designation exists.

(C) Deer that escape from deer breeder facility within a CZ may not be recaptured.

§65.82. High Risk Zones; Restrictions.

The areas described in paragraph (1) of this section are HRZs.

(1) High Risk Zones.

(A) High-Risk Zone 1: That portion of the state lying within a line beginning in Reeves County where the Pecos River enters from New Mexico; thence southeast along the Pecos River to Interstate Highway (I.H.) 20; thence west along I.H. 20 to I.H. 10; thence west along I.H. 10 to the Culberson County line; thence southwest along the Culberson County line to the Rio Grande; thence northwest along the Rio Grande to the El Paso County line; thence north along the El Paso County line to the Texas-New Mexico border.

(B) Existing HRZs may be modified and additional HRZs may be designated as necessary by the executive director as provided in §65.84 of this title (relating to Powers and Duties of the Executive Director).

(2) Restrictions.

(A) Except as provided in §65.87 of this title (relating to Exception) and subparagraph (B) of this paragraph, no person within an HRZ may conduct, authorize or cause any activity involving the movement of a susceptible species, into, out of, or within an HRZ under a permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter C, E, L, R, or R-1. Such prohibited activity, includes, but is not limited to transportation, introduction, removal, authorizing the transportation, introduction or removal, or causing the transportation, introduction or removal of a live susceptible species into, out of, or within an HRZ.

(B) No person shall:

(i) introduce, remove, authorize the introduction or removal, or cause the introduction or removal of a live susceptible species into or from a deer breeder facility permitted under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter L, that is located in a HRZ unless:

(I) CWD test results of "not detected" have been returned from an accredited test facility on all eligible mortalities that occurred within the facility within the preceding five-year period;

(II) the facility has obtained Level "C" status as defined by 4 TAC §40.3 (relating to Herd Status Plans for Cervidae); and

(III) the department has confirmed that the herd inventory record maintained by the department is accurate; or

(ii) transport, authorize the transport, or cause the transport of a susceptible species into an HRZ unless:

(I) the requirements of clause (i)(I) - (III) of this subparagraph have been met; and

(II) the susceptible species are transported to a deer breeder facility permitted under Parks and Wildlife Code, Chapter 43, Subchapter L.

(C) No person shall liberate a susceptible species within an HRZ.

(D) Deer that escape from deer breeder facility within an HRZ may not be recaptured.

§65.83. Buffer Zones.

The areas described in paragraph (1) of this section are BZs.

(1) Buffer Zones.

(A) Buffer Zone 1: That portion of the state not within a CZ or HRZ and lying west of a line beginning where U.S. Highway (U.S.) 67 meets the Rio Grande in Presidio County; thence northeast along U.S. 67 to State Highway (S.H.) 349 in Upton County; thence north along S.H. 349 to S.H. 137 in Dawson County; thence northwest along S.H. 137 to U.S. 385 in Terry County; thence north along U.S. 385 to Farm to Market Road (F.M.) 145 in Castro County; thence west along F.M. 145 to U.S. 84 in Parmer County; thence northwest along U.S. 84 to the Texas-New Mexico border.

(B) Existing BZs may be modified and additional BZs may be designated as necessary by the executive director as provided in §65.84 of this title (relating to Powers and Duties of the Executive Director).

(2) Restrictions.

(A) No person shall introduce, remove, authorize the introduction or removal, or cause the introduction or removal of a live susceptible species into or from a deer breeder facility permitted under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter L, that is located in a BZ unless:

(i) the facility is "movement qualified" under the provisions of §65.604 of this title (relating to Disease Monitoring);

(ii) CWD test results of "not detected" have been returned from an accredited test facility on at least 50% of all eligible mortalities that occurred within the facility on or after January 1, 2013;

(iii) zero CWD test results of "detected" have been returned from an accredited test facility for any susceptible species submitted for testing; and

(iv) the department has confirmed that the herd inventory record maintained by the department is accurate.

(B) The department will not authorize the trapping of susceptible species in a BZ unless:

(i) a minimum of 30 test results of "not detected" have been returned from an accredited test facility for adult deer of the species to be trapped, obtained from the trap site; and

(ii) zero CWD test results of "detected" have been returned from an accredited test facility for adult deer of any susceptible species.

(C) The department will regulate activities involving susceptible species under permits issued under Parks and Wildlife Code, Chapter 43, Subchapter C, under the conditions of the permit.

§65.84. Powers and Duties of the Executive Director.

(a) The executive director may designate any geographic area in this state a CZ, HRZ, or BZ if the area meets the applicable definition set forth in §65.80 of this title (relating to Definitions).

(b) The executive director shall notify the presiding officer of the commission prior to taking any action under the provisions of subsection (a) of this section.

(c) The executive director shall ensure that the department makes a reasonable effort to provide public notice in the event that a CZ, HRZ, or BZ is declared.

(d) The designation of a CZ, HRZ, or BZ under the provisions of subsection (a) of this section is:

(1) effective immediately; and

(2) applicable to all permits issued under the provisions of Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1.

(e) The department shall initiate rulemaking to adopt any CZ, HRZ, or BZ designated by the executive director as soon as practicable.

§65.85. Mandatory Check Stations.

(a) The department may establish mandatory check stations in any CZ, HRZ, or BZ for the purpose of collecting biologic information on susceptible species taken within a CZ, HRZ, or BZ.

(b) In a CZ, HRZ, or BZ where mandatory check stations have been established, the intact, unfrozen head of any susceptible species that has been killed must be presented to a designated check station within 24 hours of take by the person or representative of the person who killed the susceptible species, unless otherwise authorized in writing by department personnel.

(c) The department will issue documentation for each specimen of a susceptible species that is presented at a check station. The department-issued documentation must remain with the specimen until it reaches the possessor's final destination.

(d) A person who fails or refuses to comply with this section commits an offense.

§65.86. Preemption.

To the extent a provision of this subchapter conflicts with a provision of another subchapter of this chapter, this subchapter controls.

§65.87. Exception.

The department may waive any provision of this subchapter as necessary for the holder of a scientific research permit when the proposed research is determined to be of use in advancing the understanding of the etiology of CWD in susceptible species.

§65.88. Penalties.

A person who violates any provision of this subchapter commits an offense and is subject to the penalties prescribed by Parks and Wildlife

Code, Chapter 43, Subchapter C, E, L, R or R-1, and Chapter 61, as applicable.

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 September 24, 2012.

TRD-201205064
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 389-4775

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PART 10 TEXAS WATER DEVELOPMENT BOARD

CHAPTER 356. GROUNDWATER MANAGEMENT

The Texas Water Development Board (board) proposes for repeal Chapter 356, Subchapter A, §§356.1 - 356.12, Subchapter B, §§356.21 - 356.23, Subchapter C, §§356.31 - 356.35, and Subchapter D, §§356.41 - 356.46, relating to groundwater management.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED REPEAL

This chapter is proposed for repeal because a new Chapter 356 is being proposed elsewhere in this issue of the *Texas Register.* The board has determined that due to the extensive reorganization of proposed new Chapter 356, repeal of the entire chapter is more efficient than to propose amendments for the changes. The revision of Chapter 356 results from statutory changes by the 82nd Legislature in 2011.

The repeal of Chapter 356 in its entirety provides the public with an opportunity to better understand the proposed new Chapter 356 without the confusion of extensive amendments. Current Chapter 356 contains 26 sections. These sections affect the work of the state's groundwater conservation districts and direct that certain steps be taken to create groundwater conservation district management plans, designate groundwater management areas, submit desired future conditions developed by joint planning efforts, and appeal the approval of desired future conditions. Chapter 356 is based on Texas Water Code Chapter 36, which relates to groundwater conservation districts, and Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Melanie Callahan, Executive Administrator, has determined that there is no fiscal impact to state or local governments as a result of this proposed repeal because rules governing the same subject matter will be revised and proposed for adoption simultaneously with this repeal.

PUBLIC BENEFITS AND COSTS

Melanie Callahan, Executive Administrator, has determined that there are public benefits to repealing this chapter because the proposed new chapter will be more streamlined and orderly and will clarify the responsibilities of the groundwater conservation districts in the development and approval of their management plans and desired future conditions for the aquifers. Ms. Callahan has also determined there is no increased cost to the public resulting from the repeal of this chapter. Additionally, Ms. Callahan has determined that there are no economic costs to persons required to comply with the rules. They will incur no economic costs because the rules do not impose mandates on the public, but provide guidance to the groundwater conservation districts and provide notice to the public regarding the process for development, approval, and appeal of desired future conditions and the content of the districts' management plans.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed repeal does not adversely affect a local economy in a material way for the first five years that the repeal is in effect because it will impose no new requirements on local economies.

The board has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of this rule repeal. The board has also determined that there is no anticipated economic cost to persons who are otherwise required to comply with the rules that are proposed for repeal. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY IMPACT ANALYSIS

The board has determined that the proposed repeal is not subject to Texas Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT

The board has determined that the promulgation and enforcement of this proposed rule repeal will constitute neither a statutory nor a constitutional taking of private real property. The proposed repeal does not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the repeal does not impose a burden nor restrict or limit the owner's right to property. Therefore, the proposed repeal does not constitute a taking under Texas Government Code, Chapter 2007.

SUBMISSION OF COMMENTS

Comments on the proposed rulemaking will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.texas.gov,* or by fax at (512) 475-2053.

SUBCHAPTER A. GROUNDWATER MANAGEMENT PLAN APPROVAL

31 TAC §§356.1 - 356.12

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

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code Chapters 35 and 36.

§356.1. Scope of Subchapter.
§356.2. Definitions of Terms.
§356.3. Required Management Plan.
§356.4. Sharing with Regional Water Planning Groups.
§356.5. Required Content of Management Plan.
§356.6. Plan Submittal.
§356.7. Approval.
§356.8. Appeal of Denied Management Plan Approval
§356.9. Approval of Amendments.
§356.10. Possible Conflicts with State Water Plan.
§356.11. Training on Data Collection Methodology
§356.12. Data Collected by the District.

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 September 20, 2012.

TRD-201204982
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 463-8061

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SUBCHAPTER B. DESIGNATION OF GROUNDWATER MANAGEMENT AREAS

31 TAC §§356.21 - 356.23

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

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code Chapters 35 and 36.

§356.21. Scope of Subchapter.
§356.22. Definitions of Terms.
§356.23. Designation of Groundwater Management Areas.

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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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SUBCHAPTER C. SUBMITTAL OF DESIRED FUTURE CONDITIONS

31 TAC §§356.31 - 356.35

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

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code Chapters 35 and 36.

§356.31. Scope of Subchapter.
§356.32. Definitions of Terms.
§356.33. Submission Date.
§356.34. Submission Package.
§356.35. Acknowledgment.

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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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SUBCHAPTER D. APPEALING APPROVAL OF DESIRED FUTURE CONDITIONS

31 TAC §§356.41 - 356.46

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

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code Chapters 35 and 36.

§356.41. Scope of Subchapter.
§356.42. Definitions.
§356.43. Petition: Reviewability; Form; Receipt; Postponement; Rebuttal and Joinder.

§356.44. Hearing.

§356.45. Board Evaluation, Consideration and Deliberation.

§356.46. Board Findings and Public Hearing on Recommended Revisions.

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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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CHAPTER 356. GROUNDWATER MANAGEMENT

The Texas Water Development board (board) proposes new Chapter 356, §§356.10, 356.20 - 356.22, 356.30 - 356.35, 356.40 - 356.46, 356.50 - 356.57, and 356.60 - 356.62, relating to groundwater management.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED NEW RULES

This proposed new Chapter 356 replaces current Chapter 356 in its entirety. Current Chapter 356 is being proposed separately for repeal elsewhere in this issue of the *Texas Register.* This proposed new Chapter 356 contains the substantive changes discussed below in each section. The proposed new Chapter 356 is prompted, in part, by statutory changes. The board was subject to Sunset Commission review in 2011 resulting in the enactment of the board's reauthorization bill, Senate Bill 660. In Senate Bill 660, the 82nd Legislature also amended sections of Texas Water Code Chapter 36 relating to groundwater conservation districts. Other changes were made to Chapter 36 through Senate Bills 727 and 737. Rules changes arising out of enactments from the 82nd Legislature include: (1) changing the final quantified output of the joint planning process used in the groundwater conservation districts' management plans and the related definition from "managed available groundwater" to "modeled available groundwater;" (2) adding a definition of "desired future condition;" and (3) expanding the process and requirements for adoption of desired future conditions by the groundwater conservation districts in a groundwater management area.

This proposed new Chapter 356 reorganizes the materials so that rules are arranged to reflect the sequential steps in the board's process of working with the groundwater conservation districts. The process of designating groundwater management areas, adoption and appeal of desired future conditions, and developing, reviewing, and approving districts' management plans is more transparent as the rules generally reflect the order in which the groundwater conservation districts conduct their work. Another benefit of reorganizing the rules is that the proposed new Chapter 356 contains new directives relating to the board's review of district management plans and the procedure for hearings of appeals of desired future conditions.

SECTION BY SECTION DISCUSSION OF THE PROPOSED NEW RULES

Subchapter A. Definitions.

Proposed new §356.10, relating to Definitions, contains definitions not previously part of Chapter 356 for the following terms: agency, groundwater availability model, natural resources issues, non-relevant aquifer, and total estimated recoverable storage. Terms that were defined in other portions of the current chapter have been consolidated under §356.10 for ease of use. This proposed new section also deletes from current Chapter 356 definitions of terms that are either defined in statute, defined in context, or are commonly understood: artificial recharge, administratively complete, aquifer, discharge, estimate, management goals, management plan, groundwater, groundwater management area, groundwater reservoir, and respondent.

Subchapter B. Designation of Groundwater Management Areas.

Proposed new §356.20, relating to Scope of Subchapter, is a reference to the statutory requirements for the designation of groundwater management areas. Groundwater management areas must be designated by rule as provided by Texas Water Code §35.004(d).

Proposed new §356.21 relating to designation of groundwater management areas is in fulfillment of the board's responsibility under Texas Water Code §35.004(c) for alteration of groundwater management area boundaries. The rule establishes the location of the digital files and graphic representations of the groundwater management area boundaries as these may change. The rule, which replaces current §356.23 being proposed for repeal elsewhere in this issue of the *Texas Register,* removes the references to specific electronic files as these may change due to administrative adjustments or corrections to the boundary data required by degradation of the data. Over time, the files become corrupt and do not accurately reflect the boundaries of counties, districts, the groundwater management areas, and natural features described in the files. The process set out here will allow for correction of those errors that, though not significant individually, do affect the overall accuracy of the data.

Proposed new §356.22, relating to Request to Amend Groundwater Management Area Boundaries, establishes procedures by which boundaries may be changed, either on request of the districts or upon action by the executive administrator. Under proposed subsection (a), any request to amend the boundaries of a groundwater management area must be addressed to the executive administrator in writing and contain a resolution supporting the change signed by each district in each affected groundwater management area, a demonstration or explanation as to the geographic and hydrogeologic conditions that necessitate the boundary change, and a copy of the notice and minutes of the public meetings held by each groundwater management area at which the districts approve the request. Proposed subsection (b) describes the review process by the executive administrator, and subsection (c) provides that the executive administrator may, at the executive administrator's discretion, make administrative changes to the data files to maintain their accuracy. Subsection (d) provides that the executive administrator may waive any of the requirements of this subsection upon a showing of good cause.

Subchapter C. Submission of Desired Future Conditions.

Proposed new §356.30, relating to Scope of Subchapter, is a reference to the statutory requirements for the submission of desired future conditions by groundwater conservation districts as provided by Texas Water Code §36.108.

Proposed new §356.31 relating to the submission date for the desired future conditions provides the timetable under which the districts in a groundwater management area must propose their desired future conditions for adoption and provides for districts to propose designation of an aquifer as non-relevant. No desired future condition will be required for aquifers designated as non-relevant because the statute requires the districts to adopt desired future conditions only for the relevant aquifers within the management area. Proposed new §356.31(b) also requires the districts to submit an explanation to the board for each aquifer designated as non-relevant. In this way, a record is preserved of the decision by the districts to designate an aquifer as non-relevant.

Proposed new §356.32, relating to Submission Package, describes the materials that must be submitted to the executive administrator in fulfillment of the requirements of Texas Water Code §36.108(4), relating to modeled available groundwater, which requires the districts to submit the adopted desired future conditions to the executive administrator not later than 60 days after adoption. Proposed new §356.32 also requires a copy of the posted notice for the joint planning meeting at which the districts adopted the desired future condition and the name of the designated contact for the groundwater management area. Section 356.32(5) provides that the districts must submit any groundwater availability model files or aquifer assessments used in developing the adopted desired future condition with documentation sufficient to replicate the work. Modeled available groundwater is calculated using the groundwater availability models approved by the executive administrator. The information requested in 356.32(5) will allow agency staff to more easily ensure that the modeled available groundwater provided to the districts reflects the modeling used in determining the adopted desired future conditions.

Proposed new §356.33, relating to Determination of Administrative Completeness, provides that the executive administrator will consider a submitted desired future condition package complete if it contains all of the information required by §356.32. Proposed §356.33(1) relating to acknowledgement of receipt of a submitted package provides that the executive administrator will acknowledge receipt in writing and will advise the districts whether the submitted package is complete or contains deficiencies. Districts are required to correct any deficiencies and notify the executive administrator no later than 90 days following the date the executive administrator provides a notice of deficiencies.

Proposed new §356.34, relating to District Adoption of the Desired Future Condition, provides that once the executive administrator advises the districts that the desired future condition package is administratively complete, each district must adopt the desired future condition for the aquifer or aquifers within its boundaries.

Proposed new §356.35, relating to Modeled Available Groundwater, provides that the executive administrator will provide the draft modeled available groundwater value for each relevant aquifer with adopted desired future conditions to both the districts in the groundwater management area and the appropriate regional water planning groups no later than 180 days after the executive administrator has notified the districts that the submitted desired future condition package is administratively complete. Proposed new §356.35 further clarifies that the modeled available groundwater value will not be issued until after a petition filed under Texas Water Code §36.1083 has been resolved.

Subchapter D. Appealing Approval of Desired Future Conditions.

Proposed new §356.40, relating to Scope of Subchapter, is a reference to the statutory requirements for the submission of a petition that appeals the desired future conditions adopted by the districts in a groundwater management area as provided by Texas Water Code §36.1083.

Proposed new §356.41, relating to Petition: Reviewability, Form, Receipt, Postponement, Response, and Joinder, identifies factors related to the initial receipt of a petition by the board and responses by the districts. Subsection (a) simplifies and clarifies the basis upon which the agency will determine that a petition is reviewable. Subsection (a) also changes the date by which a petition must be filed from one year to 120 days following the date of the adoption of the desired future condition by the districts meeting as a groundwater management area. This change is intended to expedite the appeal process and bring the process more in line with other similar types of appeals. The board has determined that no reason exists for waiting up to one year following the adoption of the desired future condition before an appeal is brought.

Proposed new §356.41(b), relating to Form and Contents of Petition, removes the requirement that a certified copy of a resolution or other official document describing the extent and nature of the authority of the representative of the petitioner be submitted with the petition. This requirement was confusing and appeared to presume that a petitioner would not represent himself. Representation by legal counsel is usually apparent in the petition. Thus, the requirement is not necessary.

Proposed §356.41(c) provides that the executive administrator will notify the petitioner and the districts within 15 days of receipt of a petition and advise the petitioner whether the petition has been accepted as reviewable. Subsection (d) provides that the petitioner will have an additional 15 days to remedy any deficiency in the filing if the petition is not accepted.

Proposed new §356.41(e) provides that, within 10 business days of receipt of the executive administrator's acknowledgement of a reviewable petition, a district in the groundwater management area may request a postponement of any further action on the petition for 60 days to encourage resolution of the issues raised by the petition. Subsection (e) further provides that additional extensions may be granted upon the request of either a petitioner or a district upon a showing that the parties are in active negotiations toward a resolution of the issues raised in the petition.

Proposed new §356.41(f) provides that the districts in the groundwater management area may, but are not required to, present evidence to the agency and the petitioner prior to the hearing on the petition. If the districts choose to respond, proposed subsection (f) provides the districts 90 days in which to do so.

Proposed new §356.41(g) provides that the executive administrator may join multiple petitions concerning the same aquifers or the same issues within a groundwater management area if such joinder is beneficial to the agency, the petitioners, and the respondents.

Proposed new §356.42, relating to Hearing, provides the procedures to be followed in fulfillment of the statutory requirement of

Texas Water Code §36.1083(c). Proposed subsection (a) clarifies that at least one hearing will be held to take testimony from the petitioner and the districts. Evidence from other interested persons is addressed in §356.42(f).

Proposed new §356.42(b) clarifies that any hearing shall be conducted at a central location in the groundwater management area. This provision mirrors the language of the statute and is intended to underscore that the desired future conditions represent the collective action of all the districts in a groundwater management area.

Proposed new §356.42(c) provides for notice of the hearing to affected parties. Under proposed subsection (c), affected parties include counties in the groundwater management area that do not have a district, districts adjacent to the groundwater management area, and any regional water planning group in the groundwater management area, as well as the petitioner and the districts in the groundwater management area. The provision recognizes that these entities may have an interest in the desired future condition process (as evident by the statutory identification of who may file a petition).

Proposed new §356.42(d) states that a hearing on a petition appealing a desired future condition is not a contested case hearing subject to the Texas Administrative Procedure Act, Texas Government Code §§2001.051 - 2001.178. A contested case hearing is limited to matters where the legislation specifically requires one. Unless an enabling statute requires a contested case hearing, the agency is not authorized to provide such a hearing. *Best & Co. v. Tex. State Bd. Of Plumbing Examiners,* 927 S.W.2d 306 (Tex.App.--Austin 1996, writ denied). The legislature did not provide for a contested case hearing in Texas Water Code §36.1083, or in any of the agency's enabling statutes. Therefore the board does not consider a hearing on a petition appealing a desired future condition a contested case hearing and related rules--the Texas Rules of Evidence, Rules of Civil Procedure, and the rules promulgated by the State Office of Administrative Hearings related to contested case hearings--will not apply to a hearing on a desired future condition petition.

Proposed new §356.42(e) provides the structure that participants may expect during the hearing. It underscores that the purpose of the hearing is to give the petitioner and the districts an opportunity to provide testimony and evidence for the record in a fair, orderly, and efficient manner. While the hearing is open to the public, it is not a forum for public comment.

Proposed new §356.42(f) provides an opportunity for interested person, members of the public who have a legally defined interest in the issues, to provide evidence and written testimony regarding the issues raised in the petition. The hearing record will remain open for 15 days following the close of the hearing for public statements. The time is not intended, however, to provide an opportunity for parties to supplement the testimony or evidence provided during the hearing. No post-hearing briefing is anticipated.

Proposed new §356.42(g) provides that the executive administrator has the discretion to adopt different or additional procedures at the hearing either on the joint request of the parties or on the executive administrator's own initiative.

Proposed new §356.43 relating to board evaluation, consideration, and deliberation describes how board staff will evaluate the petition in preparing a recommendation to the board and what staff will consider in its analysis. Proposed §356.43 represents a revision of current §356.44 and §356.45 proposed for repeal elsewhere in this issue of the *Texas Register* to reflect the changes that were made by the 82nd Legislature to Texas Water Code §36.108.

Proposed new §356.43(a) provides that the executive administrator must prepare a report on the petition that includes a summary of the testimony, an analysis of the evidence received, a recommendation regarding the reasonableness of the desired future condition and any necessary findings. Proposed subsection (d) further clarifies the contents of the report by providing that findings will only be prepared if the desired future condition is found to be unreasonable. The board has determined that findings are not otherwise necessary as this proceeding is not a contested case that requires findings of fact and conclusions of law in all cases as under the Texas Administrative Procedure Act, Texas Government Code §§2001.060 - 2001.061. If the board determines that a desired future condition is not reasonable, then the board will include a list of findings with its recommendations in the report to the districts *(see* Texas Water Code §36.1083(c)).

Proposed new §356.43(b) lists the contents of the hearing record on which the board will base its decision regarding the petition. The language is revised from existing §356.44(g) proposed for repeal elsewhere in this issue of the *Texas Register* to reflect the record available for evaluation and consideration when the staff recommendation is taken to the board.

Proposed new §356.43(c) lists the criteria that will be used in determining whether a desired future condition is reasonable. In addition to the petition and relevant evidence, the board shall also consider whether the desired future condition is physically possible, that is, is it achievable. In addition, the statutory revisions in 2011 require that the desired future conditions must provide a balance between production from the aquifer and conservation, preservation, protection, recharging, and prevention of waste of the water in the aquifer (Texas Water Code §36.108(d-2)). Therefore, the list of criteria includes an assessment of whether the desired future condition provides such a balance. Similarly, the statute provides that the districts must consider a list of factors before adopting the desired future condition. The explanatory report that must be provided with the desired future condition under Texas Water Code §36.108(d-3) and proposed new §356.32, relating to Submission Package, is required under the proposed rule to include an explanation of how the report addresses the factors in Texas Water Code §36.108(d). Therefore, part of the board's evaluation of the reasonableness of the desired future condition will be a determination of whether the districts have given appropriate consideration to the factors set forth in Texas Water Code §36.108(d).

Finally, proposed new §356.43(c) provides that the board will consider whether the districts have stated a purpose for the desired future condition and whether the desired future condition is reasonably fit and appropriate for that particular purpose. This criterion is based on the requirement in Texas Water Code §36.108(d-3)(2) that the districts provide the policy justification for each desired future condition. There should be a reasonable correlation between the desired future condition and the state of the aquifer it is intended to address. This criterion notes that concern and is to be articulated by the districts when they develop the desired future condition.

Proposed new §356.43(f) provides that action by the executive administrator is sufficient to terminate the proceedings on a petition in the event the parties reach an agreement that resolves the petition or a petition is withdrawn. Subsection (f) also pro-

vides that any agreement or notice of withdrawal of the petition becomes part of the administrative record of the proceedings.

Proposed new §356.44, relating to Board Findings and Public Hearing on Recommended Revisions, provides the process and timetable for the districts to respond to revisions recommended by the board should the board find that the desired future condition is unreasonable. Proposed new subsection (a) provides that the districts shall propose for adoption revised desired future conditions in accordance with the board's recommendation within 90 days following the board's decision. Proposed new subsection (b) provides for a public hearing to be held by the districts to solicit public comment on the proposed revised desired future condition and requires the districts to provide a copy of the notice of the public hearing to the executive administrator within three days of the date on which the notice is published. Subsection (c) provides that the districts will act on revising the desired future condition and submit the revised desired future condition to the board within 30 days of the districts' action along with a rationale for any changes to the desired future condition that vary from the board's recommendation. Subsection (d) provides that the revision of the desired future condition under this section does not require the preparation of an explanatory report pursuant to Texas Water Code §36.108(d-3).

Proposed new §356.45, relating to Waiver, provides that the executive administrator may waive any of the requirements of Subchapter D, §§356.40 - 356.46 upon a showing of good cause.

Proposed new §356.46, relating to Administrative Record of the Proceedings, provides that the administrative record of an appeal under Subchapter D, §§356.40 - 356.46 will be closed when the executive administrator provides the modeled available groundwater to the districts and the regional planning groups. Section 356.46 further identifies the items that will be included in the administrative record of the proceedings.

Subchapter E. Groundwater Management Plan Approval.

Proposed new §356.50, relating to Scope of Subchapter provides that the subchapter governs the agency's procedures for reviewing and approving management plans as administratively complete under Texas Water Code §36.1071 and §36.1072.

Proposed new §356.51, relating to Required Management Plan, provides that a district must submit to the executive administrator an approvable management plan with goals that are time-based and quantifiable.

Proposed new §356.52, relating to Required Content of Management Plan, details the content of a management plan, including management goals, objectives, performance standards, and estimates of certain measures used in the management plan. Subsection (b) provides that the goals, performance standards, and management objectives must be consistent with the applicable desired future condition(s). Subsection (c) provides that the district must use the groundwater availability modeling information provided by the executive administrator in conjunction with site-specific information when developing the estimates.

Proposed new §356.53, relating to Plan Submission, provides instructions on the contents of a plan package submitted to the executive administrator.

Proposed new §356.54, relating to Approval, describes an administratively complete plan and provides that a district has 180 days from receipt of a notice denying approval of a plan in which to revise the plan so that it complies with all requirements. Subsection (c) provides the conditions under which an approved management plan remains in effect when the plan is set to expire.

Proposed new §356.55, relating to Appeal of Denial of Management Plan Approval, provides the procedures under which a district may appeal the denial of a management plan to the board.

Proposed new §356.56, relating to Approval of Amendments, provides procedures under which a district may propose to amend its management plan for revision of items other than the modeled available groundwater or desired future conditions and review of any amendment for approval by the executive administrator. Section 356.56 further provides that amendments addressing items required by Texas Water Code §36.1071 relating to contents of a management plan must be submitted in the form of an amended plan instead of an addendum. Such amendments must be submitted in accordance with the requirements of this subchapter relating to the submission of a plan.

Proposed new §356.57, relating to Sharing with Regional Water Planning Groups, requires each district to forward a copy of its approved management plan to the chair of each regional water planning group within the district's boundaries.

Subchapter F. Data Collection and Training.

Proposed new §356.60, relating to Scope of Subchapter, provides that the purpose of the subchapter is to provide for data collection training and reporting by districts.

Proposed new §356.61, relating to Training on Data Collection Methodology, provides that the Texas Water Development Board will provide training on basic data collection and reporting methodology if requested by a district in writing addressed to the executive administrator.

Proposed new §356.62, relating to Data Collected by the District, provides that a district will provide any data collected by the district to the executive administrator upon request.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Melanie Callahan, Executive Administrator, has determined that there will not be any additional estimated costs to state and local governments as a result of enforcing or administering the rule for the first five years these rules will be in effect. These rules contain procedural and substantive directives to the groundwater conservation districts that are required to comply with the directives. There are no estimated additional costs because the directives are connected directly to statutory processes with which the groundwater conservation districts must comply.

Ms. Callahan has determined that there are no estimated reductions in costs to state or local governments as a result of enforcing or administering these rules for the first five years these rules will be in effect. In addition, Ms. Callahan has determined that there will not be any loss of or increase to revenue to state or local governments as a result of enforcing or administering these rules for the first five years that these rules will be in effect. These proposed rules do not affect the revenues of state or local governments.

PUBLIC BENEFITS AND COSTS

Ms. Callahan also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking because the rules are not directed to members of the public. Additionally, these rules provide a public benefit through improved clarity and elimination of unnecessary

rules that will assist the public in understanding the activities of the groundwater conservation districts. These public benefits will be effective for the first five years the rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has 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 because it will impose no new requirements on local economies.

The board has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The board has also determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY IMPACT ANALYSIS

The board has determined that the proposed rulemaking is not subject to Texas Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT

The board has determined that the promulgation and enforcement of these proposed new rules will constitute neither a statutory nor a constitutional taking of private real property. The proposed new rules do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because these proposed new rules do not burden nor restrict or limit the owner's right to property. Therefore, the proposed new rules do not constitute a taking under Texas Government Code, Chapter 2007.

SUBMISSION OF COMMENTS

Comments on the proposed rulemaking will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.texas.gov,* or by fax at (512) 475-2053.

SUBCHAPTER A. DEFINITIONS

31 TAC §356.10

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code Chapters 35 and 36.

§356.10. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. Words defined in Texas Water Code Chapter 36, Groundwater Conservation Districts, that are not defined here shall have the meanings provided in Chapter 36.

(1) Agency--The Texas Water Development Board.

(2) Amount of groundwater being used on an annual basis--An estimate of the quantity of groundwater annually withdrawn or flowing from wells in an aquifer for at least the most recent five years that information is available. It may include an estimate of exempt uses.

(3) Board--The six-member governing body of the Texas Water Development Board.

(4) Conjunctive use--The combined use of groundwater and surface water sources that optimizes the beneficial characteristics of each source, such as water banking, aquifer storage and recovery, enhanced recharge, and joint management.

(5) Conjunctive use issues--Issues related to conjunctive use such as groundwater or surface water quality degradation and impacts of shifting between surface water and groundwater during shortages.

(6) Desired future condition--The desired, quantified condition of groundwater resources (such as water levels, spring flows, or volumes) within a management area at one or more specified future times as defined by participating groundwater conservation districts within a groundwater management area as part of the joint planning process.

(7) District--Any district or authority subject to Chapter 36, Texas Water Code.

(8) Evidence--Information, including but not limited to oral statements or presentations, written materials, data files, or graphic representations, which relates to the reasonableness of the desired future conditions.

(9) Executive administrator--The executive administrator of the Texas Water Development Board or a designated representative.

(10) Groundwater Availability Model--A regional groundwater flow model approved by the executive administrator.

(11) Modeled Available Groundwater--The amount of water that the executive administrator determines may be produced on an average annual basis to achieve a desired future condition.

(12) Most efficient use of groundwater--Practices, techniques, and technologies that a district determines will provide the least consumption of groundwater for each type of use balanced with the benefits of using groundwater.

(13) Natural resources issues--Issues related to environmental and other concerns that may be affected by a district's groundwater management plan and rules, such as impacts on endangered species, soils, oil and gas production, mining, air and water quality degradation, agriculture, and plant and animal life.

(14) Non-relevant aquifer--The portion or portions of a major or minor aquifer, not included as a source of water in the State Water Plan, for which districts in a groundwater management area determine that:

(A) aquifer uses and conditions do not warrant adoption of a desired future condition for joint planning in a management area; and

(B) groundwater conditions will not affect the achievement of desired future conditions in adjacent or hydraulically connected relevant aquifers.

(15) Person with a legally defined interest in groundwater--A person or entity that owns or leases land or rights to groundwater in a groundwater management area, uses a well for beneficial use in a groundwater management area, or has current or pending authorization from a district to produce groundwater.

(16) Petition--A document submitted to the executive administrator appealing the adoption of a desired future condition that complies with the requirements of §356.41(b) of this chapter (relating

to Petition: Reviewability, Form, Receipt, Postponement, Response, and Joinder).

(17) Petitioner--A person with a legally defined interest in groundwater, a district in or adjacent to the groundwater management area, or a regional water planning group for a region in the groundwater management area who appeals the adoption of a desired future condition.

(18) Projected water demand--The quantity of water needed on an annual basis according to the state water plan for the state water plan planning period.

(19) Recharge enhancement--Increased recharge accomplished by the modification of the land surface, streams, or lakes to increase seepage or infiltration rates or by the direct injection of water into the subsurface through wells.

(20) State water plan--The most recent state water plan adopted by the board under Texas Water Code §16.051 (relating to State Water Plan).

(21) Surface water management entities--Political subdivisions as defined by Texas Water Code Chapter 15 and identified from Texas Commission on Environmental Quality records that are granted authority under Texas Water Code Chapter 11 to store, take, divert, or supply surface water either directly or by contract for use within the boundaries of a district.

(22) Total Estimated Recoverable Storage--The estimated amount of groundwater within an aquifer that accounts for aquifer conditions, hydrologic properties, water quality, and desired future conditions, and that is adjusted for recovery scenarios that typically range between 25% and 75% of the porosity-adjusted aquifer volume.

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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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SUBCHAPTER B. DESIGNATION OF GROUNDWATER MANAGEMENT AREAS

31 TAC §§356.20 - 356.22

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code Chapters 35 and 36.

§356.20. Scope of Subchapter.

This subchapter describes the agency's delineation of groundwater management areas pursuant to the requirements of Texas Water Code §35.004.

§356.21. Designation of Groundwater Management Areas.

The boundaries of the groundwater management areas are delineated using a geographic information system maintained and updated by the executive administrator. The digital files and a graphic representation of the groundwater management area boundaries are available on a CD-ROM located in agency offices and on the agency's web site at *http://www.twdb.texas.gov*. The graphic representation includes groundwater management area boundaries superimposed on a map that includes Texas county lines and may be used for creating graphic representations of the groundwater management area boundaries and other associated geographic features. These files are controlling in the event of a conflict with any graphic representation.

§356.22. Request to Amend Groundwater Management Area Boundaries.

(a) A request to amend the boundaries of a groundwater management area must be addressed to the executive administrator and must contain the following:

(1) a resolution supporting the change signed by each of the district representatives in each affected groundwater management area;

(2) a demonstration that the geographic and hydrogeologic conditions require the proposed boundary change or an explanation that the change involves only an administrative correction; and

(3) a copy of the notice and minutes of the public meeting held by the districts in each affected groundwater management area at which the districts approved the resolution in paragraph (1) of this subsection.

(b) The executive administrator will review the request and will notify the districts of his decision.

(1) If the proposed change involves only an administrative adjustment or correction to the boundary data files identified in §356.21 of this subchapter (relating to Designation of Groundwater Management Areas), the executive administrator will instruct agency staff to make the change and notify the districts upon completing the change.

(2) If the proposed change involves a substantive change to the boundaries of one or more groundwater management areas, the request will be presented to the board for authorization to proceed with rulemaking.

(c) The executive administrator may, in his discretion, make administrative corrections to the data files described in §356.21 of this subchapter. The executive administrator will notify the affected districts before making any correction.

(d) The executive administrator may, in his discretion, waive any of the requirements of this subchapter upon a showing of good cause.

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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SUBCHAPTER C. SUBMISSION OF DESIRED FUTURE CONDITIONS

31 TAC §§356.30 - 356.35

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code Chapters 35 and 36.

§356.30. Scope of Subchapter.

This subchapter identifies the agency's requirements and process for submitting desired future conditions under the requirement of Texas Water Code §36.108.

§356.31. Submission Date.

(a) Not later than five years after the date on which the districts in a groundwater management area last collectively adopted a desired future condition, the districts shall propose a desired future condition for adoption in accordance with Texas Water Code §36.108.

(b) The districts in a groundwater management area may, as part of the process for adopting and submitting desired future conditions, propose classification of an aquifer or portions of an aquifer as non-relevant, in which case no desired future condition is required. The districts must submit the following documentation to the agency for the aquifer or portion of the aquifer proposed to be classified as non-relevant:

(1) A description, location, and/or map of the aquifer or portion of the aquifer;

(2) A summary of aquifer characteristics, groundwater demands, and current groundwater uses that support the conclusion that desired future conditions in adjacent or hydraulically connected relevant aquifer(s) will not be affected; and

(3) An explanation of why the aquifer or portion of the aquifer is non-relevant for joint planning purposes.

§356.32. Submission Package.

Districts must provide the following to the executive administrator no later than 60 days following the date on which the desired future condition(s) was adopted by the groundwater management area:

(1) a copy of the explanatory report addressing the information required by Texas Water Code §36.108(d-3) and the criteria in Texas Water Code §36.108(d);

(2) a copy of the resolution of the groundwater management area adopting the desired future conditions as required by Texas Water Code §36.108(d-3);

(3) a copy of the notice that was posted for the joint planning meeting as required by Texas Water Code §36.108(e) and §36.108(e-2);

(4) the name of a designated representative of the groundwater management area;

(5) any groundwater availability model files or aquifer assessments used in developing the adopted desired future condition with documentation sufficient to replicate the work; and

(6) any other information the executive administrator may require.

§356.33. Determination of Administrative Completeness.

A submitted package will be considered administratively complete if it contains complete copies of all documents required under §356.32 of this subchapter (relating to Submission Package) and is signed and dated.

(1) The executive administrator will acknowledge in writing receipt of submitted packages and will advise whether they are administratively complete or will provide a notice of deficiencies.

(2) Districts must submit to the executive administrator an updated package that contains corrections to the deficiencies noted in paragraph (1) of this section no later than 90 days following the date on which the executive administrator provided a notice of deficiencies.

§356.34. District Adoption of the Desired Future Condition.

Each district shall adopt the desired future condition for the aquifer(s) within its boundaries as soon as possible after the executive administrator advises that the desired future condition package is administratively complete.

§356.35. Modeled Available Groundwater.

(a) The executive administrator will provide the modeled available groundwater value for each aquifer with a desired future condition to districts in a groundwater management area and the appropriate regional water planning groups. The modeled available groundwater value will be provided:

(1) No later than 180 days after the executive administrator has provided notice that the submitted package is administratively complete as described in §356.32 of this subchapter (relating to Submission Package); or

(2) No later than 180 days after the date on which the board determines that the petition is resolved.

(b) An appeal of a desired future condition will be considered resolved when:

(1) The board determines that the desired future condition is reasonable; or

(2) When districts in the groundwater management area submit a revised desired future condition(s) to the board.

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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SUBCHAPTER D. APPEALING APPROVAL OF DESIRED FUTURE CONDITIONS

31 TAC §§356.40 - 356.46

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code Chapters 35 and 36.

§356.40. Scope of Subchapter.

This subchapter describes the process related to an appeal challenging the approval of desired future conditions established by Texas Water Code §36.1083.

§356.41. Petition: Reviewability, Form, Receipt, Postponement, Response, and Joinder.

(a) Reviewability. The agency will review a petition when:

(1) the petition conforms to the requirements of this subchapter;

(2) the issues raised in the petition have not previously been considered by the board for the particular desired future condition in a petition under Texas Water Code §36.1083; and

(3) the petition is submitted to the executive administrator within 120 days following the date of the districts' adoption of the desired future condition in the groundwater management area.

(b) Form and Contents of Petition. A petition shall be addressed to the executive administrator, signed by the petitioner, and contain the following information:

(1) the petitioner's name and contact information, including mailing address, e-mail address, telephone number, and fax number and, if applicable, the same information for any person or entity designated as a representative of the petitioner;

(2) documentation that clearly identifies the nature of the petitioner's legally defined interest in groundwater in the area unless the petitioner is a district in or adjacent to the groundwater management area or a regional water planning group for a region in the area;

(3) a summary of the evidence upon which the petitioner will rely at the hearing for the contention that the adopted desired future condition is not reasonable; and

(4) evidence that the petitioner has provided a copy of the petition to each of the districts in the groundwater management area.

(c) Receipt of Petition and Acknowledgment. The executive administrator shall notify the petitioner and the districts within the groundwater management area within 15 days of receipt of a petition and advise whether the petition has been accepted as reviewable or has not been accepted as reviewable and the reasons for not accepting the petition.

(d) If the petition is not accepted, the petitioner will be allowed an additional 15 days to remedy the failure.

(e) Requests for Postponement.

(1) A district in the groundwater management area may, within 10 business days of its receipt of the executive administrator's acknowledgment of a reviewable petition, request that the executive administrator postpone review of the petition for 60 days to encourage consultation and resolution of the issues raised in the petition.

(2) Further extensions may be granted upon the request of a petitioner or a district upon a showing that the parties are in negotiations toward a resolution of the issues raised in the petition.

(f) Districts' Response to Petition. If the districts choose to respond, they shall have 90 days in which to present a written response to agency and the petitioner.

(g) Joinder of Petitions. The executive administrator may join multiple petitions concerning the same aquifers or issues within a groundwater management area if such joinder is beneficial to the agency, the petitioners, and the respondents.

§356.42. Hearing.

(a) Hearing on petition. The executive administrator shall hold at least one hearing to receive evidence and take testimony on the petition from the petitioner and the districts.

(b) Location of hearing. Any hearing shall be conducted at a central location in the groundwater management area.

(c) Notice of the hearing. The notice of hearing shall be published in the *Texas Register* and shall be provided to the petitioners, the districts, any districts adjacent to the groundwater management area, any regional water planning group in the groundwater management area, and the county judge for each county in the groundwater management area at least two weeks before the hearing.

(d) Form of hearing. A hearing under this subchapter is not a contested case hearing. The Texas Rules of Evidence, Rules of Civil Procedure, and the rules promulgated by the State Office for Administrative Hearings related to contested case hearings will not apply to this hearing. Testimony will be under oath.

(e) Hearing procedure. The executive administrator may issue any directives necessary to ensure an orderly, fair, and efficient hearing. The hearing to receive evidence and take testimony from the petitioner and districts shall be conducted by the executive administrator and shall proceed as follows:

(1) The executive administrator shall provide a concise statement relating to the scope and purpose of the hearing and shall proceed to take testimony and accept evidence.

(2) The petitioner and the districts shall be provided an equal amount of time to present testimony and evidence. The petitioner carries the burden of persuasion and may reserve time for rebuttal.

(f) Evidence from other interested persons. The executive administrator shall provide other persons with a legally-defined interest in the issues raised in the petition the opportunity to provide evidence and written testimony in any form acceptable to the executive administrator after the hearing concludes. The executive administrator shall keep the record of the hearing open for 15 days following the end of the hearing for receipt of evidence and written testimony from other interested persons.

(g) The executive administrator has the discretion to adopt different or additional procedures at the hearing upon the joint request of the petitioner and the districts or on the executive administrator's own initiative.

§356.43. Board Evaluation, Consideration, and Deliberation.

(a) The executive administrator shall prepare a report on the petition, including a summary of the testimony and an analysis of the evidence received, and recommendation regarding the reasonableness of the desired future condition and any necessary findings.

(b) Record. The record on which the board will decide whether to grant the petition shall consist of:

(1) the petition and the districts' response, if any;

(2) the testimony and evidence presented at the hearing;

(3) the written testimony and evidence submitted by other interested persons; and

(4) the executive administrator's report and recommendations.

(c) The board shall review the petition and any evidence relevant to the petition including, but not limited to, the following criteria when determining whether a desired future condition is reasonable:

(1) whether the adopted desired future condition is physically possible within a management area (that is, whether there is any groundwater production scenario that would allow the desired future condition to be achieved);

(2) whether the desired future condition provides a balance between the highest level of groundwater production from the aquifer and conservation of groundwater in the aquifer as described in Texas Water Code §36.108(d-2);

(3) whether the districts have stated a purpose for the desired future condition and whether the desired future condition is reasonably fit and appropriate for that particular purpose. For example, if the purpose is to protect spring flow, the desired future condition must have a reasonable correlation to spring flow and provide an appropriate indication of whether spring flow is protected; and,

(4) whether the districts have given appropriate consideration to the factors set out in Texas Water Code §36.108(d).

(d) The board's consideration of the reasonableness of a desired future condition pursuant to this subchapter shall be limited to the issue or issues that were raised in the petition and upon which evidence was received in the proceeding.

(e) If the desired future condition is found to be unreasonable, the board shall make findings and recommend revisions that would make the desired future condition reasonable.

(f) The executive administrator may at any stage of the process described in this subchapter, terminate the proceedings on a petition when an agreement is reached resolving the petition or a petition has been withdrawn. A copy of any such agreement or withdrawal of the petition shall become a part of the record.

§356.44. Board Findings and Public Hearing on Recommended Revisions.

(a) Within 90 days after the board finds that the desired future condition is unreasonable and recommends revisions, the districts shall revise and propose for adoption the desired future condition in accordance with the board's recommendations.

(b) The districts shall hold a public hearing at a central location in the groundwater management area to solicit public comment on the revised desired future condition. The notice of the public hearing shall be posted no later than 30 days after the districts propose for adoption the desired future condition and at least 10 days before the hearing and include a copy of the board's recommended revisions. The districts shall provide a copy of the notice of the public hearing to the executive administrator within three days of the date on which the notice is published.

(c) The districts shall consider all public and board comments, revise the desired future condition, and, within 30 days after the districts' action, submit the revised desired future condition to the board along with the rationale, based upon comments received at the public hearing, for any changes to the desired future condition that vary from the board's recommended revisions. The districts' rationale shall be part of the record.

(d) In revising the desired future conditions under this section, the districts are not required to prepare an explanatory report pursuant to Texas Water Code §36.108(d-3).

(e) The executive administrator shall provide the districts and appropriate regional water planning groups with the modeled available groundwater based on the desired future conditions as revised according to the process described in Texas Water Code §36.1084 and §356.35 of this chapter (relating to Modeled Available Groundwater).

§356.45. Waiver.

The executive administrator may, in his discretion, waive any of the requirements of this subchapter upon a showing of good cause.

§356.46. Administrative Record of the Proceedings.

When the executive administrator provides the modeled available groundwater to the districts and the regional water planning groups, the administrative record of the appeal will be closed. It shall contain, in addition to the items listed in §356.43(b) of this subchapter (relating to Board Evaluation, Consideration, and Deliberation):

(1) the minutes of the board's public deliberation on the petition;

(2) the board's report containing any recommended revisions transmitted to the districts along with a copy of the transmittal letter;

(3) the rationale for the districts' changes to the desired future condition; and

(4) any other information that the executive administrator determines is relevant to the petition.

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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SUBCHAPTER E. GROUNDWATER MANAGEMENT PLAN APPROVAL

31 TAC §§356.50 - 356.57

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code Chapters 35 and 36.

§356.50. Scope of Subchapter.

This subchapter governs the agency's procedures for reviewing and approving management plans as administratively complete.

§356.51. Required Management Plan.

As required by Texas Water Code §§36.1071, 36.1072, and 36.1085, a district shall submit to the executive administrator a management plan that meets the requirements of §356.52 of this subchapter (relating to Required Content of Management Plan). The management plan goals must be time-based and quantifiable.

§356.52. Required Content of Management Plan.

(a) A management plan shall contain, unless explained as not applicable, the following elements:

(1) Management goals:

(A) providing the most efficient use of groundwater;

(B) controlling and preventing waste of groundwater;

(C) controlling and preventing subsidence;

(D) addressing conjunctive surface water management issues;

(E) addressing natural resource issues which impact the use and availability of groundwater, and which are impacted by the use of groundwater;

(F) addressing drought conditions;

(G) addressing conservation, recharge enhancement, rainwater harvesting, precipitation enhancement and brush control, where appropriate and cost-effective; and

(H) addressing the desired future conditions established pursuant to Texas Water Code §36.108;

(2) Management objectives that the district will use to achieve the management goals in paragraph (1) of this subsection. Management objectives are specific and time-based statements of future outcomes, each linked to a management goal. Each future outcome must be the result of actions that can be taken by the district during the five years following the effective date of the adopted management plan;

(3) Performance standards for each management objective. Performance standards are indicators or measures used to evaluate the effectiveness and efficiency of district activities. Evaluation of the effectiveness of district activities measures the performance of the district. Evaluation of the efficiency of district activities measures how well district resources are used to produce an output, such as the amount of resources devoted for each management action;

(4) Details of how the district will manage groundwater supplies in the district, including a methodology by which the district will track its progress in achieving its management goals. At least one goal must be tracked on an annual basis; however, other goals may be defined and tracked over a longer time period as appropriate; and

(5) Estimates of the following:

(A) modeled available groundwater in the district as provided by the executive administrator based on the desired future condition established under Texas Water Code §36.108;

(B) the amount of groundwater being used within the district on an annual basis taken from either the water use survey data provided by the executive administrator or the district's own estimate;

(C) the annual amount of recharge from precipitation, if any, to the groundwater resources within the district as provided by the executive administrator;

(D) for each aquifer, the annual volume of water that discharges from the aquifer to springs and any surface water bodies, including lakes, streams, and rivers as provided by the executive administrator;

(E) the annual volume of flow into and out of the district within each aquifer and between aquifers in the district, if a groundwater availability model is available from the executive administrator;

(F) the projected surface water supply in the district according to the most recently adopted state water plan; and

(G) the projected water demand for water in the district according to the most recently adopted state water plan.

(b) The management goals, performance standards and management objectives required in subsection (a)(1), (2), and (3) of this section must be consistent with the established desired future conditions of the district's groundwater management area(s).

(c) Each district must use the groundwater availability modeling information provided by the executive administrator in conjunction with available site-specific information provided by the district when developing the estimates required in subsection (a)(5) of this section.

§356.53. Plan Submission.

(a) A district requesting approval of its management plan shall submit to the executive administrator the following:

(1) one hard copy of the adopted management plan;

(2) one electronic copy of the adopted management plan; and

(3) evidence that the plan was adopted after notice posted in accordance with Texas Government Code Chapter 551, including a copy of the posted agenda, meeting minutes, and copies of the notice printed in the newspaper or publisher's affidavit.

(b) The plan or revised plan under §356.54 of this subchapter (relating to Approval) shall be considered properly submitted to the executive administrator when all of the items specified in subsection (a) of this section are received by the executive administrator.

§356.54. Approval.

(a) The executive administrator will approve a plan as administratively complete when it contains the information required by Texas Water Code §36.1071(a) and (e). The executive administrator will notify the district in writing of the determination.

(b) If approval is denied, the executive administrator will provide written reasons for the denial with the notice of denial. A district has 180 days from receipt of notice to submit a revised management plan for review and approval. A revised or amended management plan must comply with all requirements of this subchapter.

(c) An approved management plan remains in effect until:

(1) the district fails to readopt a management plan at least 90 days before the plan expires;

(2) the district fails to submit the district's readopted management plan to the executive administrator at least 60 days before the plan expires; or

(3) the executive administrator determines that the readopted management plan does not meet the requirements for approval and the district has exhausted all appeals to the board or court in accordance with Texas Water Code §36.1072(f).

§356.55. Appeal of Denial of Management Plan Approval.

(a) If the executive administrator denies approval of a management plan, a revised management plan, or an amendment to a management plan, the district may appeal the denial by notifying the executive administrator in writing of its intent to appeal, not later than 60 days after the executive administrator's written notice of denial.

(1) Not later than 30 days after filing its notice of intent to appeal, a district shall submit to the executive administrator in writing points of appeal addressing each of the executive administrator's reasons for denial of approval.

(2) The appeal shall be heard at the first regularly scheduled meeting of the board to occur after the expiration of 30 days from the receipt of the district's written points of appeal. Written notice of appeal and written points of appeal shall be considered to be received by the executive administrator when received in the Austin offices of the agency.

(3) The executive administrator may file a written response to the district's points of appeal with the board and shall provide a copy of the response to the district.

(b) If the board upholds the executive administrator's decision to deny approval of the management plan, the district may request that the matter be mediated or, failing mediation, may appeal to a district court in Travis County, in accordance with Texas Water Code §36.1072(f).

§356.56. Approval of Amendments.

(a) If the district proposes to amend its plan for revisions of items other than the modeled available groundwater or desired future condition, the district shall submit a written copy of the proposed amendment to the executive administrator so that the executive administrator may determine whether the amendment requires approval.

(b) If the executive administrator determines that the amendment requires approval, the district shall submit all amendments to the management plan developed under §356.52 of this subchapter (relating to Required Content of Management Plan) to the executive administrator within 60 days of adoption of the amendment by the district's board. Amendments shall be submitted either in the form of an addendum to the management plan or as changes highlighted within the entire management plan.

(c) If the amendments address items required by Texas Water Code §36.1071, they should be in the form of an amended plan instead of an addendum to avoid confusion and preserve the integrity of the plan. Amendments must be submitted in accordance with §356.53 of this subchapter (relating to Plan Submission). Incorporation of newly developed desired future conditions and modeled available groundwater values must be adopted as an amendment.

§356.57. Sharing with Regional Water Planning Groups.

Each district shall forward a copy of its approved management plan to the chair of each regional water planning group within the district's boundaries.

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 September 20, 2012.

TRD-201204990
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 463-8061

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SUBCHAPTER F. DATA COLLECTION AND TRAINING

31 TAC §§356.60 - 356.62

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code Chapters 35 and 36.

§356.60. Scope of Subchapter.

This subchapter discusses data collection training and reporting by districts.

§356.61. Training on Data Collection Methodology.

If requested by a district in writing to the executive administrator, the agency shall provide the district training on basic data collection methodology and reporting and provide technical assistance, including basic data collection and reporting methodology.

§356.62. Data Collected by the District.

Upon written request of the executive administrator, a district shall provide any data collected by the district to the executive administrator in a format acceptable to the executive administrator. The executive administrator shall provide to the districts a list of acceptable formats for reporting by the districts.

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 363. FINANCIAL ASSISTANCE PROGRAMS
SUBCHAPTER A. GENERAL PROVISIONS
DIVISION 2. GENERAL APPLICATION PROCEDURES

31 TAC §363.15

The Texas Water Development Board (TWDB or Board) proposes to amend §363.15, regarding Required Water Conservation Plan.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT

In 2011, the 82nd Legislature passed Senate Bill (SB) 181, amending Texas Water Code (TWC) Chapter 16, regarding 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, amending TWC Chapter 16, and TWC Chapter 11, regarding the functions of the TWDB and related entities in connection with the reporting of municipal water use data.

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 Texas Commission on Environmental Quality (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 to be used by municipalities and other water utilities in developing water conservation plans and preparing reports required under the TWC. TWC §16.402 and §16.403 require that the methodology and guidance include 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 residential sector that includes both single-family and multifamily residences in GPCD, a method of calculating water use in the non-population dependent sectors, and guidelines on the use of service populations in developing a per-capita-based method of calculation. The methodology and guidance applies to all entities required to submit water conservation plans to the TWDB or the TCEQ. Additionally, the TWDB, in consultation with the TCEQ and WCAC, shall develop a data collection and reporting program for municipalities and other water utilities with more than 3,300 connections.

SB 181 added TWC §16.404, and SB 660 amended TWC §16.402 and §11.1271, to require the TWDB and TCEQ to adopt rules requiring the use of the methodology and guidance. The rules must require entities to report the most detailed level of water use possible, but cannot require entities to report at a higher level of detail than their current billing systems allow.

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

SECTION BY SECTION DISCUSSION OF THE PROPOSED AMENDMENT

The TWDB proposes to amend §363.15 regarding Required Water Conservation Plan, to implement the requirements of TWC §§16.402, 16.403, and 16.404.

The TWDB proposes to amend §363.15(b) by deleting the May 1, 2005 start date for five-year and ten-year targets for water savings. The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because it is more than five years since this date and the rule requires a new or revised water conservation plan that has been in effect for less than five years, this date is no longer needed.

The TWDB proposes to amend §363.15(b)(1)(A) by adding the requirement that the utility profile in a water conservation plan must include data developed "in accordance with the methodology and guidance for calculating water use and conservation developed and maintained by the executive administrator in coordination with the commission under Texas Water Code §16.403" in order to comply with the requirement in TWC §16.402 and §16.404 that the Board adopt rules requiring the use of the methodology and guidance. The methodology and guidance is currently being developed by the TWDB and TCEQ in consultation with the WCAC and will not be finalized until the end of 2012. In addition, this amendment adds the requirement that the utility profile required in a water conservation plan include the classification of water sales and uses at the most detailed level of water use data currently available, in order to comply with the requirements of TWC §16.402(f) and §16.404 that the rules require an entity to report the most detailed level of municipal water use data currently available to the entity, but not to report data that is more detailed than the entity's billing system is capable of producing. This amendment also requires that the utility profile include the most detailed level of water use data currently available for the sectors identified in TWC §16.403.

The TWDB proposes to amend §363.15(b)(1)(B) to specify that the goals for municipal use be in total GPCD and residential GPCD, in order to assure that the water use data in the utility profile is consistent with the goals for municipal use. The proposed amendments also define "municipal use" as "the use of potable water or sewage effluent for residential, commercial, industrial, agricultural, institutional, and wholesale uses by an individual or entity that supplies water to the public for human consumption." This amendment clarifies the use of the term "municipal use" in TWC §11.1271(c), which requires goals for "municipal use" in GPCD. The amendment is consistent with the TCEQ's definition of "municipal use" in 30 TAC §288.1 as that term is used in 30 TAC §288.2(a)(1)(C) and is consistent with the requirement in Texas Water Code §16.403(b)(2) and (4) that water use by a municipality or other water utility be reported in both total GPCD and residential GPCD.

The TWDB proposes to amend §363.15(c) to add a comma for grammatical correctness.

The TWDB proposes to amend §363.15(g)(1) to delete the reference to "May 1, 2010" as the deadline for the filing of the first report on an entity's progress in implementing each of the minimum requirements in the water conservation plan, since this date has already passed, and instead requires the report annually every May 1st.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Melanie Callahan, Chief Financial Officer, has determined that there will be no significant fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration. These rules are not expected to result in reductions in costs to either state or local governments. These rules are not expected to have any impact on state or local revenues. The rules do not require any significant increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules. These rules affect only those entities that apply for financial assistance from the TWDB. In addition, the proposed rules require municipalities and other utilities to report the most detailed level of data currently available to them and do not require these entities to upgrade their billing systems.

PUBLIC BENEFITS AND COSTS

Ms. Callahan also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it will 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. There will be no significant economic cost to persons required to comply with these rules. These rules affect only those entities that are apply for financial assistance from the TWDB.

LOCAL EMPLOYMENT ECONOMIC IMPACT STATEMENT

The TWDB has determined that a local employment impact statement is not required because the proposed rulemaking

does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The TWDB also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking because the rules are not regulatory and are not directed at private small or micro-businesses. The TWDB also has determined that there is no anticipated significant economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY ANALYSIS

The TWDB has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT

The TWDB has determined that the promulgation and enforcement of this proposed rulemaking will constitute neither a statutory nor a constitutional taking of private real property. The proposed rule does not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed rule does not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed rulemaking does not constitute a taking under Texas Government Code, Chapter 2007, or the Texas Constitution.

SUBMISSION OF COMMENTS

Comments on the proposed rulemaking will be accepted for 30 days following publication in the *Texas Register* and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.texas.gov,* or by fax at (512) 475-2053.

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of TWC §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB, and TWC §16.402(e), which requires the TWDB and the TCEQ to jointly adopt rules requiring the methodology and guidance for calculating water use and conservation developed under TWC §16.403 to be used in the water conservation annual reports required by TWC §16.402(b).

This rulemaking affects Texas Water Code Chapters 15, 16, and 17.

§363.15. Required Water Conservation Plan.

(a) (No change.)

(b) The water conservation plan required under subsection (a) of this section must be new or revised to include five-year and ten-year targets for water savings, unless the applicant has[~~, since May 1, 2005,~~] implemented an approved water conservation plan that meets the requirements of this section, and that has been in effect for less than five years. The water conservation plan shall include an evaluation of the applicant's water and wastewater system and customer water use characteristics to identify water conservation opportunities and shall set goals to be accomplished by water conservation measures. The water conservation plan shall provide information in response to the following minimum requirements. If the plan does not provide information for each minimum requirement, the applicant shall include in the plan an explanation of why the requirement is not applicable.

(1) Minimum requirements. Water conservation plans shall include the following elements:

(A) a utility profile including, but not limited to, information regarding population and customer data, water use data, water supply system data, and wastewater system data at the most detailed level of water use data currently available and in accordance with the methodology and guidance for calculating water use and conservation developed and maintained by the executive administrator in coordination with the commission under Texas Water Code §16.403. The utility profile must include the classification of water sales and uses for the following sectors, as appropriate:[~~;~~]

(i) residential;

(I) single-family;

(II) multi-family;

(ii) commercial;

(iii) institutional;

(iv) industrial;

(v) agricultural; and

(vi) wholesale.

(B) specific, quantified five-year and ten-year targets for water savings to include goals for water loss programs [~~in gallons per capita per day,~~] and goals for municipal use[~~,~~] in total gallons per capita per day and residential gallons per capita per day. As used herein, "municipal use" means the use of potable water or sewer effluent for residential, commercial, industrial, agricultural, institutional, and wholesale uses by an individual or entity that supplies water to the public for human consumption;

(C) - (M) (No change.)

(2) (No change.)

(c) Pursuant to Water Code §§15.106(c), 17.125(c), 17.277(c), and 17.857(c), an applicant is not required to provide a water conservation plan if the board determines an emergency exists; the amount of financial assistance to be provided is $500,000 or less; or the board finds that implementation of a water conservation program is not reasonably necessary to facilitate water conservation; or the application is for flood control purposes under Water Code, Chapter 17, Subchapter G.

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

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

(g) Annual reports.

(1) Each entity that is required to submit a water conservation plan to the board or the commission, other than a recipient of financial assistance from the board, shall file a report annually not later than May 1st [~~May 1, 2010, and annually thereafter~~] to the executive administrator on the entity's progress in implementing each of the minimum requirements in the water conservation plan.

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

(h) (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 September 20, 2012.

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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS

SUBCHAPTER A. RETIREE HEALTH CARE BENEFITS (TRS-CARE)

34 TAC §§41.2, 41.5, 41.7

The Board of Trustees (board) of the Teacher Retirement System of Texas (TRS) proposes amendments to the following rules for TRS-Care, the health benefits program for TRS retirees administered by TRS, as trustee: §41.2 relating to additional enrollment opportunities; §41.5 relating to the payment of contributions; and §41.7 relating to the effective date of coverage under TRS-Care.

TRS proposes amendments to §§41.2, 41.5 and 41.7 to distinguish between the plans offered under the TRS-Care 2 and TRS-Care 3 levels of coverage and the levels of coverage themselves. With the introduction of the new TRS-Care Medicare Advantage (medical) plans and the new TRS-Care Medicare Part D (drug) plans on January 1, 2013, for the first time, there will be several medical plans and several drug plans available within both the TRS-Care 2 and TRS-Care 3 levels of coverage. Under law, not all individuals enrolled in TRS-Care at the TRS-Care 2 and TRS-Care 3 levels of coverage will be eligible to enroll in the new TRS-Care medical plans and drug plans. Consequently, amendments are proposed to clarify the above distinctions in the following: §41.2(a)(5), (6) and (7), which address the opportunities to enroll in TRS-Care that are in addition to the initial enrollment opportunities described in §§41.1, 41.5(e) and 41.5(h)(3)(B), which address the payment of contributions in TRS-Care.

TRS proposes the deletion of obsolete language in §41.2(b) and §41.7(g). In addressing special enrollment events, both of these subsections make a distinction between special enrollment events that occurred on or before August 31, 2011 and those that occurred or will occur on or after September 1, 2011. With the passage of time, this distinction is no longer needed and the language creating this distinction can now be deleted.

Non-substantive amendments are also proposed to §§41.2, 41.5 and 41.7 to enhance the clarity of these TRS-Care rules, including those found in §§41.2(d), 41.5(h)(3)(C), and 41.7(m) and (n).

Ken Welch, TRS Deputy Director, estimates that, for each year of the first five years that proposed amendments to §§41.2, 41.5 and 41.7 will be in effect, there will be no foreseeable implications to state or local governments as a result of administering the proposed amendments.

For each year of the first five years that the proposals will be in effect, Brian Guthrie, TRS Executive Director, and Mr. Welch have determined that the public benefit will be to provide TRS retirees with clearer, more accurate rules concerning the TRS-Care program. Mr. Welch has also determined that there will be no direct economic costs to persons required to comply with the proposed rules. There will be no effect on a local economy because of the proposals, and therefore no local employment impact statement is required under §2001.022 of the Government Code. Moreover, there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing the proposed amendments, and therefore no statement about the effect of the proposals on small businesses is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Brian Guthrie, Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by the Executive Director at the designated address no later than 30 days after publication of this notice in the *Texas Register.*

Statutory Authority: The amendments to §§41.2, 41.5 and 41.7 are proposed under Insurance Code, §1575.052, which authorizes TRS as trustee for TRS-Care to adopt rules it considers necessary to implement and administer the TRS-Care program, and Government Code, §825.101, which makes the board responsible for TRS' general administration, and §825.102, which authorizes the board to adopt rules for the administration of TRS funds and transaction of business of the board.

Cross-reference to Statute: The proposed amendments to §§41.2, 41.5 and 41.7 affect Insurance Code, Chapter 1575.

§41.2. Additional Enrollment Opportunities.

(a) Age 65 Additional Enrollment Opportunity. "Eligible participants," as defined in paragraph (1) of this subsection, have an additional enrollment opportunity in TRS-Care as described in this subsection when they become 65 years old (the "Age 65 Additional Enrollment Opportunity").

(1) For purposes of this subsection, the term "eligible participants" means:

(A) all TRS service retirees who are enrolled in TRS-Care;

(B) dependents, as defined in Insurance Code, §1575.003, who are enrolled in TRS-Care and who are eligible to enroll in TRS-Care in their own right as a TRS service or disability retiree; and

(C) surviving spouses, as defined in Insurance Code, §1575.003 who are enrolled in TRS-Care.

(2) Those eligible participants who are enrolled in TRS-Care on August 31, 2004, and who become 65 years old after that date have the Age 65 Additional Enrollment Opportunity on the date that they become 65 years old.

(3) Those eligible participants who enroll in TRS-Care after August 31, 2004, and who become 65 years old after the date of their enrollment have the Age 65 Additional Enrollment Opportunity on the date that they become 65 years old.

(4) The Age 65 Additional Enrollment Opportunity for those eligible participants who enroll in TRS-Care after August 31, 2004, and who are 65 years old or older when they enroll in TRS-Care runs concurrently with the initial enrollment period as set out in §41.1 of this title (relating to Initial Enrollment Periods for the Health Benefits Program Under the Texas Public School Retired Employees Group Benefits Act (TRS-Care)).

(5) An eligible participant who is not enrolled in Medicare Part A at the time of his or her Age 65 Additional Enrollment Opportunity can enroll:

(A) in any plan, for which he or she is eligible under law, located in the next-higher TRS-Care coverage tier (level of coverage), as determined by TRS-Care;[,] and

(B) add dependent coverage in any plan, for which the dependent is eligible under law, located in that same coverage tier (level of coverage).

(6) An eligible participant who is enrolled in Medicare Part A at the time of his or her Age 65 Additional Enrollment Opportunity can enroll:

(A) in any plan, for which he or she is eligible under law, located in any TRS-Care coverage tier (level of coverage); and

(B) add dependent coverage in any plan, for which the dependent is eligible under law, located in that same coverage tier (level of coverage).

(7) An eligible participant, at the time of his or her Age 65 Additional Enrollment Opportunity, can:

(A) choose to remain in the same TRS-Care coverage tier (level of coverage);

(B) enroll in any plan, for which he or she is eligible under law, located in that same TRS-Care coverage tier (level of coverage); and

(C) add dependent coverage in any plan, for which the dependent is eligible under law, in that same coverage tier (level of coverage).

(8) The period to enroll in TRS-Care pursuant to the Age 65 Additional Enrollment Opportunity for eligible participants described in paragraph (2) or (3) of this subsection expires at the end of the later of:

(A) the 31st day following the last day of the month in which the eligible participant becomes 65 years old; or

(B) the 31st day after the date printed on the notice of the additional enrollment opportunity sent to the eligible participant at the eligible participant's last-known address, as shown in the TRS-Care records.

(b) Special Enrollment Opportunity.

(1) An [~~For a special enrollment event that occurs on or after September 1, 2011, an~~] individual who becomes eligible for coverage under the special enrollment provisions of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996)), including a dependent whose coverage under TRS-Care was waived due to the existence of other coverage for the dependent during the Age 65 Additional Enrollment Opportunity described in subsection (a) of this section, may elect to enroll in TRS-Care.

(2) The enrollment period for an individual who becomes eligible for coverage due to a special enrollment event shall be the 31 calendar days immediately after the date of the special enrollment event. To make an effective election, a completed TRS-Care application must be received by TRS within this 31-day period.

[~~(2) For a special enrollment event that occurs on or before August 31, 2011, except as provided in the exceptions found in subparagraphs (A) - (C) of this paragraph, an individual who becomes eligible for coverage under the special enrollment provisions of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996)), including a dependent whose coverage under TRS-Care was waived due to the existence of other coverage for the dependent during the Age 65 Additional Enrollment Opportunity described in subsection (a) of this section, may elect to enroll in TRS-Care.~~]

[~~(A) In no event may an individual who is already enrolled in TRS-Care elect a different plan, for himself or any eligible dependents, but may only add eligible dependents for coverage under the individual's existing plan selection upon the occurrence of a special enrollment event.~~]

[~~(B) In no event may a TRS retiree enroll in TRS-Care as a result of a special enrollment event applicable to his dependent.~~]

[~~(C) In no event, as a result of a special enrollment event applicable to the dependent, may the dependent of a TRS retiree enroll in TRS-Care if the TRS retiree is not enrolled in TRS-Care.~~]

(c) Enrollment Opportunity Established by TRS. If an eligible TRS retiree or his eligible dependent does not have either an Age 65 Additional Enrollment Opportunity or a special enrollment event, then he may enroll in TRS-Care only during a subsequent enrollment period established by TRS.

(d) This section does not affect the right of a TRS service retiree or surviving spouse enrolled in a TRS-Care coverage tier (level of coverage) to drop coverage, select a lower coverage tier (level of coverage), or drop dependents at any time.

§41.5. Payment of Contributions.

(a) Retirees, surviving spouses, and surviving dependent children or their representative (collectively, "participants") shall pay monthly contributions as set by the trustee for their and their dependents' participation in TRS-Care.

(b) To be eligible for TRS-Care coverage, a participant must authorize the trustee in writing to deduct the contribution amount from the annuity payment. After such authorization, the trustee may deduct the amount of the contribution from the annuity payment.

(c) If the amount of the contribution is more than the amount of the annuity payment, the participant will be billed directly by TRS or the TRS-Care administrator for the entire contribution amount.

(d) Failure to timely pay the full amount of a required contribution for coverage of a dependent or a surviving dependent child will result in termination of coverage for the dependent or surviving dependent child at the end of the month for which the last contribution was made.

(e) Failure to timely pay the full amount of a required contribution for coverage of a retiree or a surviving spouse enrolled in a TRS-Care 2 plan or a TRS-Care 3 plan will result in termination of coverage in the TRS-Care 2 plan or the TRS-Care 3 plan, as applicable, and enrollment in TRS-Care 1 for the retiree or surviving spouse, resulting in a decrease in coverage at the end of the month for which the last contribution was made. The retiree or surviving spouse will not be able to change his or her TRS-Care coverage tier (level of coverage) unless and until the retiree or surviving spouse has an additional enrollment opportunity as set out in §41.2 of this title (relating to Additional Enrollment Opportunities) or some other opportunity under Insurance Code, §1575.161.

(f) A disability retiree whose annuity payments are forfeited under §31.36 of this title (Relating to Forfeiture of Disability Retirement Annuity Payments Due to Excess Compensation) shall pay the total monthly cost of coverage, as determined by the trustee, attributable to the participation of that disability retiree and the dependents of that disability retiree during the months for which the disability re-

tiree's annuity payments are forfeited. A disability retiree shall pay the total monthly cost of coverage starting with the calendar month for which the first annuity payment is forfeited. The disability retiree shall continue to pay the total monthly cost of coverage for each month of coverage in which the annuity payment for that month is forfeited in accordance with §31.36 of this title. Nothing in this section shall be construed to prevent TRS from collecting the total monthly cost of coverage for months in which annuities should have been but were not forfeited if TRS determines that a disability retiree knowingly failed to report compensation as required and the failure resulted in payment of annuities by TRS that the disability retiree was not eligible to receive.

(g) Notwithstanding subsections (d) and (e) of this section, a disability retiree whose annuity payments are forfeited under §31.36 of this title who fails to timely pay the full amount of a required contribution for coverage attributable to his participation or that of his dependents, including but not limited to amounts found due and owing pursuant to a TRS determination that a disability retiree knowingly failed to report compensation as required and the failure resulted in payment of annuities by TRS that the disability retiree was not eligible to receive, shall have coverage under TRS-Care for himself and his dependents suspended unless TRS-Care receives full payment of all costs of coverage currently due and owing within thirty-one (31) days after TRS-Care mails written notice to the disability retiree of the current amount due and owing. Under such circumstances, the suspension of coverage will be effective at midnight of the last day of the month in which TRS-Care mailed the above written notice to the disability retiree of the current amount due and owing. During such a suspension, coverage under TRS-Care will cease and the costs of coverage for TRS-Care will no longer accrue.

(h) If TRS resumes payment of an annuity to a disability retiree whose coverage has been suspended as described in subsection (g) of this section, the following shall apply:

(1) Such disability retiree shall pay, no later than the last day of the month in which TRS resumes annuity payments to the disability retiree, all costs of coverage due and owing attributable to the participation of that disability retiree and the dependents of that disability retiree, including past due amounts for coverage prior to the suspension and the costs of coverage for all months during which the disability retiree's annuity payments are resumed, if any.

(2) Upon payment, reinstatement of TRS-Care coverage shall be effective the first day of the earliest month for which the disability retiree's annuity payments are resumed.

(3) If payment in full of all required contributions then due and owing is not timely received by TRS-Care, then notwithstanding subsections (d) and (e) of this section:

(A) TRS-Care coverage for the dependents of that disability retiree shall be terminated effective the last day of the month in which coverage was suspended under subsection (g) of this section;

(B) TRS-Care coverage for the disability retiree enrolled in a TRS-Care 2 plan or a TRS-Care 3 plan prior to the suspension, as applicable, will terminate effective the last day of the last month during which the disability retiree's coverage was suspended and the disability retiree will be enrolled in TRS-Care 1, effective the first day of the earliest month for which the disability retiree's annuity payments are resumed following the suspension, resulting in a decrease in coverage; and

(C) TRS-Care coverage for the disability retiree enrolled prior to the suspension in TRS-Care 1 will resume effective the first day of the earliest month for which the disability retiree's annuity payments are resumed following the suspension. The disability retiree will not be able to change his TRS-Care coverage tier (level of coverage) or add dependents unless and until the disability retiree has an additional enrollment opportunity as set out in §41.2 of this title [(~~relating to Additional Enrollment Opportunities~~)] or some other opportunity under Insurance Code, §1575.161.

§41.7. Effective Date of Coverage.

(a) Except as allowed by subsection (c) of this section, for TRS members who take a service or disability retirement and enroll in coverage during their initial enrollment period as described in §41.1 of this title (relating to Initial Enrollment Periods for the Health Benefits Program Under the Texas Public School Retired Employees Group Benefits Act (TRS-Care)), the effective date of coverage is:

(1) the first day of the month following the effective date of retirement if the application for coverage is received by TRS-Care on or before the effective retirement date; or

(2) the first day of the month following the receipt of the application for coverage by TRS-Care if the application is received after the effective retirement date but within the initial enrollment period.

(b) A TRS member who takes a service or disability retirement and enrolls in coverage during his or her initial enrollment period may, at any time during his or her initial enrollment period, make changes to his or her coverage elections. The effective date of coverage for the new elections is the first day of the month following receipt by TRS-Care of the application requesting the change in coverage.

(c) Regardless of the date a TRS member submits his application for retirement, if a TRS member enrolls in coverage during his initial enrollment period as described in §41.1 of this title, the TRS member may defer the effective date of coverage described in subsection (a) of this section for himself and his eligible dependents to the first day of any of the three (3) months immediately following the month after the effective date of retirement. This deferment period runs concurrent with, and does not extend, the enrollment period as described in §41.1 of this title. In no event may a TRS member defer the effective date of TRS-Care coverage to a date prior to the date upon which TRS-Care receives the application for coverage from the TRS member.

(d) The effective date of coverage for a surviving spouse or for a surviving dependent child is the first day of his or her eligibility if TRS-Care receives an application within the initial enrollment period as described in §41.1 of this title and the deceased participant had the surviving spouse or the surviving dependent child enrolled in TRS-Care before the participant died.

(e) If the surviving spouse or the surviving dependent child was not enrolled in TRS-Care immediately preceding his or her becoming eligible for coverage, the effective date of coverage will be, at the election of the surviving spouse or the surviving dependent child, either the first day of the month following:

(1) TRS-Care's receipt of an application during the initial enrollment period as described in §41.1 of this title; or

(2) the month of the death of the deceased TRS service or disability retiree or deceased active TRS member, provided TRS-Care receives an application during the initial enrollment period as described in §41.1 of this title.

(f) The effective date of coverage for an eligible dependent who is enrolled under a retiree's or surviving spouse's TRS-Care coverage during the initial enrollment period is the same date as the retiree or surviving spouse's effective date of coverage unless the dependent is enrolled after the retiree's effective retirement date and after the retiree has enrolled but within the initial enrollment period, in which case the

dependent's effective date of coverage will be the first day of the month following TRS-Care's receipt of the application to enroll the dependent.

(g) The [~~effective date of coverage for a special enrollment event is determined as follows:~~]

[~~(1) For a special enrollment event that occurs on or after September 1, 2011, the~~] effective date of coverage for an eligible individual who is enrolled in TRS-Care as a result of a special enrollment event, as described in §41.2(b)(1) of this chapter (relating to Additional Enrollment Opportunities), is the date specified under the provisions of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996)).

~~[(2) For a special enrollment event that occurs on or before August 31, 2011, the effective date of coverage for an eligible individual who is enrolled under a retiree's or surviving spouse's TRS-Care coverage as a result of a special enrollment event, as described in and limited by §41.2(b)(2) of this chapter, is the date specified under the provisions of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996)).]~~

(h) The effective date of coverage for a retiree, a surviving spouse, and an eligible dependent described in §41.2(a)(2) or (3) of this title who submit an application within the time period described by §41.2(a)(8) of this title is:

(1) the first day of the month following the retiree's or surviving spouse's 65th birthday if the application for coverage is received by TRS-Care on or before the retiree's or surviving spouse's 65th birthday; or

(2) the first day of the month following the receipt of the application by TRS-Care if the application is received after the retiree's or surviving spouse's 65th birthday but within the enrollment period.

(i) Except as provided in subsections (l), (m), and (n) of this section, the effective date of changes in coverage due to the acquisition of Medicare is the first of the month following the date of TRS-Care's receipt of a copy of the participant's or dependent's Medicare card.

(j) Except as provided in subsections (l), (m), and (n) of this section, the effective date of reduction in coverage shall be the first day of the month following TRS-Care's receipt of a signed request for reduced coverage.

(k) A retiree, surviving spouse, or surviving dependent child may cancel any coverage by submitting the appropriate cancellation notice to TRS-Care. Cancellations will be effective on:

(1) the first day of the month following the date printed on the notice of cancellation form ("notice date") sent to the retiree at the retiree's last known address, as shown in the TRS-Care records, if TRS-Care receives the completed notice of cancellation within fourteen days of the notice date; or

(2) the first day of the month following TRS-Care's receipt of the retiree's completed notice of cancellation form if the form is received more than fourteen calendar days after the notice date; or

(3) the first day of the month following TRS-Care's receipt of a written request to cancel coverage from a surviving spouse or from or on behalf of a surviving dependent child.

(l) Where a participant who has Medicare Part A coverage incorrectly enrolls in an insurance coverage option that provides for coverage without corresponding Medicare Part A coverage and payment is made by Medicare and TRS-Care in a manner that violates the provisions of Chapter 1575, Insurance Code, which requires TRS-Care to be secondary to Medicare, TRS may seek the recovery of funds paid in violation of Chapter 1575 and may make the effective date of the correct coverage retroactive to the first day of the earliest month for which recovery of such overpaid funds is possible under Medicare rules.

(m) Where a participant who has Medicare Part A coverage incorrectly enrolls in a TRS-Care coverage option that provides for coverage without corresponding Medicare Part A coverage and there is no claim made upon TRS-Care or the legitimate claim is less than the amount of overpaid contributions, TRS-Care may refund or credit the amount due to the participant and may make the effective date of the correct coverage retroactive to when the participant was first enrolled in both Medicare and TRS-Care to a maximum retroactive period of twelve months, including the month in which proof of Medicare Part A coverage is received by TRS-Care.

(n) Upon TRS-Care's discovery that a participant does not have Medicare Part A coverage and is incorrectly enrolled in a TRS-Care coverage option that requires Medicare Part A coverage, TRS-Care will contact the participant and advise the participant that the cost of coverage and the coverage will be adjusted prospectively effective the first day of the next month unless a copy of a Medicare card showing Medicare Part A coverage is received prior to that date. Claims will be paid based upon the coverage in effect at the time the services were provided. Any claims already paid as if Medicare Part A were in effect will not be adjusted.

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 September 19, 2012.

TRD-201204963
Brian K. Guthrie
Executive Director
Teacher Retirement System of Texas
Earliest possible date of adoption: November 4, 2012
For further information, please call: (512) 542-6438

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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 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 305. CONSOLIDATED PERMITS

SUBCHAPTER C. APPLICATION FOR PERMIT OR POST-CLOSURE ORDER

30 TAC §305.50

The Texas Commission on Environmental Quality withdraws the proposed amendment to §305.50 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 2988).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204948
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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SUBCHAPTER D. AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS, REVOCATION, AND SUSPENSION OF PERMITS

30 TAC §305.64, §305.69

The Texas Commission on Environmental Quality withdraws the proposed amendments to §305.64 and §305.69 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 2988).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204949
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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SUBCHAPTER F. PERMIT CHARACTERISTICS AND CONDITIONS

30 TAC §305.122

The Texas Commission on Environmental Quality withdraws the proposed amendment to §305.122 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 2988).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204950
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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SUBCHAPTER I. HAZARDOUS WASTE INCINERATOR PERMITS

30 TAC §305.176

The Texas Commission on Environmental Quality withdraws the proposed new §305.176 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 2988).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204951
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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CHAPTER 324. USED OIL STANDARDS

SUBCHAPTER A. USED OIL RECYCLING

30 TAC §§324.1 - 324.4, 324.6, 324.7, 324.11 - 324.16

The Texas Commission on Environmental Quality withdraws the proposed amendments to §§324.1 - 324.4, 324.6, 324.7, and 324.11 - 324.16 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3004).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204952
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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30 TAC §324.5

The Texas Commission on Environmental Quality withdraws the proposed repeal to §324.5 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3004).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204953
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

SUBCHAPTER A. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE IN GENERAL

30 TAC §§335.1, 335.2, 335.10 - 335.13, 335.19, 335.24

The Texas Commission on Environmental Quality withdraws the proposed amendments to §§335.1, 335.2, 335.10 - 335.13, 335.19, and 335.24 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3011).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204954
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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SUBCHAPTER C. STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

30 TAC §§335.61, 335.62, 335.69, 335.76, 335.78, 335.79

The Texas Commission on Environmental Quality withdraws the proposed amendments to §§335.61, 335.62, 335.69, 335.76, 335.78 and new §335.79 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3011).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204955
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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SUBCHAPTER E. INTERIM STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITIES

30 TAC §335.111, §335.112

The Texas Commission on Environmental Quality withdraws the proposed amendments to §335.111 and §335.112 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3011).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204956
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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SUBCHAPTER F. PERMITTING STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITIES

30 TAC §§335.151, 335.152, 335.155, 335.168, 335.170

The Texas Commission on Environmental Quality withdraws the proposed amendments to §§335.151, 335.152, 335.155, 335.168, and 335.170 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3011).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204957
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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SUBCHAPTER H. STANDARDS FOR THE MANAGEMENT OF SPECIFIC WASTES AND SPECIFIC TYPES OF FACILITIES

DIVISION 1. RECYCLABLE MATERIALS USED IN A MANNER CONSTITUTING DISPOSAL

30 TAC §335.213

The Texas Commission on Environmental Quality withdraws the proposed amendment to §335.213 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3011).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204958
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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DIVISION 2. HAZARDOUS WASTE BURNED FOR ENERGY RECOVERY

30 TAC §335.222

The Texas Commission on Environmental Quality withdraws the proposed amendment to §335.222 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3011).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204959
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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DIVISION 4. SPENT LEAD-ACID BATTERIES BEING RECLAIMED

30 TAC §335.251

The Texas Commission on Environmental Quality withdraws the proposed amendment to §335.251 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3011).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204960
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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SUBCHAPTER O. LAND DISPOSAL RESTRICTIONS

30 TAC §335.431

The Texas Commission on Environmental Quality withdraws the proposed amendment to §335.431 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3011).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204961
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
For further information, please call: (512) 239-0779

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SUBCHAPTER R. WASTE CLASSIFICATION

30 TAC §335.504

The Texas Commission on Environmental Quality withdraws the proposed amendment to §335.504 which appeared in the April 27, 2012, issue of the *Texas Register* (37 TexReg 3011).

Filed with the Office of the Secretary of State on September 19, 2012.

TRD-201204962
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 19, 2012
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 51. EXECUTIVE
SUBCHAPTER D. EDUCATION

31 TAC §51.81

The Texas Parks and Wildlife Department withdraws the proposed amendment to §51.81 which appeared in the July 27, 2012, issue of the *Texas Register* (37 TexReg 5560).

Filed with the Office of the Secretary of State on September 24, 2012.

TRD-201205044
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: September 24, 2012
For further information, please call: (512) 389-4775

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CHAPTER 53. FINANCE
SUBCHAPTER A. FEES
DIVISION 3. TRAINING AND CERTIFICATION FEES

31 TAC §53.50

The Texas Parks and Wildlife Department withdraws the proposed amendment to §53.50 which appeared in the July 27, 2012, issue of the *Texas Register* (37 TexReg 5562).

Filed with the Office of the Secretary of State on September 24, 2012.

TRD-201205045
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: September 24, 2012
For further information, please call: (512) 389-4775

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CHAPTER 65. WILDLIFE
SUBCHAPTER B. DISEASE DETECTION AND RESPONSE

31 TAC §§65.80 - 65.85

The Texas Parks and Wildlife Department withdraws the proposed new §§65.80 - 65.85 which appeared in the July 27, 2012, issue of the *Texas Register* (37 TexReg 5564).

Filed with the Office of the Secretary of State on September 24, 2012.

TRD-201205065
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: September 24, 2012
For further information, please call: (512) 389-4775

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 351. COORDINATED PLANNING AND DELIVERY OF HEALTH AND HUMAN SERVICES

1 TAC §351.3

The Texas Health and Human Services Commission (HHSC) adopts the amendment to §351.3, concerning Purpose, Task and Duration of Advisory Committees, without changes to the proposed text as published in the July 27, 2012, issue of the *Texas Register* (37 TexReg 5525) and will not be republished.

Background and Justification

The amendment is adopted to clarify the names of two existing committees, update the expiration date of two existing committees, update the name of an existing committee, delete an expired committee, and add three new HHSC advisory committees: the Quality Based Payment Advisory Committee, the Physician Payment for Quality Committee, and the Neonatal Intensive Care Unit Council.

The amendment is also adopted in response to:

- Senate Bill (S.B.) 37, 82nd Legislature, Regular Session, 2011, which amends Government Code §531.02441 by adding a date on which the Promoting Independence Advisory Committee expires;

- S.B. 293, 82nd Legislature, Regular Session, 2011, which amends the title of the Telemedicine Advisory Committee, authorized under the Government Code §531.02172, to the Telemedicine and Telehealth Advisory Committee, expanding the scope of the committee to include the term "Telehealth";

- S.B. 7, 82nd Legislature, First Called Session, 2011, which adds Chapter 536 to the Government Code, requiring HHSC to establish the Quality Based Payment Advisory Committee to provide recommendations to HHSC concerning Medicaid and the Children's Health Insurance Program (CHIP);

- The 2012-13 General Appropriations Act, House Bill (H.B.) 1, 82nd Legislature, Regular Session, 2011 (Article II, Health and Human Services Commission, Rider 68), which requires HHSC to establish the Physician Payment for Quality Committee to identify the ten most overused services performed by physicians; and

- H.B. 2636, 82nd Legislature, Regular Session, 2011, which requires HHSC to establish the Neonatal Intensive Care Unit Council. The Council will make recommendations regarding neonatal intensive care unit operating standards and reimbursement through the Medicaid program for services provided to an infant admitted to a neonatal intensive care unit.

Comments

The 30-day comment period ended August 26, 2012. During this period, HHSC received no comments regarding the proposed amendment to the rule.

Statutory Authority

The amendment is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Government Code §531.012, which provides the authority to establish advisory committees.

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 September 24, 2012.

TRD-201205031
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 14, 2012
Proposal publication date: July 27, 2012
For further information, please call: (512) 424-6900

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CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

The Texas Health and Human Services Commission (HHSC) adopts the repeal of Chapter 371, Medicaid and Other Health and Human Services Fraud and Abuse Program Integrity, Subchapter G, Legal Action Relating to Providers of Medical Assistance, consisting of Division 1, §§371.1601, 371.1603, 371.1605, 371.1609, and 371.1611, concerning fraud or abuse and administrative enforcement involving Medicaid and other health and human services programs; Division 2, §§371.1613, 371.1615, 371.1617, and 371.1619, concerning Medicaid program authority and violations; Division 3, §§371.1629, 371.1631, and 371.1633, concerning administrative actions; Division 4, §§371.1643, 371.1645, 371.1647, 371.1649, 371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1661, 371.1663, 371.1665, 371.1667, 371.1669, 371.1671, 371.1673, 371.1675, 371.1677, 371.1679, 371.1681, 371.1683, 371.1685,

371.1687, and 371.1689, concerning administrative sanctions; Division 5, §§371.1701, 371.1703, 371.1705, 371.1707, and 371.1709, concerning recovery of overpayments; and Division 6, §§371.1721, 371.1723, 371.1725, 371.1727, 371.1729, 371.1731, 371.1733, 371.1735, 371.1737, 371.1739, and 371.1741, concerning administrative damages and penalties. The repeals are adopted without changes to the proposal published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5869).

HHSC also adopts new Subchapter G, Administrative Actions and Sanctions, consisting of Division 1, §§371.1601, 371.1603, 371.1605, 371.1607, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617, 371.1619, 371.1621, 371.1623, 371.1625, and 371.1627, concerning general provisions; Division 2, §§371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1661, 371.1663, 371.1665, 371.1667, and 371.1669, concerning grounds for enforcement; and Division 3, §§371.1701, 371.1703, 371.1705, 371.1707, 371.1709, 371.1711, 371.1713, 371.1715, 371.1717, and 371.1719, concerning administrative actions and sanctions, in Chapter 371, Medicaid and Other Health and Human Services Fraud and Abuse Program Integrity. New §§371.1607, 371.1659, 371.1705, 371.1707, 371.1709, and 371.1715 are adopted with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5869) and will be republished with this preamble. New §§371.1601, 371.1603, 371.1605, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617, 371.1619, 371.1621, 371.1623, 371.1625, 371.1627, 371.1651, 371.1653, 371.1655, 371.1657, 371.1661, 371.1663, 371.1665, 371.1667, 371.1669, 371.1701, 371.1703, 371.1711, 371.1713, 371.1717, and 371.1719 are adopted without changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5869) and will not be republished.

The changes are non-substantive. Section 371.1607(64)(E) and §371.1659(9)(A)(iii) add the word "or" for clarification and grammatical completeness. Section 371.1705(a)(6)(B)(vi) replaces the word "an" with "a." Sections 371.1705(e)(2)(F), 371.1707(a)(6), and 371.1715(e)(1)(B) replace the phrase, "an elderly person, disabled person, or minor," with a more definitive one, "a person who is 65 years of age or older, a person with a disability, or a person under 18 years of age," and §371.1709(c)(3) corrects a grammatical inconsistency.

HHSC intends that a program violation committed before the effective date of the adopted rules be governed by the prior rules and provisions of Subchapter G that were in effect when the program violation was committed, and that the repealed provisions of Subchapter G continue in effect for this purpose. HHSC does not intend for the repeal of the rules in Subchapter G to affect the prior operation of the rules, any prior actions taken under the rules, any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under the rules, any violation of the rules or any penalty, forfeiture, or punishment incurred under the rules before their amendment or repeal, any investigation, proceeding, or remedy concerning any privilege, obligation, liability, penalty, forfeiture, or punishment. HHSC additionally intends that any investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the rules had not been repealed or amended.

HHSC intends that should any sentence, paragraph, subdivision, clause, phrase, or section of the new rules in Subchapter G be determined, adjudged, or held to be unconstitutional, illegal or invalid, the same shall not affect the validity of the subchapter as a whole, or any part or provision hereof other than the part so declared to be unconstitutional, illegal, or invalid, and shall not affect the validity of the subchapter as a whole.

Background and Justification

The existing rules in Subchapter G include various provisions to ensure Medicaid and other health and human services (HHS) agency program integrity by discovering, preventing, and correcting fraud, waste, and abuse.

The new rules in Subchapter G are adopted in light of recent state and federal legislation, specifically Senate Bill 223, House Bill (H.B.) 300, and H.B. 1720, 82nd Legislature, Regular Session, 2011; and the federal Patient Protection and Affordable Care Act. Updated provisions in light of this state and federal legislation include the following:

- New §371.1651, which reflects the requirement that providers with certain affiliations that are terminated by another state's Medicaid program or Children's Health Insurance Program (CHIP), have been convicted of a criminal offense related to involvement in Medicaid, Medicare, or a Title XXI program in the last ten years, or do not pass new provider screening measures be terminated from the Texas Medicaid Program.

- New §371.1653, which incorporates the requirement that the national provider number of supervising and supervised practitioners be included in claims for payment for services and the requirement that durable medical equipment and home health providers conduct in-person evaluations every 12 months.

- New §371.1655, which requires CHIP providers that fail to repay overpayments or who are affiliated with and who control a prohibited provider be terminated; requires providers to establish a compliance program for detecting criminal, civil, and administrative violations and that promotes quality of care; and requires providers who that are inactive for a period of 12 months be terminated from enrollment.

- New §371.1657, which adds specific prohibitions against the misuse and improper transmission of protected health information.

- New §371.1663, which incorporates requirements related to managed care organization's investigation, recovery, and reporting of fraud and abuse.

- New §371.1703, which incorporates grounds for mandatory termination from program participation.

- New §371.1709, which incorporates requirements for mandatory payment holds upon receipt of reliable evidence that the circumstances giving rise to the hold involve provider fraud or willful misrepresentation.

- New §371.1715, which incorporates the authorization that allows OIG to impose penalties for any program violation committed knowingly and for failure to maintain documentation to support a claim for payment in accordance with program requirements.

Further, the new rules are adopted to delete unnecessary language, revise or eliminate obsolete terminology, and to provide better and more helpful organization. Unless otherwise indicated, the new rules do not substantially change current HHSC Office of Inspector General (OIG) policy related to providers' substantive rights or the procedural due process afforded them.

Government Code §2001.039 requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (the Administrative Procedure Act). HHSC has reviewed all sections in Chapter 371, Subchapter G and has determined that, although the reasons for adopting rules governing Medicaid program integrity continue to exist, some of the rules in Chapter 371, Subchapter G are obsolete or unnecessary and others need updating. As a result of this review, HHSC is adopting these repeals and new sections.

Comments

HHSC received written comments from Clinical Pathology Laboratories (CPL), Medco Medical Supply (Medco), Texas Dental Association (TDA), and Texas Medical Association (TMA). A summary of the comments and the responses follow.

Comment: Medco suggested that during the inspection process, providers be graded as to risk. The risk assessment would then determine the next time for an on-site review. If an initial site visit reveals no deficiencies, then ensuing site reviews should only occur if there is a change in the provider's billing patterns, change of ownership events, business relocation, or other triggering event.

Response: To the extent this comment relates to proposed §371.1651(7), the Affordable Care Act requires the state to perform continuing follow-up site visits but does not identify specific parameters for conducting them. These site visits will be performed on all provider types that are required to enroll through the consolidated enrollment and screening process, so specific criteria for risk assessments will differ. Such decisions, if any, may be made in consultation with program staff, given the nature and extant circumstances. To the extent this comment refers to proposed §371.1667(3)(D) or §371.1703, those site visits would typically occur during an investigation into specific allegations of wrongdoing against that provider. As such, these would not be routine site visits and would not lend themselves to predetermined thresholds. No changes are made in response to this comment.

Comment: TMA states that the proposed language in §371.1603(f) deletes the language "not all actions resulting in overpayment to a provider are necessarily fraudulent" which is in the current section being proposed for repeal. TMA asks that the language be reinstated to reiterate that not all actions or overpayments are fraud.

Response: The definitions provided in these rules clearly define the types of violations that may occur, and the rules outline the violations that may or may not include fraud. OIG is aware that various factors can contribute to overpayments and that it may or may not constitute fraud, and does not feel reiteration is necessary. No changes are made in response to this comment.

Comment: TMA states that the proposed rules do not clearly define a reasonable standard and process for "verifying" a credible allegation of fraud prior to initiating a payment hold, and they unreasonably and unnecessarily expand the discretion of the OIG to initiate a payment hold.

Response: Verifying a credible allegation of fraud is done on a case-by-case basis and is fact-driven. It is not possible to predict what specific factors or which process will determine whether an allegation of fraud is credible. Again, this rule refers only to the investigative process. The OIG conducts an integrity review pursuant to its enabling legislation and conducts its processes as required by law. After an investigation is completed, all providers have the right to request an informal review, in which settlement discussions occur and a contested case hearing in which an ALJ will render an impartial opinion on the sufficiency of the OIG's verification process. No changes are made in response to this comment.

Comment: TMA states that the proposed rules define "affiliate" extremely broadly to allow payment holds and other sanctions and penalties to be imposed on a person based solely on the actions of another. CPL expressed concern that a penalty can be imposed due to entity's conduct that is not controlled by a provider.

Response: Current rule 1 TAC §371.1603(e) authorizes OIG to impose administrative actions and sanctions against providers or their principals or affiliates. Accordingly, the proposed rule does not expand OIG's current and longstanding authority to take administrative action(s) against providers, persons, or their affiliates. The concept of liability for an affiliate is set out in 42 CFR §455.1001, §455.416. Similarly, section 6502 of the Affordable Care Act requires the state to exclude the affiliates of excluded providers.

OIG routinely takes some actions against persons who are not providers. For example, persons who have been convicted of certain criminal offenses or lost their professional licensure are excluded from eligibility to enroll or participate in the Medicaid program. Thus, there is a public policy need for this provision as written.

Moreover, this provision could inure to the benefit of providers who do not wish to be held liable for the acts or omissions of their affiliates. If OIG can take separate enforcement action against the responsible person, it may not need to look to the enrolled provider for restitution. No changes are made in response to this comment.

Comment: TMA states that proposed §371.1709(b)(3) authorizes the OIG to impose a payment hold upon "receipt of reliable evidence that verifies a credible allegation of fraud," when the OIG is only authorized to suspend a Medicaid payment after it verifies there is a credible allegation of fraud for which an investigation is pending at MFCU.

Response: Existing rules already support the imposition of a payment hold on the basis of any program violation. *See* 1 TAC §371.1703(b)(5). The state enabling statute requires OIG to impose a payment suspension "upon receipt of reliable evidence that the circumstances involve fraud or willful misrepresentation." Texas Government Code §531.102(g)(2). This standard differs substantively from the former expectation that the agency establish prima facie evidence of a program violation before imposing a payment hold. It also more closely comports with the federal requirement that the state suspend payments upon verifying fraud allegations that have "indicia of reliability." 76 FR 5932 (2011). No changes are made in response to this comment. As previously discussed, new federal and state legislation impose some potential liability for certain actions by affiliates. Given the expedited due process and costs associated with imposing a payment hold, OIG does not expect to employ this provision in many circumstances. No changes are made in response to this comment.

Comment: TMA comments that it strongly urges that OIG include a requirement that an integrity review of a physician be done by an expert physician panel as used by the Texas Medical Board.

Response: No law or requirement exists to impose that an integrity review of a professional to determine a "credible allegation of fraud" be conducted by a panel of that professional's peer group. This requirement would be burdensome and costly and would impede the ability of the OIG to fulfill its mission. The integrity review is done to meet a preliminary threshold in the early stages of the investigation and OIG retains expert consultants who are qualified under the Texas Rules of Evidence. If a complaint proceeds beyond this review, a professional has an opportunity to challenge the qualifications of the expert as well as any adverse findings. No changes are made in response to this comment.

Comment: TMA comments that it objects to §371.1709(a)(3) because it allows a person to be penalized for the actions of another over whom he/she has no control. TMA states that this is concerning and unfair and wants this paragraph removed.

Response: Current rule 1 TAC §371.1603(e) authorizes OIG to impose administrative actions and sanctions against providers or their principals or affiliates. Accordingly, the proposed rule does not expand OIG's current and longstanding authority to take administrative action(s) against providers, persons or their affiliates. The concept of liability for an affiliate is set out in 42 CFR §455.101, §455.416. Similarly, section 6502 of the Affordable Care Act requires the state to exclude the affiliates of excluded providers.

OIG routinely takes some actions against persons who are not providers. For example, persons who have been convicted of certain criminal offenses or lost their professional licensure are excluded from eligibility to enroll or participate in the Medicaid program. Thus, there is a public policy need for this provision as written.

Moreover, this provision could inure to the benefit of providers who do not wish to be held liable for the acts or omissions of their affiliates. If OIG can take separate enforcement action against the responsible person, it may not need to look to the enrolled provider for restitution. No changes are made in response to this comment.

Comment: TMA states that it opposes §371.1603(c), because it is overly broad and unfair. It continues by stating that OIG enforcement measures based upon a "finding" or investigation would violate due process and substantive rights. It wants the OIG to define a "finding."

Response: All OIG enforcement measures are based upon findings and are the result of investigations, audits, or reviews. A "finding" has a generally understood meaning and requires no definition. After an investigation, audit, or review is completed, providers have the right to request an informal review, in which settlement discussions occur and, in most cases, a contested case hearing. No changes are made in response to this comment.

Comment: TMA states that the factors OIG provides in §371.1603(f)(1) are appreciated but requests OIG "clarify and broaden when these factors will be considered." As opposed to the OIG initiating settlement discussions "at its discretion," OIG should use the factors listed in (f)(1) to make that determination.

Response: Investigations will proceed on a case-by-case basis and are fact-driven. It is not possible to predict which specific factors will determine whether discussions would benefit or impede resolution of any particular investigation. Again, this rule refers only to the investigative process. After an investigation is completed, all providers have the right to request an informal review, in which settlement discussions occur. No changes are made in response to this comment.

Comment: TMA wants the factors listed in §371.1603(f)(1) to be referenced in §371.1603(h) to outline the criteria for when overpayments will be collected in lump sum or in installments, as opposed to this determination being made at the OIG's discretion.

Response: As the current rules provide in 1 TAC §371.1603(f), "(n)ot all actions resulting in overpayment to a provider are necessarily fraudulent." The proposed subsection (g) provides the option of a payment, and OIG regularly offers repayment arrangements when warranted by the facts and circumstances. But OIG is unwilling to obligate itself by rule to set up a payment plan for every overpayment. OIG may be willing to offer a payment plan for routine payment corrections if such an arrangement is possible according to the program area and fiscal agent's established processes. No changes are made in response to this comment.

Comment: TMA comments that proposed §371.1603(f)(3) is outrageous as it allows the "sanction of payment hold before establishing prima facie evidence." TMA recommends this language be stricken. TMA states that the definition of "prima facie" in §371.1607(54) allows a payment hold on sufficient evidence to raise a presumption versus establishing a presumption.

Response: The state enabling statute requires OIG to impose a payment suspension "upon receipt of reliable evidence that the circumstances involve fraud or willful misrepresentation." Texas Government Code §531.102(g)(2). This standard differs substantively from the former expectation that the agency establish prima facie evidence of a program violation before imposing a payment hold. It also more closely comports with the federal requirement that the state suspend payments upon verifying fraud allegations that have "indicia of reliability." 76 FR 5932. No changes are made in response to this comment.

Comment: TMA comments that §371.1605(a) is overly broad because it holds a provider responsible for the acts of others, i.e., its affiliates, employees, contractors, vendors, and agents. TMA states that "a provider should be responsible for exercising ordinary care and reasonable diligence," but not for the fraud or program violations of others or for those over whom they have no control. TMA strongly suggests that (a)(2) of this section be struck.

Response: Current rules authorize OIG to impose administrative actions and sanctions against providers or their principals or affiliates. Accordingly, the proposed rule does not expand OIG's current and longstanding authority to take administrative action(s) against providers, persons, or their affiliates. The concept of liability for an affiliate is set out in 42 CFR §455.101, §455.416. Similarly, section 6502 of the Affordable Care Act requires the state to exclude the affiliates of excluded providers.

OIG routinely takes some actions against persons who are not providers. For example, persons who have been convicted of certain criminal offenses or lost their professional licensure are excluded from eligibility to enroll or participate in the Medicaid program. Thus, there is a public policy need for this provision as written.

Moreover, this provision could inure to the benefit of providers who do not wish to be held liable for the acts or omissions of their affiliates. If OIG can take separate enforcement action against the responsible person, it may not need to look to the enrolled

provider for restitution. No changes are made in response to this comment.

Comment: TMA comments that requiring providers and participants to have knowledge of Medicaid laws, manuals, regulations, bulletins, etc. is overly broad and unattainable. TMA likens this to requiring a taxpayer to know all of the tax laws/rules/forms/policies. TMA wants "including" struck from §371.1605(b)(1); (b)(3) to be limited in scope to "published and publicly available Health and Human Services program and procedure manuals with which the person participates"; (b)(5) to only hold a provider accountable to the agreement or application he/she signs; and (b)(6) not to include the language "or publicly available policy".

Response: Providers can be responsible for their affiliates which broadens their accountability beyond the provider agreement. Providers are also held responsible for the policies that define their contractual obligations. No changes are made in response to this comment.

Comment: TMA comments that the definition of "abuse" in §371.1607(1) is overly broad, because it goes beyond the definition in federal law.

Response: This definition is a verbatim copy of the definition of "abuse" in the current TAC and very similar to the definition at 42 CFR §455.2. As noted above, both the current and proposed definitions of "abuse" and "professionally recognized standards for health care" are identical. OIG is unaware of any issues or concerns caused by these definitions in the past.

Comment: TMA comments that the definition of "affiliate/affiliate relationship" in §371.1607(2) is not defined in the Code of Federal Regulations and the definition should be removed. In addition, TMA states that an affiliate should be under the control of a person for that person to be responsible. TMA also opposes subparagraph (I) as it is too expansive, and recommends, in the alternative, that the affiliate be required to share tax identification numbers, social security numbers, national provider numbers, Texas provider numbers, or bank accounts.

Response: As previously discussed, the concept of affiliate liability is established in federal law. Moreover, proposed rule §371.1607(3) merely combines the current definitions at §371.1601(2) and §371.1643(d) and (e) into one rule (§371.1607(3)). There is no proposed substantive change to the current rule. OIG is unaware of any problems or issues that have been caused in the past by this language. No changes are made in response to this comment.

Comment: TMA states that the definition of "at the time of request" in §371.1607(4) is plain English and not necessary, unreasonable, and unfair and recommends it be stricken.

Response: This definition exists in the current rules at 1 TAC §371.1601(4) and the new rule does not create any substantive change. Normally, OIG works with the provider to arrive at an agreeable production schedule. No changes are made in response to this comment.

Comment: TMA states that the definition of "costs related to an administrative appeal" in §371.1607(17) is broad, so the word "include" should be replaced with "means." TMA, specifically, wants subparagraphs (D) through (H) to be stricken.

Response: Paragraph (17)(B) - (H) refers to costs associated with case preparation, witness preparation, travel, attorney, and court reporter fees. These are commonly recognized reasonable expenses similar to court costs related to formal litigation which are typically assessed against the non-prevailing party. Article II, Rider 13 directs the allocation of moneys received as a refund from the claims administrator or any other source. HHSC Budget has interpreted this to include all OIG recoveries. Article II, Special Provision 43 expressly refers to "costs of the investigation and collection proceedings" in addition to "amounts collected as reimbursement for claims paid by the agency." No changes are made in response to this comment.

Comment: TMA states that the definition of "credible allegation of fraud" in §371.1607(18) is critical to the rules and the definition as written would be potentially catastrophic to an innocent provider. TMA strongly urges OIG to adopt a definition that requires a credible allegation of fraud to be verified by the OIG pursuant to an integrity review which is undergoing a full investigation by the Medicaid Fraud Control Unit.

Response: This definition tracks the federal definition in 42 C.F.R. §455.2. No changes are made in response to this comment.

Comment: TMA states that the definition of "knew or should have known" in §371.1607(38) is overly broad and confusing, has a plain meaning and, therefore, is not necessary. TMA recommends that the last sentence of the definition be deleted.

Response: This definition is now paragraph (33). It requires a higher level of scienter than that required by statute. Texas Human Resources Code allows the state to charge a person with civil fraud if he or she acted knowingly, with conscious indifference, or in reckless disregard. Tex. Hum. Res. Code §36.0011(a). No changes are made in response to this comment.

Comment: TMA requests that the word "indirectly" be removed from the definition of "managing employee" in §371.1607 as it makes the definition vague and ambiguous. TMA recommends the removal of "or who directly or indirectly conducts the day-to-day operations of the entity."

Response: The concept of indirect control of a managing employee is set out in 42 CFR §455.101. No changes are made in response to this comment.

Comment: TMA requests that the word "includes" be replaced with "means" in the definition of "Overpayment" in §371.1607(48).

Response: The requested modification would substantially alter the meaning and intent of the rule, and would cause the definition to change materially from the federal definition of overpayment. No changes are made in response to this comment.

Comment: TMA states that the definition of "ownership interest" in §371.1607(49) should be changed to 10% ownership interest.

Response: This definition is required by federal law. 42 CFR §455.101 establishes the 5% threshold. Federal regulation further includes all officers, directors, and partners as indirect owners, regardless of their ownership interest percentage.

Moreover, this is a verbatim copy of the definition for the same term in the current rule at 1 TAC §371.1601(21). The federal standard is also applied in existing 1 TAC §371.1681(a) and (b). No changes are made in response to this comment.

Comment: TMA states that the "Professionally recognized standards of health care" definition in §371.1607(56) should be removed because the standard of care is defined by the profession

and by Texas case law. TMA requests that the definition be the case law definition or the language "and the community in which the provider practices" added at the end.

Response: The proposed rule repeats the provisions of the existing definition in §371.1601(39) which has been in effect and has not raised any issues. No changes are made in response to this comment.

Comment: TMA comments that the "program violation" definition in §371.1607(57) should only require a program participant be required to know information that is published and publicly available or with agreements that he/she has signed. It also recommends that the definition should end after the words on line four, "other HHS program."

Response: OIG believes that its modifications to proposed rule 1 TAC §371.1605(b) will alleviate the concerns about publicly available policy. OIG maintains that proposed rules §§371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1661, 371.1663, 371.1665, 371.1667, and 371.1669 are needed to give adequate notice about what conduct may constitute a program violation. No changes are made in response to this comment.

Comment: TMA contends that the "reasonable request" definition in §371.1607(67) is disingenuous and unfair and that the definition should be deleted.

Response: Presuming that TMA was referring to paragraph (62), the proposed definition is substantially similar to the existing definition in current rule 1 TAC §371.1601(43), and it does not expand OIG's existing authority. The definition provides protection for the provider by requiring an auditor or investigator to identify himself or herself as a duly-authorized agent of the state or federal government, and by limiting the presentation of records requests to normal business hours during which the provider is open for business. OIG recognizes that reasonableness is a concept that must ultimately be determined by a fact finder, and it intends to present records requests with this standard in mind. No changes are made in response to this comment.

Comment: TMA states that the "substantial contractual relationship" definition in §371.1607(81) should truly be substantial; therefore, "indirect" should be stricken, the threshold should not be 5% (or $25,000), but should be at least 10% of an entity's "annual" operating expenses.

Response: Presuming that TMA was referring to paragraph (76), this provision tracks the requirements of 42 CFR §1002.203. In keeping with the federal definition of this term, no changes are made in response to this comment.

Comment: TMA states that the "waste" definition in §371.1607(87) is overly broad and unreasonable. It specifically does not like the words "careless" and "inefficient" because they are not legal terms and are subjective in application.

Response: This definition is substantially similar to the existing rule. In current §371.1607(57), the definition of "waste" includes the words "carelessly" and "inefficient". OIG's responsibility is to ensure efficient utilization of taxpayer money, and it involves recovering money that was used carelessly or inefficiently. No changes are made in response to this comment.

Comment: TMA comments that subsection (b) of §371.1611 (Due Process) should be deleted, because due process should be afforded for administrative actions as well as sanctions.

Response: Administrative actions are limited to such matters as provider education or review of a claim prior to payment. They do not result in a deprivation of property, and as such, they do not trigger any right to formal due process. OIG must make the best and most efficient use of its resources, and believes that the administrative burden of granting contested case hearings for complaints about minor matters such as provider education would not serve any public benefit.

Any agency action that would deprive a person of property is classified as a sanction, and all persons subject to sanctions are afforded full due process. No changes are made in response to this comment.

Comment: TMA states that it strongly opposes rule §371.1613's requirement that the OIG *receive* a request for an informal hearing within 10 days, and it believes that the rules should require that the hearing be *requested* by the provider within ten days.

Response: The rule allows 30 days to request an informal hearing. No changes are made in response to this comment.

Comment: TMA states that it strongly opposes rule §371.1615's requirement that the OIG receive a request for an expedited appeal within 10 days, and it believes that the rules should require that the expedited appeal be *requested* by the provider within ten days.

Response: Providers are entitled to expedited hearings only in rare circumstances when a significant sanction has been imposed. If a provider is requesting an expedited appeal from such a sanction, it is in the provider's best interests to request and schedule the appeal as soon as feasible. No changes are made in response to this comment.

Comment: In response to subsection (b)(2) of rule §371.1617, TMA comments that the terms of a payment plan should not be at the "sole discretion" of the OIG, but the rule should provide the criteria to be considered by the OIG when using its discretion. TMA further suggests that these criteria should be outlined in the rule.

Response: OIG agrees that each case is unique, and that payment plans should be constructed after consideration of the relevant facts. OIG further agrees to establish criteria in policy, but not in rule, for considering payment plan requests. OIG has historically worked with any provider seeking a payment plan, and is unaware of any providers who have experienced difficulty with this matter. No changes are made in response to this comment.

Comment: TMA recommends that subsection (c) of rule §371.1617 should allow for a provider to have the opportunity to exercise the judicial process prior to a debt being deemed delinquent. In addition, TMA wants the language "may include" in subsection (e) to be changed to "are". This would limit the rule to the items listed.

Response: The judicial process is unavailable unless and until a provider has exhausted all administrative remedies. Upon completion of the administrative process, the agency will consider the matter final and proceed with execution. The provider may invoke judicial remedies at that point and the agency will honor any ensuing court orders. The OIG may consider other debt collection methods as they become available, and declines to limit its options in this rule. No changes are made in response to this comment.

Comment: TMA commented on §371.1621 and §371.1623.

Response: These rules will soon be proposed for repeal and the relevant provisions will be moved to another subchapter and subject to another comment period. For the time being, they

track the language of the existing rules verbatim. No changes are made in response to this comment.

Comment: TMA comments that rule §371.1651 which lists actions that could subject a provider to administrative action or sanction, is too broad and unreasonable, specifically paragraphs (2), (3), (4), (6) and (16). TMA opposes these violations and urges OIG to delete them from the rule.

Response: This rule provision is required by state law. Human Resources Code §32.047(b) provides that the agency must prohibit a person from participating in the Medicaid program if the person is affiliated with a provider who has been suspended or prohibited from participating in the program. Thus, this event must be categorized as a program violation in subsection (a)(2) to support the sanctions of exclusion or termination as required by federal and state law. No changes are made in response to this comment.

Comment: TMA states that paragraph (3) of §371.1653 is overly broad and should be stricken. TMA comments that if prior authorization is not obtained for treatment, the remedy should be that the claim is not paid, and the lack of authorization should not be a "program violation". In addition, paragraph (4) should be an administrative error and not a "violation". Finally, TMA states that paragraph (14) should be deleted as it is misplaced, so paragraphs (3), (4), and (14) should be deleted.

Response: The provision is expressly limited to those instances in which the particular item required prior authorization. There is no edit system in place to capture claims for payment when the provider failed to obtain prior authorization as TMA suggests. HHSC's only recourse is to recoup the payment from the provider.

OIG recaptures overpayments that may result from fraud, waste, abuse, or simple mistake. The fact that an event is listed as a program violation does not imply that the provider was committing fraudulent activity. But in order for OIG to seek recoupment of an overpayment, which is a sanction, the error must be prohibited by rule as a program violation. No changes are made in response to this comment. With respect to paragraph (14), providers have attempted to pass through prior damages, costs, or penalties through to the agency on ensuing cost reports. Such expenses are disallowed as costs, and subject the provider to sanctions or administrative actions.

Comment: TMA stated that §371.1667(3) provides that a person commits a program violation if the person fails to grant "immediate access" to the premises, records, documentation or "any items or equipment determined necessary by the OIG?" The requirement for "immediate access" is unreasonable, and does not account for or provide any exception for reasonable delay, patient safety, etc. There are a plethora of examples in which a physician may be unable to provide "immediate access" and should not be penalized for failing to do so. TMA recommends that "immediate" be removed from this language, and that language be added to provide to allow exceptions when there is a good faith effort at compliance, but circumstances prevent an immediate access.

Response: OIG conducts surprise audits and reviews of some program areas and this is an important aspect of its work. OIG may have a legitimate need for immediate access when conducting site visits of high-risk providers, utilization reviews, and investigations of possible patient neglect or abuse.

The term "immediate access" is used throughout the current rules, specifically at 1 TAC §371.1643(f). The proposed rule does not make a substantive change. OIG has consistently worked with providers to arrange workable production and access schedules in its more typical audits and investigations, and it will continue to do so. No changes are made in response to this comment.

Comment: TMA comments that paragraph (10) of rule §371.1669 provides that a physician commits a program violation if the physician refers to an entity with which the physician has a financial relationship for the furnishing of designated health services. TMA is concerned about the potential impact this provision will have on a physician's participation in an Accountable Care Organization under the Patient Protection and Affordable Care Act, or a Health Care Collaborative under Texas law. TMA seeks clarification from OIG regarding a physician's participation under these circumstances. Also, TMA recommended that paragraph (10) should be removed.

CPL expressed concern that the rules do not clarify conduct that is authorized by the federal safe harbors or exceptions to the Stark self-referral law.

Response: The basis for the proposed rule is §32.039 of the Human Resources Code, which prohibits most forms of self-referral. The rule was previously revised to give rise to liability only if payment would be denied pursuant to Stark I, II, or III. No changes are made in response to this comment.

Comment: TMA expressed concern with §371.1701, because the administrative actions do not give rise to due process, additional notice or hearing requirements. TMA again expressed concern with the affiliation issue and the fraud v. overpayment issues which have been previously addressed in these Responses.

Response: Administrative actions involve remedial action that does not deprive anyone of a property right, so due process does not attach. OIG disagrees that it should fund contested case hearings in such matters. Such an approach would contradict its statutory mandate to allocate its resources to those cases with the highest likelihood for the recovery of dollars. No changes are made in response to this comment.

Comment: TMA objects to §371.1703, subsections (b)(1), (4), (7), and (8)(C), for the reasons previously offered and addressed earlier. TMA objects to a provider being held accountable for the actions of another over whom the provider has no control, or of another who has no control over the provider. Such a policy is fundamentally unfair, and does nothing to deter future violations. TMA urges OIG to strike these subsections.

Response: Federal and state provisions dictate the terms of the proposed rule. 42 CFR §455.416 expressly requires termination of a provider's participation if the conditions are met by the provider, any person with an ownership or control interest of the provider, or any agent or managing employee of the provider. The responses to proposed §371.1651 give the legal basis for the termination provisions in proposed §371.1703. No changes are made in response to this comment.

Comment: TMA objects to §371.1703(g)(6)(B). TMA understands the OIG making termination effective on the notice of termination when the health or safety of a person is at risk. However, failure to grant "immediate" access to OIG or a Requesting Agency, or failing to provide copies, etc. does not warrant this harsh penalty. TMA objects to OIG making its ac-

tivities, requests, and time of requests at the utmost importance in this program. TMA requests that OIG allow for reasonable compliance, make exceptions in certain circumstances, and be open to good faith efforts at compliance with OIG's requests. TMA requests that subsection (g)(6)(B) be stricken.

Response: 42 CFR §1001.1301, §1001.2001(c) and existing rule 1 TAC §371.1659(a)(3) already authorize immediate exclusion without prior notice for failure to grant immediate access to records. This rule does not expand OIG's existing authority. OIG is unaware of any instance in which this authority has been abused in the past.

OIG normally works with providers to arrange access to a facility in advance, during normal business hours. OIG normally works out records production schedules with providers in order to lessen their administrative burdens and allow for a normal pace of records production. But OIG has a legitimate need on occasion to have immediate access to a facility for surprise audits or investigations, site visits to high-risk provider locations, and investigations involving allegations of possible client abuse or neglect. No changes are made in response to this comment.

Comment: TMA commented that §371.1705(b) provides that OIG may exclude a person without sending prior notice under certain circumstances. TMA appreciates the need to have an exclusion when the health or safety of a person is being placed at risk, but strongly objects to mandatory exclusion without prior notice for those reasons enumerated in subsection (b)(2).

Response: OIG's proposed rule resembles its federal counterparts. 42 CFR §1001.2001(c) provides that the government may exclude a person without sending prior notice if the basis of the exclusion includes failure to grant immediate access, as defined in 42 CFR §1001.1301(a)(3). OIG has not excluded any provider in recent years without sending a prior notice, and it does not anticipate that this provision will be used often. But OIG will submit the rule as written so that it comports with federal authority. No changes are made in response to this comment.

Comment: TMA states that §371.1705(e) provides when the exclusion becomes effective. If the person files a timely appeal, the date of the exclusion should be when the administrative law judge upholds the exclusion. To allow otherwise would chill the ability of a provider to have an appeal in good faith. OIG can place holds or prepayment reviews, etc. on any subsequent billing, but should not make a finding retroactive when an appeal has occurred.

Response: The Medicaid program cannot pay a provider who has been disqualified from providing services by the events giving rise to retroactive exclusion. Moreover, the effective date will be retroactive only if and when the administrative judge renders a decision to uphold the exclusion. If, conversely, the administrative law judge reverses the exclusion, the provider has benefited from the appeals process. No changes are made in response to this comment.

Comment: TMA expressed concern regarding §371.1705(e)(4)(D) which provides that an excluded person is prohibited from "accepting employment by any person whose revenue stream includes funds from a Title V, VIII, XIX, XX or CHIP program." This prohibition seems overly broad and harsh. If the person is not obtaining any benefit or income from these programs, the person should not be prohibited from being employed by an entity who receives income from these programs. Indeed, this prohibition is absolute, regardless of how small or insignificant the income stream to the entity is.

Response: 42 CFR §1002.211 prohibits the agency from paying for any item or service furnished by an excluded person. Federal guidance is clear that payments made to an excluded provider and payments made for services rendered by an excluded provider are overpayments and must be recouped by the state. *See* CMS SMDL #09-001. The U.S. Department of Health and Human Services OIG interprets this to mean that "an excluded person may not be employed by a provider to perform any functions for which the provider is paid, in whole or in part, by any federal health care program." No changes are made in response to this comment.

Comment: TMA reiterates its objections to §371.1705 here, as §371.1707 mirrors §371.1705. In that regard, and for the same reasons stated above, TMA objects to subsection (b), which allows OIG to exclude a person without sending prior notice of intent to exclude. TMA urges OIG to always send a notice of intent to exclude.

Response: OIG's proposed rule resembles its federal counterparts. 42 CFR §1001.2001(c) provides that the government may exclude a person without sending prior notice if the basis of the exclusion includes failure to grant immediate access, as defined in 42 CFR §1001.1301(a)(3). OIG has not excluded any provider in recent years without sending a prior notice, and it does not anticipate that this provision will be used often. But OIG will submit the rule as written so that it comports with federal authority. No changes are made in response to this comment.

Comment: TMA objects to §371.1707(e)(1)(D), which makes an exclusion after an administrative appeal retroactive.

Response: The retroactivity provision is limited to those permissive appeals that are based upon a determination that the provider was placing the health or safety of Medicaid clients at risk, or the provider failed to grant access or records. OIG has not excluded any provider on either basis in recent years, and it does not anticipate that this provision will be used often. Moreover, this rule does not render the appeals process meaningless; if the provider prevails, there will be no retroactive effective date of termination. No changes are made in response to this comment.

Comment: TMA objects to §371.1707(e)(4)(D) which prohibits an excluded person from "accepting employment by any person whose revenue stream includes funds from a Title V, VIII, XIX, XX or CHIP program." TMA objects to (a)(2) allowing OIG to exclude a physician for being affiliated with a person who commits a program violation. As noted throughout our comments, physicians should not be held accountable for the actions of someone over whom they have no control.

Response: 42 CFR §1002.211 prohibits the agency from paying for any item or service furnished by an excluded person. Federal guidance is clear that payments made to an excluded provider and payments made for services rendered by an excluded provider are overpayments and must be recouped by the state. *See* CMS SMDL #09-001. The U.S. Department of Health and Human Services OIG interprets this to mean that "an excluded person may not be employed by a provider to perform any functions for which the provider is paid, in whole or in part, by any federal health care program." No changes are made in response to this comment.

Comment: TMA comments that §371.1711(b)(3) provides that OIG may recoup from any person who it establishes, by prima facie evidence, is "affiliated with" a person who commits a program violation that leads to the payment of an overpayment. TMA ob-

jects, as stated previously, to a person being penalized for the actions of another over whom the person has no control, and who has no control over the person.

Response: As previously discussed, new federal and state legislation impose some potential liability for certain actions by affiliates. No changes are made in response to this comment.

Comment: TMA states that §371.1711(e) provides that the person who is the subject of a recoupment is responsible for paying the overpayment amounts, "plus OIG's or other HHS program's costs related to an administrative appeal and all investigative and administrative costs related to the investigation that resulted in recoupment, if applicable." TMA strongly objects to and opposes this provision. This is patently unfair and unreasonable. Furthermore, a provider should not be required to pay for OIG's costs in an appeal. The appeal is a due process right afforded to the participant, and the potential repayment of these costs would effectively chill this important due process protection. There is no provision included which would require OIG to repay the provider's costs if the provider's appeal is successful.

Response: The proposed rule does not expand OIG's existing authority. 1 TAC §371.1705 provides that OIG may recover from a provider all costs associated with an appeal or other litigation as well as all costs incurred in recovering overpayments. As previously discussed, the Appropriations Act also contemplates that state agencies recover costs of investigation and prosecution. No changes are made in response to this comment.

Comment: TMA objects to §371.1713(a)(2) for the same reasons previously stated. This subsection penalizes a provider for a violation committed by an "affiliate." Control is the issue, and the appropriate definition of affiliate is essential. TMA directs OIG to its previous comments on this issue.

Response: OIG directs TMA to its previous responses on this issue. No changes are made in response to this comment.

Comment: TMA and CPL object to §371.1713(a)(2) for the same reasons previously stated and are generally concerned regarding sanctions being imposed for actions that occur without "knowing" conduct or conduct done by affiliates. This subsection penalizes a provider for a violation committed by an "affiliate." Control is the issue, and the appropriate definition of affiliate is essential. TMA directs OIG to its previous comments on this issue. They object to subsection (e)(3)(C) and (4) for the same reasons stated previously. Regarding (e)(4), TMA states that a provider should not be penalized for an administrative appeal by having the effective date made retroactive. Subsection (d)(1) states once a person is placed on restricted reimbursement, payment will be limited or denied indefinitely or for a specified period of time. The provision does not elaborate what criteria OIG will use to determine the length of time for the penalty. If the length of time is "indefinite," how frequently will OIG review the case to determine when the penalty will cease? TMA recommends that criteria be established. Regarding (e)(4), again, a provider should not be penalized for an administrative appeal by having the effective date made retroactive.

Response: As for the issue relating to the affiliate relationship, please see discussion under §371.1607(3) above. To the extent the comment applies to (e)(3) and (4), the retroactive effective date is limited to instances in which the provider placed a Medicaid client's health or safety at risk or refused to grant access to premises or records.

For the reasons previously stated, no changes are made in response to this comment.

Comment: TMA states that §371.1715(e) provides the assessment of damages and penalties. TMA is concerned with the excessiveness of the penalties in subsection (e)(1)(B). OIG is considering items that may be simple mistakes as program violations, and providers will be potentially liable for damages and penalties disproportionate to the "violation" or mistake. TMA is also concerned with subsection (e)(3) which requires a person against whom damages or penalties are assessed to pay for OIG's or other HHS program's costs related to the investigation.

Response: The provisions for this rule are expressly provided in Texas Human Resources Code §32.039. No changes are made in response to this comment.

SUBCHAPTER G. LEGAL ACTION RELATING TO PROVIDERS OF MEDICAL ASSISTANCE

DIVISION 1. FRAUD OR ABUSE AND ADMINISTRATIVE ENFORCEMENT INVOLVING MEDICAID AND OTHER HEALTH AND HUMAN SERVICES PROGRAMS

1 TAC §§371.1601, 371.1603, 371.1605, 371.1609, 371.1611

Legal Authority

The repeals are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Government Code §531.021(b), which provides HHSC with the authority to adopt rules governing the determination of Medicaid reimbursements.

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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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

DIVISION 2. MEDICAID PROGRAM AUTHORITY AND VIOLATIONS

1 TAC §§371.1613, 371.1615, 371.1617, 371.1619

Legal Authority

The repeals are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of

HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Government Code §531.021(b), which provides HHSC with the authority to adopt rules governing the determination of Medicaid reimbursements.

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DIVISION 3. ADMINISTRATIVE ACTIONS

1 TAC §§371.1629, 371.1631, 371.1633

Legal Authority

The repeals are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Government Code §531.021(b), which provides HHSC with the authority to adopt rules governing the determination of Medicaid reimbursements.

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DIVISION 4. ADMINISTRATIVE SANCTIONS

1 TAC §§371.1643, 371.1645, 371.1647, 371.1649, 371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1661, 371.1663, 371.1665, 371.1667, 371.1669, 371.1671, 371.1673, 371.1675, 371.1677, 371.1679, 371.1681, 371.1683, 371.1685, 371.1687, 371.1689

Legal Authority

The repeals are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Government Code §531.021(b), which provides HHSC with the authority to adopt rules governing the determination of Medicaid reimbursements.

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DIVISION 5. RECOVERY OF OVERPAYMENTS

1 TAC §§371.1701, 371.1703, 371.1705, 371.1707, 371.1709

Legal Authority

The repeals are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Government Code §531.021(b), which provides HHSC with the authority to adopt rules governing the determination of Medicaid reimbursements.

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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DIVISION 6 ADMINISTRATIVE DAMAGES AND PENALTIES

1 TAC §§371.1721, 371.1723, 371.1725, 371.1727, 371.1729, 371.1731, 371.1733, 371.1735, 371.1737, 371.1739, 371.1741

Legal Authority

The repeals are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Government Code §531.021(b), which provides HHSC with the authority to adopt rules governing the determination of Medicaid reimbursements.

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 G. ADMINISTRATIVE ACTIONS AND SANCTIONS
DIVISION 1. GENERAL PROVISIONS

1 TAC §§371.1601, 371.1603, 371.1605, 371.1607, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617, 371.1619, 371.1621, 371.1623, 371.1625, 371.1627

Legal Authority

The new rules are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Government Code §531.021(b), which provides HHSC with the authority to adopt rules governing the determination of Medicaid reimbursements.

The substantive requirements are generally proposed under Texas Government Code §531.102. Additionally, new §371.1609 is supported by Texas Government Code §531.1021; new §371.1613 is supported by Texas Human Resources Code §32.039; new §371.1615 is partially supported by Texas Human Resources Code §32.039; new §371.1617 is partially supported by Texas Human Resources Code §32.039; new §371.1619 is authorized by Texas Government Code §531.101.

§371.1607. Definitions.

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

(1) Abuse--Practices that are inconsistent with sound fiscal, business, or medical practices and that result in unnecessary program cost or in reimbursement for services that are not medically necessary, do not meet professionally recognized standards for health care, or do not meet standards required by contract, statute, regulation, previously sent interpretations of any of the items listed, or authorized governmental explanations of any of the foregoing.

(2) Affiliate; affiliate relationship--A person who:

(A) has a direct or indirect ownership interest (or any combination thereof) of 5% or more in the person;

(B) is the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured (in whole or in part) by the entity that interest is equal to or exceeds 5% of the value of the property or assets of the person;

(C) is an officer or director of the person, if the person is a corporation;

(D) is a partner of the person, if the person is organized as a partnership;

(E) is an agent or consultant of the person;

(F) is a consultant of the person and can control or be controlled by the person or a third party can control both the person and the consultant;

(G) is a managing employee of the person, that is, a person (including a general manager, business manager, administrator or director) who exercises operational or managerial control over a person or part thereof, or directly or indirectly conducts the day-to-day operations of the person or part thereof;

(H) has financial, managerial, or administrative influence over the operational decisions of a person;

(I) shares any identifying information with a person, including tax identification numbers, social security numbers, bank accounts, telephone number, business address, national provider numbers, Texas provider numbers, and corporate or franchise name; or

(J) has a former relationship with the person as described in subparagraphs (A) - (I) of this paragraph, but is no longer described, because of a transfer of ownership or control interest to an immediate family member or a member of the person's household of this section within the previous five years if the transfer occurred after the affiliate received notice of an audit, review, investigation, or potential adverse action, sanction, board order, or other civil, criminal, or administrative liability.

(3) Agent--Any person, company, firm, corporation, employee, independent contractor, or other entity or association legally acting for or in the place of another person or entity.

(4) At the time of the request--Immediately upon request and without delay.

(5) Audit--A financial audit, attestation engagement, performance audit, compliance audit, economy and efficiency audit, effectiveness audit, special audit, agreed-upon procedure, nonaudit service, or review conducted by or on behalf of the state or federal government. An audit may or may not include site visits to the provider's place of business.

(6) Auditor--The qualified person, persons, or entity performing the audit on behalf of the state or federal government.

(7) Business day--A day that is not a Saturday, Sunday, or state legal holiday. In computing a period of business days, the first day is excluded and the last day is included. If the last day of any period is a Saturday, Sunday, or state legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.

(8) CFR--The Code of Federal Regulations.

(9) CHIP--The Texas Children's Health Insurance Program or its successor.

(10) Claim--

(A) A written or electronic application, request, or demand for payment by the Medicaid or other HHS program for health care services or items; or

(B) A submitted request, demand, or representation that states the income earned or expense incurred by a provider in providing a product or a service and that is used to determine a rate of payment under the Medicaid or other HHS program.

(11) Claims administrator--The entity designated by an operating agency to process and pay Medicaid or HHS program provider claims.

(12) Closed-end contract--A contract or provider agreement for a specific period of time. It may include any specific requirements or provisions deemed necessary by OIG to ensure the protection of the program. It must be renewed for the provider to continue to participate in the Medicaid or other HHS program.

(13) CMS--The Centers for Medicare & Medicaid Services or its successor. CMS is the federal agency responsible for administering Medicare and overseeing state administration of Medicaid and CHIP.

(14) Commission--The Texas Health and Human Services Commission or its successor.

(15) Controlled substance--"Controlled substance" as defined by the Texas Controlled Substances Act (Texas Health and Safety Code, Chapter 481) or its successor and the Federal Controlled Substances Act (21 U.S.C. §802(a)(6) et seq.) or its successor.

(16) Conviction or convicted--Means that:

(A) a judgment of conviction has been entered against an individual or entity by a federal, state, or local court, regardless of whether:

(i) there is a post-trial motion or an appeal pending; or

(ii) the judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;

(B) a federal, state, or local court has made a finding of guilt against an individual or entity;

(C) a federal, state, or local court has accepted a plea of guilty or nolo contendere by an individual or entity; or

(D) an individual or entity has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

(17) Costs related to an administrative appeal--Such costs include:

(A) the hourly State Office of Administrative Hearings (SOAH) or other administrative hearing process costs;

(B) court reporter costs and the costs of transcripts and copies of transcripts developed in preparation for, during, or after the hearing;

(C) OIG's or other agency's costs associated with discovery, including the costs of depositions, subpoenas, service of process, and witness expenses;

(D) witness expenses incurred at any time related to the administrative appeal, including during discovery or the case in chief;

(E) travel and per diem for witnesses and OIG or other staff and witness fee;

(F) cost of preparation time, including salaries, travel and per diem, any additional costs associated with the appeal hearing or the preparation for the appeal hearing;

(G) all other reasonable costs, including attorney's fees, associated with any further litigation of the case and the preparation for that litigation; and

(H) costs incurred during the investigation or audit of a case.

(18) Credible allegation of fraud--An allegation of fraud that has been verified by the state from any source, including fraud hotline complaints, claims data mining and patterns identified through provider audits, civil false claims cases, and law enforcement investigations.

(19) Delivery of a health care item or service--Includes the provision of any item or service to an individual to meet his or her physical, mental or emotional needs or well-being, whether or not reimbursed under Medicare, Medicaid, or any federal health care program.

(20) Exclusion--Prohibition from participation in Medicaid.

(21) Executive Commissioner--The Executive Commissioner of the Texas Health and Human Services Commission or its successor.

(22) False statement or misrepresentation--Any statement or representation that is inaccurate, incomplete, or not true.

(23) Federal financial participation (FFP)--The federal government's share of a state's expenditures under the Medicaid and other HHS programs and other benefit programs.

(24) Federal health care program--Any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the federal employee health insurance program under Chapter 89 of Title 5, United States Code).

(25) Field work--With respect to an investigation or audit, field work may include site visits to the provider as well as consultation

with expert reviewers, HHS staff subject matter experts, and other state or federal agencies.

(26) Fraud--Any act that constitutes fraud under applicable federal or state law, including any intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to that person or some other person. Fraud may include any acts prohibited by the Texas Human Resources Code Chapter 36 or Texas Penal Code Chapter 35A.

(27) Health information--Any information, whether oral or recorded in any form or medium, that is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse, and that relates to:

(A) the past, present, or future physical or mental health or condition of an individual;

(B) the provision of health care to an individual; or

(C) the past, present, or future payment for the provision of health care to an individual.

(28) Health maintenance organization (HMO)--A public or private organization organized under state law that is a federally qualified HMO or that meets the definition of HMO within this state's Medicaid plan.

(29) HHS--Health and human services. Means:

(A) a health and human services agency under the umbrella of the Commission or its successor, including the Commission;

(B) a program or service provided under the authority of the Commission, including Medicaid and CHIP; or

(C) a health and human services agency, including those agencies delineated in Texas Government Code §531.001.

(30) Immediate family member--A person's spouse (husband or wife); natural or adoptive parent; child or sibling; stepparent, stepchild, stepbrother or stepsister; father-, mother-, daughter-, son-, brother- or sister-in-law; grandparent or grandchild; or spouse of a grandparent or grandchild.

(31) Indirect ownership interest--Any ownership interest in an entity that has an ownership interest in another entity. The term includes an ownership interest in any entity that has an indirect ownership interest in the entity at issue.

(32) Inducement--An attempt to entice or lure an action on the part of another in exchange for, without limitation, cash in any amount, entertainment, any item of value, a promise, specific performance, or other consideration.

(33) Knew or should have known--A person, with respect to information, knew or should have known when a person had or should have had actual knowledge of information, acted in deliberate ignorance of the truth or falsity of the information, or acted in reckless disregard of the truth or falsity of the information. Proof of a person's specific intent to commit a program violation is not required in an administrative proceeding to show that a person acted knowingly.

(34) Managed care plan--A plan under which a person undertakes to provide, arrange for, pay for, or reimburse, in whole or in part, the cost of any health care service. A part of the plan must consist of arranging for or providing health care services as distinguished from indemnification against the cost of those services on a prepaid basis through insurance or otherwise. The term does not include an insurance plan that indemnifies an individual for the cost of health care services.

(35) Managing employee--An individual, regardless of the person's title, including a general manager, business manager, administrator, officer, or director, who exercises operational or managerial control over the employing entity, or who directly or indirectly conducts the day-to-day operations of the entity.

(36) MCO--Managed care organization. Has the meaning described in §353.2 of this title (relating to Definitions), and for purposes of this chapter includes an MCO's special investigative unit under Texas Government Code §531.113(a)(1), and any entity with which the MCO contracts for investigative services under Texas Government Code §531.113(a)(2).

(37) MCO provider--An association, group, or individual health care provider furnishing services to MCO members under contract with an MCO.

(38) Medicaid or Medicaid program--The Texas medical assistance program established under Human Resources Code, Chapter 32 and regulated in part under Title 42 CFR Part 400 or its successor.

(39) Medicaid-related funds--Any funds that:

(A) a provider obtains or has access to by virtue of participation in Medicaid; or

(B) a person obtains through embezzlement, misuse, misapplication, improper withholding, conversion or misappropriation of funds that had been obtained by virtue of participation in Medicaid.

(40) Medicaid Provider Integrity Division (MPI)--The division within OIG that investigates provider or contractor fraud and abuse in Medicaid and other HHS programs or its successor.

(41) Medical assistance--Includes all of the health care and related services and benefits authorized or provided under state or federal law for eligible individuals of this state.

(42) Member of household--An individual who is sharing a common abode as part of a single-family unit, including domestic employees, partners, and others who live together as a family unit.

(43) MFCU--The Medicaid Fraud Control Unit of the Texas Office of the Attorney General or its successor.

(44) OAG--Office of the Attorney General of Texas or its successor.

(45) OIG--Office of the Inspector General or its successor. The office within the Commission responsible for:

(A) the investigation of fraud, abuse, and waste;

(B) ensuring program integrity within the Medicaid program and other health and human services provided by the state; and

(C) the enforcement of state law relating to the provision of those services.

(46) OMB--The Federal Office of Management and Budget or its successor.

(47) Operating agency--A state agency that operates any part of the Medicaid or other HHS program.

(48) Overpayment--The amount paid by Medicaid or other HHS program or the amount collected or received by a person by virtue of the provider's participation in Medicaid or other HHS program that exceeds the amount to which the provider or person is entitled under §1902 of the Social Security Act or other state or federal statutes for a service or item furnished within the Medicaid or other HHS programs. This includes:

(A) any funds collected or received in excess of the amount to which the provider is entitled, whether obtained through error, misunderstanding, abuse, misapplication, misuse, embezzlement, or improper retention or fraud;

(B) recipient trust funds and funds collected by a person from recipients if collection was not allowed by Medicaid or other HHS program policy; or

(C) questioned costs identified in a final audit report that found that claims or cost reports submitted in error resulted in money paid in excess of what the provider is entitled to under an HHS program, contract, or grant.

(49) Ownership interest--A direct or indirect ownership interest (or any combination thereof) of 5% or more in the equity in the capital, the stock, the profits, or other assets of a person or any mortgage, deed, trust or note, or other obligation secured in whole or in part by the property or assets of the person.

(50) Payment hold (suspension of payments)--An administrative sanction that withholds all or any portion of payments due a provider until the matter in dispute, including all investigation and legal proceedings, between the provider and the Commission or an operating agency or its agent(s) are resolved. This is a temporary denial of reimbursement under the Medicaid or other HHS program for items or services furnished by a specified provider.

(51) Person--Any legally cognizable entity, including an individual, firm, association, partnership, limited partnership, corporation, agency, institution, MCO, Special Investigative Unit, CHIP participant, trust, non-profit organization, special-purpose corporation, limited liability company, professional entity, professional association, professional corporation, accountable care organization, or other organization or legal entity.

(52) Person with a disability--An individual with a mental, physical, or developmental disability that substantially impairs the individual's ability to provide adequately for the person's care or his or her own protection, and:

(A) who is 18 years of age or older; or

(B) who is under 18 years of age and who has had the disabilities of minority removed.

(53) Practitioner--A physician or other individual licensed or certified under state law to practice their profession.

(54) Prima facie--Sufficient to establish a fact or raise a presumption unless disproved.

(55) Probationary contract--A contract or provider agreement for any period of time. It may include any special requirements or provisions deemed necessary by OIG to ensure the protection of the program. It must be renewed by OIG for the provider to continue to participate in the program. It may also be referred to as a provisional contract, depending upon the terminology used by the provider's agency and program area.

(56) Professionally recognized standards of health care--Statewide or national standards of care, whether in writing or not, that professional peers of the individual or entity whose provision of care is an issue, recognize as applying to those peers practicing or providing care within the state of Texas.

(57) Program violation--A failure to comply with a Medicaid or other HHS provider contract or agreement, the Texas Medicaid Provider Procedures Manual or other official program publications, or any state or federal statute, rule, or regulation applicable to the Medicaid or other HHS program, including any action that constitutes grounds for enforcement as delineated in this subchapter that forms the basis for an investigation, audit, or other review or that results in a notice of potential or final adverse action for cause.

(58) Provider--Any person, including an MCO and its subcontractors, that:

(A) is furnishing Medicaid or other HHS services under a provider agreement or contract in force with a Medicaid or other HHS operating agency;

(B) has a provider or contract number issued by the Commission or by any HHS agency or program or their designee to provide medical assistance, Medicaid, or any other HHS service in any HHS program, including CHIP, under contract or provider agreement with the Commission, its designee, or an HHS agency; or

(C) provides third-party billing services under a contract or provider agreement with the Commission or its designee.

(59) Provider agreement--A contract, including any and all amendments and updates, with Medicaid or other HHS program to subcontract services, or with an MCO to provide services.

(60) Provider screening process--The process that a person participates in to become eligible to participate and enroll as a provider in Medicaid or other HHS program. This process includes enrollment under this chapter, 42 CFR Part 1001, or other processes delineated by statute, rule or regulation.

(61) Provisional contract--A contract or provider agreement for any period of time. It may include any special requirements or provisions deemed necessary by OIG to ensure the protection of the program. It must be renewed by OIG for the provider to continue to participate in the program. It may also be referred to as a probationary contract, depending upon the terminology used by the provider's agency and program area.

(62) Reasonable request--Request for access, records, documentation or other items deemed necessary or appropriate by OIG or a Requesting Agency to perform an official function, and made by a properly identified agent of OIG or a Requesting Agency during hours that a person, business, or premises is open for business.

(63) Recipient--A person eligible for and covered by the Medicaid or any other HHS program.

(64) Records and documentation--Records and documents in any form, including electronic form, which include:

(A) medical records, charting, other records pertaining to a patient, radiographs, laboratory and test results, molds, models, photographs, hospital and surgical records, prescriptions, patient or client assessment forms, and other documents related to diagnosis, treatment or service of patients;

(B) billing and claims records, supporting documentation such as Title XIX forms, delivery receipts, and any other records of services provided to recipients and payments made for those services;

(C) cost reports, documentation supporting cost reports;

(D) managed care encounter data, financial data necessary to demonstrate solvency of risk-bearing providers;

(E) ownership disclosure statements, articles of incorporation, bylaws, corporate minutes, or other documentation demonstrating ownership of corporate entities;

(F) business and accounting records, business and accounting support documentation;

(G) statistical documentation, computer records and data;

(H) clinical practice records, including patient sign-in sheets, employee sign-in sheets, office calendars, daily or other periodic logs, employment records, and payroll documentation related to items or services rendered under a HHS program; and

(I) records affidavits, business records affidavits, evidence receipts, and schedules.

(65) Recoupment of overpayment--A sanction imposed to recover funds paid to a provider or person to which they were not entitled.

(66) Requesting Agency--Includes OIG, the OAG or its successor's Medicaid Fraud Control Unit or Civil Medicaid Fraud Division, any other state or federal agency authorized to conduct compliance, regulatory, or program integrity functions on a provider, a person, or the services rendered by the provider or person.

(67) Restricted reimbursement--An administrative sanction that limits or denies payment of a provider's Medicaid or other HHS program claims for specific procedures for a specified time period.

(68) Risk analysis--The process of defining and analyzing the dangers to individuals, businesses, and governmental entities posed by potential natural and human-caused adverse events. A risk analysis can be either quantitative, which involves numerical probabilities, or qualitative.

(69) Sanction--Any administrative enforcement measure imposed by OIG pursuant to this subchapter other than administrative actions defined in §371.1701 of this subchapter (relating to Administrative Actions). Sanctions include termination of Medicaid or other HHS contracts or agreements, mandatory exclusion, permissive exclusion, payment hold, recoupment of overpayments, restricted reimbursement, assessment of damages, penalties, and other costs, and recoupment of audit overpayments.

(70) Sanctioned entity--An entity that has been convicted of any offense described in 42 CFR §§1001.101 - 1001.401 or has been terminated or excluded from participation in Medicare, Medicaid in Texas, or any other state or federal health care program.

(71) Services--The types of medical assistance specified in §1905(a) of the Social Security Act (42 U.S.C. §1396d(a)) and other HHS program services authorized under federal and state statutes that are administered by the Commission and other HHS agencies.

(72) SIU--A Special Investigative Unit of an MCO as defined under Texas Government Code §531.113(a)(1).

(73) Social Security Act--Legislation passed by Congress in 1965 that established the Medicaid program under Title XIX of the Act and created the Medicare program under Title XVIII of the Act.

(74) Solicitation--Offering to pay or agreeing to accept, directly or indirectly, overtly or covertly any remuneration in cash or in kind to or from another for securing a patient or patronage for or from a person licensed, certified, or registered or enrolled as a provider or otherwise by a state health care regulatory or HHS agency.

(75) State health care program--A State plan approved under Title XIX, any program receiving funds under Title V or from an allotment to a State under such Title, any program receiving funds under Subtitle I of Title XX or from an allotment to a State under Subtitle I of Title XX, or any State child health plan approved under Title XXI.

(76) Substantial contractual relationship--A relationship in which a person has a direct or indirect business transactions with an entity that, in any fiscal year, amounts to more than $25,000 or 5 percent of the entity's total operating expenses, whichever is less.

(77) Suspension of payments (payment hold)--An administrative sanction that withholds all or any portion of payments due a provider until the matter in dispute, including all investigation and legal proceedings, between the provider and the Commission or an operating agency or its agent(s) are resolved. This is a temporary denial of reimbursement under the Medicaid or other HHS program for items or services furnished by a specified provider.

(78) System recoupment--Any recoupment to recover funds paid to a provider or other person to which they were not entitled, by means other than the imposition of a sanction under these rules. It may include any routine payment correction by an agency or an agency's fiscal agent to correct an overpayment that resulted without any alleged wrongdoing.

(79) Terminated--Means:

(A) with respect to a Medicaid or CHIP provider, a state Medicaid program or CHIP has taken an action to revoke the provider's billing privileges, and the provider has exhausted all applicable appeal rights or the timeline for appeal has expired; and

(B) with respect to a Medicare provider, supplier, or eligible professional, the Medicare program has revoked the provider or supplier's billing privileges, and the provider has exhausted all applicable appeal rights or the timeline for appeal has expired.

(80) Terminated for cause--Termination based on allegations related to fraud, program violations, integrity, or improper quality of care.

(81) Title XVIII--Title XVIII (Medicare) of the Social Security Act, codified at 42 U.S.C. §§1395, *et seq.*

(82) Title XIX--Title XIX (Medicaid) of the Social Security Act, codified at 42 U.S.C. §§1396-1, *et seq.*

(83) Title XX--Title XX (Social Services Block Grant) of the Social Security Act, codified at 42 U.S.C. §§1397, *et seq.*

(84) Title XXI--Title XXI (State Children's Health Insurance Program (CHIP)) of the Social Security Act, codified at 42 U.S.C. §§1397aa, *et seq.*

(85) U.S.C.--United States Code.

(86) Vendor hold--Any legally authorized hold or lien by any state or federal governmental unit against future payments to a person. Vendor holds may include tax liens, state or federal program holds, liens established by the OAG Collections Division, and State Comptroller voucher holds.

(87) Waste--Practices that a reasonably prudent person would deem careless or that would allow inefficient use of resources, items, or services.

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 September 24, 2012.

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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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DIVISION 2. GROUNDS FOR ENFORCEMENT

1 TAC §§371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1661, 371.1663, 371.1665, 371.1667, 371.1669

Legal Authority

The new sections are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Government Code §531.021(b), which provides HHSC with the authority to adopt rules governing the determination of Medicaid reimbursements.

The substantive requirements are generally adopted under Texas Government Code §531.102. Additionally, new §371.1651 is authorized by Texas Government Code §411.1143 and Texas Human Resources Code §32.0322; new §371.1653 is authorized by Texas Government Code §531.024161; new §371.1655 is further supported by Texas Health and Safety Code §62.1561 and 42 U.S.C. §1396cc(j); new §371.1661 is authorized by Texas Human Resources Code §32.039; and new §371.1663 is authorized by Texas Government Code §§531.1131, 531.1132, and 531.117.

§371.1659. Compliance with Health Care Standards.

A person is subject to administrative actions or sanctions if the person:

(1) engages in any negligent or abusive practice that results in death, injury, or substantial probability of death or injury to a recipient;

(2) fails to provide an item or service to a recipient in accordance with accepted medical community standards or standards required by statute, regulation, or contract, including statutes and standards that govern occupations;

(3) furnishes or orders services or items for a recipient under the Medicaid or other HHS program that substantially exceed a recipient's needs, are not medically necessary, are not provided economically or are of a quality that fails to meet professionally recognized standards of health care;

(4) is the subject of a voluntary or involuntary action taken by a licensing or certification agency or board, which action is based upon the agency or board's receipt of evidence of noncompliance with licensing or certification requirements;

(5) has its license to provide health care revoked, suspended, or probated by any state's licensing or certification authority, or surrenders a license or certification while a formal disciplinary proceeding is pending before any state's licensing or certification authority;

(6) fails to abide by applicable statutes and standards governing providers;

(7) fails to comply with the privacy standards of the Health Insurance Portability and Accountability Act (HIPAA) and regulations promulgated under HIPAA;

(8) fails to timely provide notice of electronic disclosure to a recipient for whom the person creates or receives protected health information that is subject to electronic disclosure;

(9) electronically discloses or permits the electronic disclosure of a recipient's protected health information to any person without a separate, documented authorization from the recipient or the recipient's legally authorized representative for each disclosure, unless the disclosure is:

(A) to a covered entity as defined by §181.001 of the Health and Safety Code or to a covered entity as that term is defined by §602.001 of the Insurance Code for the purpose of:

(i) treatment;

(ii) payment;

(iii) health care operations; or

(iv) performing an insurance or health maintenance organization function as described by §602.053 of the Insurance Code; or

(B) as otherwise authorized by state or federal law; or

(10) employs any treatment modality that has been declared unsafe or ineffective by the Food and Drug Administration (FDA), CMS, the Public Health Service (PHS), or other state or federal agency with regulatory authority.

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 September 24, 2012.

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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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DIVISION 3. ADMINISTRATIVE ACTIONS AND SANCTIONS

1 TAC §§371.1701, 371.1703, 371.1705, 371.1707, 371.1709, 371.1711, 371.1713, 371.1715, 371.1717, 371.1719

Legal Authority

The new sections are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper

and efficient operation of the Medicaid program; and Texas Government Code §531.021(b), which provides HHSC with the authority to adopt rules governing the determination of Medicaid reimbursements.

The substantive requirements are generally adopted under Texas Government Code §531.102. Additionally, new §371.1703 is supported by Texas Human Resources Code §32.0322; new §371.1709 is authorized by Texas Government Code §411.1143 and 42 C.F.R. §455.23; and new §371.1715 is further authorized by Texas Human Resources Code §32.0322.

§371.1705. Mandatory Exclusion.

(a) OIG must exclude from participation in Titles V, XIX, XX and CHIP programs, as applicable, any person if it determines that the person:

(1) has been excluded from participation in Medicare or any other federal health care programs;

(2) is a provider whose health care license, certification, or other qualifying requirement to perform certain types of service is revoked, suspended, voluntarily surrendered, or otherwise terminated such that the provider is unable to legally perform their profession due to loss of their license, certification, or other qualifying requirement;

(3) has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, including the performance of management or administrative services relating to the delivery of items or services under any such program;

(4) has been convicted, under federal or state law, of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct:

(A) in connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of such items or services; or

(B) with respect to any act or omission in a health care program (other than Medicare and a State health care program) operated by, or financed in whole or in part, by any federal, state or local government agency;

(5) has been convicted, under federal or state law, of a felony relating to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance, as defined under federal or state law. This applies to a person that:

(A) is, or has ever been, a health care practitioner, person, or supplier;

(B) holds, or has held, a direct or indirect ownership or control interest (as defined in §1124(a)(3) of the Social Security Act) in an entity that is a health care person or supplier, or is, or has ever been, an officer, director, agent or managing employee (as defined in §1126(b) of the Social Security Act) of such an entity; or

(C) is or has ever been, employed in any capacity in the health care industry;

(6) is an MCO or other entity furnishing services under a waiver approved under §1915(b)(1) of the Social Security Act that has an affiliate relationship with a person, and that person:

(A) has been convicted:

(i) of an offense that is a ground for mandatory exclusion under this section;

(ii) of an offense under federal or state law consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct:

(I) in connection with the delivery of a health care item or service;

(II) with respect to any act or omission in a health care program (other than those specifically described in paragraph (1) of this subsection) operated by or financed in whole or in part by any federal, state, or local government agency; or

(III) relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct with respect to any act or omission in a program (other than a health care program) operated by or financed in whole or in part by any federal, state, or local government agency;

(iii) of an offense under federal or state law in connection with the interference with or obstruction of any investigation related to:

(I) an offense that is a ground for mandatory exclusion under this section; or

(II) the use of funds received, directly or indirectly, from any federal health care program;

(iv) of an offense under federal or state law for acts that took place after January 1, 2010, in connection with the interference with or obstruction of any audit related to:

(I) an offense that is a ground for mandatory exclusion under this section; or

(II) the use of funds received, directly or indirectly, from any federal health care program;

(v) has had civil money penalties or assessments imposed under §1128A of the Social Security Act (federal false claims); or

(vi) has been excluded from participation in Medicare or any of the state health care programs or CHIP; and

(B) that person:

(i) has an ownership interest in the entity;

(ii) is the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured (in whole or in part) by the entity or any of the property assets thereof, in which whole or part interest is equal to or exceeds five (5) percent of the total property and assets of the entity;

(iii) is an officer or director of the entity, if the entity is organized as a corporation;

(iv) is a partner in the entity, if the entity is organized as a partnership;

(v) is an agent of the entity;

(vi) is a managing employee, that is, a person (including a general manager, business manager, administrator, or director) who exercises operational or managerial control over the entity or part thereof, or directly or indirectly conducts the day-to-day operations of the entity or part thereof; or

(vii) was formerly described in clauses (i) - (vi) of this subparagraph, but is no longer so described because of a transfer of ownership or control interest to an immediate family member or a member of the person's household in anticipation of or following a

conviction, assessment of a civil monetary penalty, or imposition of an exclusion;

(7) is an individual and has an ownership or control interest or a substantial contractual relationship in or is an officer or managing employee of a sanctioned entity, and who knew or should have known of an action that constituted the basis for a conviction or mandatory exclusion of the sanctioned entity; or

(8) is convicted, pleads guilty or pleads nolo contendere to an offense arising from a fraudulent act under the Medicaid program, which results in injury to a person age 65 or older, a person with a disability, or a person younger than 18 years of age.

(b) OIG may exclude a person without sending prior notice of intent to exclude in the following circumstances:

(1) OIG determines that the person is subject to mandatory exclusion under subsection (a) of this section and the person may be placing the health and/or safety of persons receiving services under an HHS program at risk; or

(2) a person who is subject to mandatory exclusion under subsection (a) of this section fails:

(A) to grant immediate access to OIG or to a Requesting Agency upon reasonable request;

(B) to allow OIG or a Requesting Agency to conduct any duties that are necessary to the performance of their official functions; or

(C) to provide to OIG or a Requesting Agency as requested copies or originals of any records, documents, or other items, as determined necessary by OIG or the Requesting Agency.

(c) Notice.

(1) Except as provided in subsection (b) of this section, when OIG proposes to exclude any person on mandatory grounds, it gives written notice of its intent to exclude, which will include:

(A) the basis for the potential exclusion;

(B) the potential effect of the exclusion; and

(C) whether OIG also proposes to cancel any agreement held by the person to be excluded.

(2) When OIG makes a final determination to exclude a person on mandatory grounds or when the exclusion is based upon the grounds described in subsection (b) of this section, OIG issues a final notice of exclusion, which will include:

(A) a description of the final exclusion;

(B) the basis of the final exclusion;

(C) the effect of the final exclusion;

(D) the duration of the final exclusion;

(E) the earliest date on which OIG will consider a request for reinstatement;

(F) the requirements and procedures for reinstatement; and

(G) a statement of the person's right to request a formal administrative appeal hearing regarding the exclusion.

(d) Due process.

(1) A person may request an informal review in accordance with §371.1613 of this subchapter (relating to Informal Review) after receipt of a notice of intent to exclude. OIG must receive the written request for the informal review no later than the thirtieth (30th) calendar day after the date the person receives the potential notice. A request for an informal review does not expand the time allowed to the provider to request an administrative hearing.

(2) Within 30 days of receipt of the notice of potential exclusion, the person receiving the notice may submit to OIG, any documentary evidence or written argument regarding whether exclusion is warranted and any related issues to be considered during the informal review. Submission of documentary evidence or written argument, however, is no guarantee that OIG will not ultimately exclude the person.

(3) A person may request an administrative appeal hearing in accordance with §371.1615 of this subchapter (relating to Appeals) after receipt of a final notice of exclusion. OIG must receive the written request for an appeal no later than the 15th calendar day after the date the person receives final notice.

(4) If both an informal review and an administrative hearing are requested after a final notice of exclusion, OIG may elect, in its sole discretion, to conduct an informal review. The administrative hearing and all pertinent discovery, prehearing conferences, and all other issues and activities regarding the administrative hearing will be abated until all informal review discussions have concluded without settlement or resolution of the issues.

(5) When the exclusion is based on the existence of a criminal conviction, a civil fraud finding, a civil judgment imposing liability by federal, state, or local court, a determination by another government agency or board, any other prior determination, or provisions within a settlement agreement, the basis for the underlying determination is not reviewable and the individual or entity may not collaterally attack the underlying determination, either on substantive or procedural grounds, in an administrative appeal.

(e) Scope and effect of exclusion.

(1) The period of exclusion begins on the effective date. An exclusion becomes effective on the following:

(A) the date the person's health care services or items became ineligible for federal financial participation as described in subsection (a)(1) of this section;

(B) the effective date the person lost their license, certification, or other qualifying requirement as described in subsection (a)(2) of this section;

(C) the date of the criminal judgment of conviction as described in subsection (a)(3) - (5) and (8) of this section;

(D) the date of the criminal judgment of conviction, or effective date of the assessment of civil monetary penalties or exclusion as described in subsection (a)(6) of this section;

(E) the effective date of final determination of liability pursuant to Texas Human Resources Code §32.039(c) as described in subsection (a)(8) of this section;

(F) the date reflected on the final notice of exclusion if the exclusion is based on a health or safety risk as described in subsection (b)(1) of this section;

(G) the date of the original request for records if the exclusion is based on failure to provide access as described in subsection (b)(2) of this section;

(H) unless otherwise provided, twenty (20) days after the person's receipt of the final notice of exclusion if the provider does

not timely file a written request for an appeal that satisfies the requirements of §371.1615 of this subchapter; or

(I) if the person timely filed a written request for appeal, the date the hearing officer's or administrative law judge's decision to uphold the exclusion becomes final; however, if the administrative law judge upholds an exclusion, the effective date will be made retroactive to the applicable effective date described in this paragraph.

(2) An exclusion remains in effect for the period indicated in the final notice of exclusion. The person is not eligible to apply for reinstatement or reenrollment as a provider until the exclusion period has elapsed. The minimum length of exclusion is determined as follows:

(A) The minimum length of exclusion is the federally mandated exclusion period plus one additional year if the exclusion is based upon a conviction as described in subsection (a)(3), (4), or (5) of this section.

(B) An MCO will be excluded for the same period as the related person was excluded, as described in subsection (a)(6) of this section.

(C) An individual will be excluded for the same period as the sanctioned entity in which the individual held an ownership, control interest, or substantial contractual relationship as described in subsection (a)(7) of this section.

(D) The exclusion is effective for ten years if the exclusion is based upon an assessment of civil monetary penalties pursuant to Texas Human Resources Code §32.039(c) arising out of injury to a person who is 65 years of age or older, a person with a disability, or a person under 18 years of age as described in subsection (a)(8) of this section.

(E) The exclusion is effective for three years if the exclusion is based upon an assessment of civil monetary penalties pursuant to Texas Human Resources Code §32.039(c).

(F) The exclusion is permanent if the exclusion is based upon a criminal conviction for committing a fraudulent act under the Medicaid program that results in injury to a person who is 65 years of age or older, a person with a disability, or a person under 18 years of age as described in subsection (a)(8) of this section.

(G) Unless otherwise provided, the length of exclusion will be determined by OIG in its discretion. OIG will consider the factors enumerated in §371.1603(f)(1) of this subchapter (relating to Legal Basis and Scope) in determining the length of exclusion.

(3) Unless a person is first reinstated and then re-enrolled as a provider in the Texas Medicaid program, no payment will be made by the Medicaid program for any item or service furnished or requested by an excluded person on or after the effective date of exclusion.

(4) An excluded person is prohibited from:

(A) personally or through a clinic, group, corporation, or other association or entity, billing or otherwise requesting or receiving payment for any Title V, VIII, XIX, XX, or CHIP program for items or services provided on or after the effective date of the exclusion;

(B) providing any service under the Medicaid program, whether or not the excluded person directly requests Medicaid program payment for such services;

(C) assessing care or ordering or prescribing services, directly or indirectly, to Title V, XIX, XX, or CHIP recipients after the effective date of the person's exclusion; and

(D) accepting employment by any person whose revenue stream includes funds from a Title V, VIII, XIX, XX, or CHIP program.

(5) If, after the effective date of an exclusion, an excluded person submits or causes to be submitted claims for services or items furnished within the period of exclusion, the person may be subject to civil monetary penalty liability under §1128A(a)(1)(D), and criminal liability under §1128B(a)(3) of the Social Security Act in addition to sanctions or penalties by OIG.

(6) In accordance with federal and state requirements, when OIG excludes a person, OIG may notify each state agency administering or supervising the applicable state health care program, as well as the appropriate state or local authority or agency responsible for licensing or certifying the person excluded. If issued, notification will include:

(A) the facts, circumstances, and period of exclusion;

(B) a request that appropriate investigations be made and any necessary sanctions or disciplinary actions be imposed in accordance with applicable law and policy; and

(C) a request that the state or local authority or agency fully and timely inform the OIG with respect to any actions taken in response to the OIG's request.

(7) OIG notifies the public of all persons excluded.

(8) A person who has been excluded from the Texas Medicaid or CHIP program will be excluded from the Medicaid and/or CHIP program in every other state and from the Medicare program pursuant to each program's applicable state or federal authority. When exclusion from the Texas Medicaid and/or CHIP program is based on the person's exclusion from Medicare, or from another state's Medicaid or CHIP program, the prohibitions enumerated in paragraph (4) of this subsection may apply.

§371.1707. Permissive Exclusion.

(a) OIG may exclude from participation in Titles V, VIII, XIX, XX, or CHIP programs any person if it determines that the person:

(1) commits a program violation;

(2) is affiliated with a person who commits a program violation;

(3) commits an act for which damages, penalties, or liability could be or are assessed by OIG;

(4) is a person not enrolled as a provider whose health care license, certification, or other qualifying requirement to perform certain types of service is revoked, suspended, voluntarily surrendered, or otherwise terminated such that the provider is unable to legally perform their profession due to loss of their license, certification, or other qualifying requirement;

(5) could be excluded for any reason for which the Secretary of the U.S. Department of Health and Human Services, its Office of Inspector General, or its agents could exclude such person under 42 U.S.C. §1320a-7(b) or 42 CFR Parts 1001 or 1003;

(6) is found liable for any violation under subsection (c) of Human Resources Code §32.039 that resulted in injury to a person who is 65 years of age or older, a person with a disability, or a person younger than 18 years of age;

(7) is found liable for any violation under subsection (c) of Human Resources Code §32.039 that did not result in injury to a person 65 years of age or older, a person with a disability, or a person younger than 18 years of age; or

(8) has been excluded from participation in Medicare or any other federal health care programs.

(b) OIG may exclude a person without sending prior notice of intent to exclude in the following circumstances:

(1) OIG determines that the person is or may be placing the health and/or safety of persons receiving services under a HHS program at risk;

(2) a person fails:

(A) to grant immediate access to OIG or to a Requesting Agency upon reasonable request;

(B) to allow OIG or a Requesting Agency to conduct any duties that are necessary to the performance of their official functions; or

(C) to provide to OIG or a Requesting Agency as requested copies or originals of any records, documents, or other items, as determined necessary by OIG or the Requesting Agency;

(3) the person engages in acts that violate 42 CFR §1001.1401 (hospital's failure to comply with corrective action plan required by the Centers for Medicare and Medicaid Services);

(4) the person engages in acts that violate 42 CFR §1001.1501 (default on health education loan or scholarship obligations);

(5) the person engages in acts that violate 42 CFR §1001.901 (false or improper claims);

(6) the person engages in acts that violate 42 CFR §1001.951 (fraud and kickbacks and other prohibited activities);

(7) the person engages in acts that violate 42 CFR §1001.1601 (violations of the limitations on physician charges);

(8) the person engages in acts that violate 42 CFR §1001.1701 (billing for services of assistant at surgery during cataract operations); or

(9) the person has been excluded from the Medicaid program and obtains a new provider number without first completing the reinstatement and re-enrollment process as required by §371.1719 of this division (relating to Recoupment of Overpayments Identified by Audit).

(c) Notice.

(1) Except as provided in subsection (b) of this section, OIG will issue a notice of intent to exclude when it proposes to exclude any person on permissive grounds. The notice of intent to exclude will include:

(A) the basis for the potential exclusion;

(B) the potential effect of the exclusion; and

(C) whether OIG also proposes to cancel any agreement held by the person to be excluded.

(2) When OIG makes a final determination to exclude the person or when the exclusion is based upon the grounds enumerated in subsection (b) of this section, OIG issues a final notice of exclusion, which will state:

(A) a description of the final exclusion;

(B) the basis of the final exclusion;

(C) the effect of the final exclusion;

(D) the duration of the final exclusion;

(E) the earliest date on which OIG will consider a request for reinstatement;

(F) the requirements and procedures for reinstatement;

(G) whether OIG will also cancel any agreement held by the person to be excluded; and

(H) a statement of the person's right to request a formal administrative appeal hearing regarding the exclusion.

(d) Due process.

(1) A person may request an informal review in accordance with §371.1613 of this subchapter (relating to Informal Review) after receipt of a notice of intent to exclude. OIG must receive the written request for the informal review no later than the thirtieth (30th) calendar day after the date the person receives the notice. A request for an informal review does not expand the time allowed to the provider to request an administrative hearing.

(2) Within 30 days of receipt of the notice of intent to exclude, the person receiving the notice may submit to OIG, any documentary evidence or written argument regarding whether exclusion is warranted and any related issues to be considered during the informal review. Submission of documentary evidence or written argument, however, is no guarantee that OIG will not ultimately exclude the person.

(3) A person may request an administrative appeal hearing in accordance with §371.1615 of this subchapter (relating to Appeals) after receipt of a final notice of exclusion. OIG must receive the written request for an appeal no later than the 15th calendar day after the date the person receives final notice.

(4) If both an informal review and an administrative hearing are requested after a final notice of exclusion, OIG may elect, in its sole discretion, to conduct an informal review. The administrative hearing and all pertinent discovery, prehearing conferences, and all other issues and activities regarding the administrative hearing will be abated until all informal review discussions have concluded without settlement or resolution of the issues.

(e) Scope and effect of exclusion.

(1) The period of exclusion begins on the effective date. An exclusion becomes effective on the following:

(A) the date reflected on the final notice of exclusion if the exclusion is based on a health or safety risk as described in subsection (b)(1) of this section;

(B) the date of the original request for records if the exclusion is based on failure to provide access as described in subsection (b)(2) of this section;

(C) unless otherwise provided, 30 days after the person's receipt of the final notice of exclusion if the provider does not timely file a written request for an appeal that satisfies the requirements of §371.1615 of this subchapter; or

(D) if the person timely filed a written request for appeal, the date the hearing officer or administrative law judge upholds the decision to exclude; however, if the administrative law judge upholds an exclusion based upon subsection (b)(1) of this section, the effective date will be made retroactive to the date of the final notice, and if the judge upholds an exclusion based upon subsection (b)(2) of this section, the effective date will be made retroactive to the date of the original request for records.

(2) An exclusion remains in effect for the period indicated in the final notice of exclusion. The person is not eligible to apply for

reinstatement or re-enrollment as a provider until the exclusion period has elapsed.

(3) Unless a person is first reinstated and then re-enrolled as a provider in the Texas Medicaid program, no payment will be made by the Medicaid program for any item or service furnished or requested by an excluded person on or after the effective date of exclusion.

(4) An excluded person is prohibited from:

(A) personally or through a clinic, group, corporation, or other association or entity, billing or otherwise requesting or receiving payment from any Title V, VIII, XIX, XX, or CHIP programs for items or services provided on or after the effective date of the exclusion;

(B) providing any service pursuant to the Medicaid program, whether or not the excluded person directly requests Medicaid program payment for such services;

(C) assessing care or ordering or prescribing services, directly or indirectly, to Title V, XIX, XX or CHIP recipients after the effective date of the person's exclusion; and

(D) accepting employment by any person whose revenue stream includes funds from a Title V, VIII, XIX, XX, or CHIP program.

(5) If, after the effective date of an exclusion, an excluded person submits or causes to be submitted claims for services or items furnished within the period of exclusion, the person may be subject to civil monetary penalty liability under §1128A(a)(1)(D) and criminal liability under §1128B(a)(3) of the Social Security Act in addition to sanctions or penalties by OIG.

(6) In accordance with federal and state requirements, when OIG excludes a person, OIG may notify each state agency administering or supervising the applicable state health care program, as well as the appropriate state or local authority or agency responsible for licensing or certifying the person excluded. If issued, notification will include:

(A) the facts, circumstances, and period of exclusion;

(B) a request that appropriate investigations be made and any necessary sanctions or disciplinary actions be imposed in accordance with applicable law and policy; and

(C) a request that the state or local authority or agency fully and timely inform the OIG with respect to any actions taken in response to the OIG's request.

(7) OIG notifies the public of all persons excluded.

(8) A person who has been excluded from the Texas Medicaid or CHIP program will be excluded from the Texas Medicaid and/or CHIP program in every other state and from the Medicare program pursuant to each program's applicable state or federal authority. When exclusion from the Texas Medicaid and/or CHIP program is based on the person's exclusion from Medicare, or from another state's Medicaid or CHIP program, the prohibitions enumerated in paragraph (4) of this subsection may apply.

§371.1709. Payment Hold.

(a) OIG may impose a payment hold against any person if it determines that the person committed an act for which a person is subject to administrative actions or sanctions, including the following:

(1) is subject to a suspension of payments by the U.S. Department of Health and Human Services for Medicare violations;

(2) commits a program violation;

(3) is affiliated with a person who commits a program violation; or

(4) for any other reason provided by statute or regulation.

(b) OIG imposes a payment hold against a person:

(1) to compel the production records or documents when a request made by a Requesting Agency is refused;

(2) when requested by the state's Medicaid Fraud Control Unit; or

(3) upon receipt of reliable evidence that verifies a credible allegation of fraud.

(c) Notice.

(1) Unless OIG receives a request from a law enforcement agency to temporarily withhold notice to a person of payment hold, OIG provides written notice of a payment hold no later than the fifth (5th) business day after the date the payment hold is imposed. A law enforcement agency may request a delay in sending notice for up to 30 days. The request may be renewed up to twice and in no event may exceed 90 days.

(2) Notice of payment hold includes:

(A) a description of the hold;

(B) the basis for the hold;

(C) the effect of the hold;

(D) the duration of the hold; and

(E) a statement of the person's right to request an informal review or an expedited administrative appeal hearing regarding the imposition of the payment hold.

(3) If the payment hold is based on reliable evidence that verifies a credible allegation of fraud, written notice will also:

(A) state that the payments are being suspended according to 42 CFR §455.23;

(B) state the general allegations as to why the payment hold has been imposed;

(C) state that the hold is for a temporary period and will be lifted after either:

(i) OIG or a prosecuting authority determines that there is insufficient evidence of fraud by the person; or

(ii) legal proceedings related to the person's alleged fraud are completed;

(D) specify the types of Medicaid claims or business units to which the payment suspension is effective; and

(E) inform the provider of the right to submit written evidence for consideration by the agency.

(d) Due process.

(1) A person may request an expedited informal review after receipt of a notice of payment hold in accordance with §371.1613(e) of this subchapter (relating to Informal Review). OIG must receive the written request for the informal review no later than the tenth calendar day after the date the person receives the notice. A request for an informal review does not expand the time allowed to the provider to request an administrative hearing.

(2) Within ten days of receipt of the notice of payment hold, the person receiving the notice may submit to OIG any documentary

evidence or written argument regarding whether payment hold is warranted and any related issues to be considered during the informal review. Submission of documentary evidence or written argument, however, is no guarantee that OIG will not ultimately maintain imposition of the hold.

(3) A person may request an expedited administrative appeal hearing after receipt of a notice of payment hold in accordance with §371.1615(d) of this subchapter (relating to Appeals). OIG must receive the written request for an appeal no later than the tenth calendar day after the date the person receives the notice.

(4) If both an informal review and an administrative hearing are requested, the administrative hearing and all pertinent discovery, prehearing conferences, and all other issues and activities regarding the administrative hearing will be abated until all informal review discussions have concluded without settlement or resolution of the issues.

(e) Scope and effect of payment hold.

(1) Once a person is placed on payment hold, payment of Medicaid or other HHS program claims for specific procedures or services and any other payments to the person from an HHS agency will be limited or denied.

(2) After a payment hold is terminated for any reason, OIG may retain the funds accumulated during the payment hold to offset any overpayment, criminal restitution, penalty or other assessment, or agreed-upon amount that may result from ongoing investigation of the person, including any payment amount accepted by the prosecuting authorities made in lieu of a prosecution to reimburse the Medicaid or other HHS program.

(3) The payment hold may be terminated or partially lifted upon the following events:

(A) OIG or a prosecuting authority determines that there is insufficient evidence of fraud by the person if the hold is based upon an allegation of fraud;

(B) legal proceedings related to the person's alleged fraud are completed if the hold is based upon an allegation of fraud;

(C) the Medicaid Fraud Control Unit asks OIG to lift the hold if the hold is based upon the Unit's request;

(D) the duration of the hold expires if the hold was imposed for a specific, limited time;

(E) OIG and the person have agreed to lift the hold in whole or in part during an informal resolution;

(F) OIG determines in its sole discretion that there is insufficient evidentiary or legal basis for maintaining the hold;

(G) OIG determines in its sole discretion that it is in the best interests of the Medicaid program to lift the hold;

(H) OIG determines that a payment hold would adversely affect clients' access to care;

(I) an administrative law judge or judge of any court of competent jurisdiction orders OIG to lift the hold in whole or in part; or

(J) all proceedings against the provider, including any appeals and judicial review, have been exhausted and all overpayments and other reimbursements are satisfied.

§371.1715. Damages and Penalties.

(a) Application. OIG may assess administrative damages, penalties, or both against any person if it determines that the person committed an act for which a person is subject to administrative actions or sanctions, including the following:

(1) presents or causes to be presented to OIG or its fiscal agent, a claim that contains a statement or representation the person knows or should know to be false;

(2) commits an act of self-dealing in violation of §371.1669 of this subchapter (relating to Self-Dealing);

(3) commits a managed care violation prohibited by §371.1663 of this subchapter (relating to Managed Care);

(4) fails to maintain adequate documentation to support a claim for payment in accordance with the requirements specified by rule or policy of Medicaid or Texas Medicaid Managed Care program policy; or

(5) engages in any other conduct that OIG has defined as a program violation.

(b) Exceptions.

(1) Unless the provider submitted information to OIG for use in preparing a voucher that the provider knew or should have known was false or failed to correct information that the provider knew or should have known was false when provided an opportunity to do so, this section does not apply to a claim based on the voucher if OIG calculated and printed the amount of the claim on the voucher and then submitted the voucher to the provider for the provider's signature.

(2) Subsection (a)(2) of this section does not prohibit a person from engaging in generally accepted business practices, including:

(A) conducting a marketing campaign;

(B) providing token items of minimal value that advertise the person's trade name;

(C) providing complimentary refreshments at an informational meeting promoting the person's goods or services;

(D) providing a value-added service if the person is an MCO; or

(E) other conduct specifically authorized by law, including conduct authorized by federal safe harbor regulations (42 CFR §1001.952).

(c) Notice.

(1) Notice of preliminary report. If after an examination of the facts OIG determines by prima facie evidence that a person commits a violation that subjects the person to assessment of damages or penalties, OIG may issue a preliminary report stating the facts on which it based its conclusion, its proposal that administrative damages or penalty under this section be imposed, and stating the amount of the proposed damages or penalty. OIG will issue notice of the preliminary report to the person subject to the assessment.

(2) Content of the notice of preliminary report. The notice of preliminary report will include:

(A) a brief summary of the facts forming the basis for the assessment;

(B) a statement of the amount of the proposed damages or penalty; and

(C) a statement of the person's right to an informal review of the alleged violation, the amount of the damages or penalty, or both the alleged violation and the amount of the damages or penalty.

(3) Notice of final assessment. The notice of final assessment of damages or penalty includes:

(A) a brief summary of the facts forming the basis for the assessment;

(B) a statement of the amount of the damages or penalty;

(C) a statement of the effect of the assessment; and

(D) a statement of the person's right to an appeal of the alleged violation, the amount of the damages or penalty, or both the alleged violation and the amount of the damages or penalty.

(d) Due process.

(1) A person may request an informal review in accordance with §371.1613 of this subchapter (relating to Informal Review) after receipt of a notice of preliminary report. OIG must receive the written request for the informal review no later than the thirtieth (30th) calendar day after the date the person receives notice of preliminary report. A request for an informal review does not expand the time allowed to the provider to request an administrative hearing.

(2) Within 30 days of receipt of the notice of preliminary report, the person receiving the notice may submit to OIG any documentary evidence or written argument regarding whether damages or penalties are warranted and any related issues to be considered during the informal review. Submission of documentary evidence or written argument, however, is no guarantee that OIG will not assess damages or penalties.

(3) A person may request an administrative appeal hearing in accordance with §371.1615 of this subchapter (relating to Appeals) after receipt of a notice of final assessment. OIG must receive the written request for an appeal no later than the 15th calendar day after the date the person receives the notice of final assessment.

(4) If both an informal review and an administrative hearing are requested after a notice of final assessment, OIG may elect, in its sole discretion, to conduct another informal review. The administrative hearing and all pertinent discovery, prehearing conferences, and all other issues and activities regarding the administrative hearing will be abated until all informal review discussions have concluded without settlement or resolution of the issues.

(e) Scope and effect of assessment of damages and penalties.

(1) A person who violates subsection (a)(1) - (3) of this section is liable for:

(A) damages equal to the amount paid, if any, as a result of the violation and interest on that amount determined at the rate provided by law for legal judgments and accruing from the date on which the payment was made; plus

(B) an administrative penalty of an amount not to exceed twice the amount paid, if any, as a result of the violation, plus:

(i) an administrative penalty of an amount not less than $5,500 or more than $15,000 for each violation that results in injury to a person who is 65 years of age or older, a person with a disability, or a person younger than 18 years of age; or

(ii) an administrative penalty of an amount not more than $11,000 for each violation that does not result in injury to a person who is 65 years of age or older, a person with a disability, or a person younger than 18 years of age.

(2) A person who violates subsection (a)(4) or (a)(5) of this section is liable for:

(A) the amount paid in response to the claim for payment; or

(B) the payment of an administrative penalty in an amount not to exceed $500 for each violation, as determined by OIG.

(3) Additionally, a person against whom damages or penalties have been assessed may be responsible for OIG's and other HHS program's costs related to the investigation that resulted in the assessment and the costs of any administrative hearing arising out of the assessment.

(4) In determining the amount of administrative damages or penalties to be assessed, OIG considers:

(A) the seriousness of the violation;

(B) whether the person had previously committed a violation; and

(C) the amount necessary to deter the person from committing future violations.

(5) The assessment of damages or penalty will become final as provided in §371.1617(a) of this subchapter (relating to Finality and Collections).

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 September 24, 2012.

TRD-201205075
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 14, 2012
Proposal publication date: August 10, 2012
For further information, please call: (512) 424-6900

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TITLE 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 40. CHRONIC WASTING DISEASE

4 TAC §40.6

The Texas Animal Health Commission (Commission) adopts new §40.6, concerning CWD Movement Restriction Zone, with changes to the proposed text as published in the July 6, 2012, issue of the *Texas Register* (37 TexReg 5061) and will be republished.

The new section will create a Chronic Wasting Disease (CWD) movement restriction zone(s) in the Trans Pecos Region.

There is a task force comprised of members of affected deer and exotic livestock associations, private veterinary practitioners, and wildlife biologists who assisted the Texas Parks and Wildlife Department (TPWD) and Commission staff in the development of a CWD response plan upon detection of the disease in mule deer harvested in New Mexico within 1-2 miles of the Texas border. They recently met and provided both agencies with recommendations on a strategy to address the risk of expo-

sure of CWD to susceptible species in Texas. The recommendations follow the creation of CWD movement restriction zone(s) with restrictions put in place to protect against the exposure and spread of CWD from New Mexico. These recommendations are being taken in a coordinated effort by both TPWD and the Commission.

It was recently disclosed that through CWD sampling efforts of New Mexico Game and Fish personnel that CWD has been detected in mule deer in the southern Sacramento Mountains and northern Hueco Mountains, in southern New Mexico. While sample sizes are very small, it seems that the CWD prevalence may be quite high in that location. Several of the animals sampled were located in close proximity to the Texas border. This is significant for the state of Texas, considering basic biology and movement patterns of susceptible species located there, such as mule deer and elk, indicate that the animals may be moving back and forth between Texas and New Mexico.

Prions are found ubiquitously throughout the body of an infected animal and can be shed onto soil, where they may remain viable and able to infect other susceptible animals for many years. Suspected additional susceptible species, besides mule deer, white tail deer and elk, include red deer and Sika deer. There is still no evidence that humans or domestic livestock can be infected with CWD.

Deer populations in other states where CWD prevalence exceeds 40% have experienced significant (>45%) population declines. As the prevalence rates increase and geographic distribution has expanded in other states, hunters are more likely to alter hunting behaviors which may include avoiding areas with high CWD prevalence. This could have an adverse economic impact on local communities dependent on hunting revenue and could affect TPWD efforts to manage cervid populations through hunter harvest.

Considering the seemingly high CWD prevalence rate in the Sacramento and Hueco Mountains of New Mexico, CWD may be well established in the population and in the environment in Texas at this time. The current area of concern was delineated as all land west of the Pecos River and IH 20, and north of IH 10 to Ft. Hancock, and all land west and north of Ft. Hancock, and the Containment Zone (CZ) was delineated as all land west of HWY 62-180 and HWY 54, and north of IH 10 to Ft. Hancock, and all land west and north of Ft. Hancock. Data regarding mule deer population parameters and mule deer movements, knowledge on elk movements, and the geography and habitat types of the area were considered in the delineation of these zones.

The Commission received four comments regarding adoption of the new rule, but there is no change to the rule in response to the comments.

Two of the commenters told us to "trust experts like Dr. Dan McBride and your advisory committee that was already prepared for this issue. We must at all cost protect the whitetail herd in the dense areas of the Texas Hill Country where any outbreak could lead to panic and economic collapse of these communities where hunting dollars are vital to these communities." The Commission appreciates the support of the task force. Another comment indicated that "it will be tough to contain free ranging deer since they range many miles during breeding season." The Commission agrees that is a tough aspect to fully control the spread of the disease, but the zones were sized in order to take that into account. Lastly, a comment indicated that "in light of the Chronic Wasting Disease (CWD) epidemic, which has jumped the border from New Mexico into Texas, Texas ought to reevaluate its enthusiasm for land spreading sewage sludge bio solids on farm land, grazing ranges, hay fields and dairy pastures where livestock and deer ingest dirt and sludge with their fodder." The Commission has no jurisdiction over that issue and that is not something addressed in this rule.

STATUTORY AUTHORITY

The new rule is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The Commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061.

Section 161.054 provides that as a control measure, the Commission by rule may regulate the movement of animals, including feral swine. The Commission may restrict the intrastate movement of animals, including feral swine, even though the movement of the animals is unrestricted in interstate or international commerce. The Commission by rule may prohibit or regulate the movement of animals, into a quarantined herd, premise, or area. In §161.048, a person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place; or exercises care or control over the animal. That is under §161.002.

Section 161.0541, entitled "Elk Disease Surveillance Program", provides that the Commission by rule may establish a disease surveillance program for elk. Section 161.007 provides that if a veterinarian employed by the Commission determines that a communicable disease exists among livestock, domestic animals, or domestic fowl or on certain premises or that livestock, domestic animals, or domestic fowl have been exposed to the agency of transmission of a communicable disease, the exposure or infection is considered to continue until the Commission determines that the exposure or infection has been eradicated through methods prescribed by rule of the Commission. Section 161.005 provides that the Commission may authorize the Executive Director or another employee to sign written instruments on behalf of the Commission. A written instrument, including a quarantine or written notice, signed under that authority has the same force and effect as if signed by the entire Commission.

§40.6. CWD Movement Restriction Zone.

(a) Definitions:

(1) Containment Zone (CZ)--A geographic area which would include a known affected (quarantined) area or area within Texas where there is a high risk of CWD existing.

(2) High Risk Zone (HRZ)--Area which serves as a buffer (surveillance) zone separating the Containment Zone from the rest of Texas.

(3) Susceptible Species--All white-tailed deer, black-tailed deer, mule deer, elk, or other cervid species determined to be susceptible to Chronic Wasting Disease (CWD), which means an animal of that

species has had a diagnosis of CWD confirmed by means of an official test conducted by a laboratory approved by USDA-APHIS.

(4) Unnatural Movement--Any artificially induced movement of a live susceptible species or the carcass of a susceptible species.

(b) Declaration of Area Restricted for CWD. CWD has been detected in mule deer and/or elk in the southern Sacramento Mountains and northern Hueco Mountains of Southern New Mexico, which creates the high risk that there are susceptible species for CWD that have been exposed or infected to CWD within the state. Considering the seemingly high CWD prevalence rate in the Sacramento and Hueco Mountains of New Mexico, CWD may be well established in the population and in the environment in Texas at this time. The current area of much concern was delineated as all land west of the Pecos River and Interstate Highway (IH) 20, and north of IH 10 to Ft. Hancock, and all land west and north of Ft. Hancock and the CZ was delineated as all land west of HWY 62-180 and HWY 54, and north of IH 10 to Ft. Hancock, and all land west and north of Ft. Hancock. Data regarding mule deer population parameters, movement patterns of mule deer and elk in the area, and the geography and habitat of the area were considered in the delineation of these zones.

(c) Zone Boundaries:

(1) The CZ is defined as follows: beginning in Culberson County where State Highway 62-180 enters from New Mexico and thence in a southwesterly direction to the intersection with State Highway 54 and thence following that in a southwesterly direction to the intersection with IH 20 and thence following it in a westerly direction until Ft. Hancock to State Highway 20 and thence following it a westerly direction to Farm Road 1088 (east of Ft. Hancock), and thence following it in a southerly direction to the Rio Grande River to where it enters the state of New Mexico.

(2) The HRZ is defined as follows: beginning in Reeves County where the Pecos River enters from New Mexico and meanders in a southeasterly direction as the boundary between Reeves County and Loving and Ward Counties to the intersection with IH 20 and thence following it in a westerly direction until the intersection with State Highway 54 and thence following it in a northwesterly direction until the intersection with State Highway 62-180 and thence in a northeasterly direction to the border with the state of New Mexico and Culberson County.

(d) Restrictions:

(1) Prohibition of Unnatural Movement of Non-Captive Susceptible Species:

(A) No susceptible species may be trapped and transported from within the HRZ or the CZ to another location. No susceptible species may be released within the HRZ or the CZ without participating in a monitored herd program in accordance with the requirements of §40.3 of this chapter (relating to Herd Status Plans for Cervidae) and having a herd with Level "C" status of five years or higher as established through §40.3(4)(C) of this chapter or for species under the authority of Texas Parks and Wildlife in accordance with their applicable requirements.

(B) No part of a carcass of a susceptible species, either killed or found dead, within the HRZ or CZ may be removed from the HRZ or CZ unless a testable CWD sample from the carcass is collected by or provided to the Commission or TPWD with appropriate contact information provided by the submitter.

(2) CWD monitored status within the CZ:

(A) Previously Established CWD Monitored Facilities within the CZ. Movement of susceptible species will only be allowed for animals from previously established facilities within the CZ that have obtained a five-year status while in the CZ in accordance with the requirements of §40.3 of this chapter and having a herd with Level "C" status of five years or higher as established through §40.3(4)(C) of this chapter or for species under the authority of Texas Parks and Wildlife in accordance with their applicable requirements.

(B) Newly Established CWD Monitored Facilities within the CZ. Susceptible species moving into newly established facilities within the CZ will have their status reset at zero and must be held within the facility until it has received five-year status in accordance with the requirements of §40.3 of this chapter and having a herd with Level "C" status of five years or higher as established through §40.3(4)(C) of this chapter or for species under the authority of Texas Parks and Wildlife in accordance with their applicable requirements.

(3) CWD monitored status within the HRZ:

(A) Previously Established CWD Monitored Facilities within the HRZ. Movement of susceptible species from previously established facilities within the HRZ is only for animals that have obtained a five-year status in accordance with the requirements of §40.3 of this chapter and having a herd with Level "C" status of five years or higher as established through §40.3(4)(C) of this chapter or for species under the authority of Texas Parks and Wildlife in accordance with their applicable requirements.

(B) Newly Established CWD Monitored Facilities within the HRZ. Susceptible species moving into newly established facilities within the HRZ will have their status reset to zero, and movement will be restricted until the facility has gained five-year status in accordance with the requirements of §40.3 of this chapter and having a herd with Level "C" status of five years or higher as established through §40.3(4)(C) of this chapter or for species under the authority of Texas Parks and Wildlife in accordance with their applicable requirements.

(e) The Executive Director may authorize movement. If movement is necessary or desirable to promote the objectives of this chapter and/or to minimize the economic impact of the restricted susceptible species without endangering those objectives or the health and safety of other susceptible species within the state, the Executive Director may authorize movement in a manner that creates minimal risk to the other susceptible animals in the state.

(f) Notice of High Risk Designation. The Executive Director shall give notice of the restrictions by publishing notice in a newspaper published in the county where the restrictions will be established, or by other accepted practices or publications which circulate information in the county or counties.

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 September 20, 2012.

TRD-201204977
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: October 10, 2012
Proposal publication date: July 6, 2012
For further information, please call: (512) 719-0724

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CHAPTER 43. TUBERCULOSIS
SUBCHAPTER A. CATTLE AND BISON

4 TAC §43.6

The Texas Animal Health Commission (Commission) adopts new §43.6, concerning Dairy Calf Ranches, without changes to the proposed text as published in the July 6, 2012, issue of the *Texas Register* (37 TexReg 5063) and will not be republished.

The new rule is for the purpose of defining dairy calf ranches as high risk for disease transmission and outlining desired management and recordkeeping concepts that would facilitate epidemiological oversight necessary for adequate disease investigation processes. This adopted rule is also intended to mitigate the risk of Tuberculosis, and other diseases, being inadvertently spread throughout the dairy industry.

The "off-site" (not the birthplace dairy) concentrated feeding practice for young dairy calves at a calf ranch has become common practice in the dairy industry. Commingling of calves in high numbers from multiple dairies increases the risk of disease transmission. The feeding of non-pasteurized colostrum or waste milk to calves prior to weaning, or not properly cleaning milk bottles between uses, can further exacerbate the possibility of transferring disease pathogens to a native calf population. Calf ranches have been implicated as the possible source of infection in many past bovine tuberculosis infected dairies in Texas and other states. The inability to completely trace the movement of calves through affected facilities in past investigations has also created the situation where exposed or infected calves could not be located for follow up testing, thus posing a risk to the entire dairy industry.

The Commission received one comment regarding adoption of the new rule, but there is no change to the rule in response to the comment.

The one comment received focused on broadening the definition of dairy cattle to just cattle. The commenter felt like a broader definition for all cattle would better ensure that people were not claiming dairy cattle as feeder cattle. The Commission appreciates the comment, but would note that these types of dairy calf ranches are unique to the dairy industry and though some of the animals may be grown out and then go into beef channels, the primary purpose of these facilities are to grow replacement heifers that go back into dairies. The other reason for focus on these facilities is the practice of feeding colostrum which creates the high disease risk for Tuberculosis exposure. This is not a common practice for calves being fed and raised for beef production. The commenter also asked why we did not identify a specific number of days in which colostrum is produced by the cow. The reason is it depends on each animal and the timeframe can vary by animal. The bottom line is this is not something for which a specific timeframe can be established other than it is the initial milk offering from the cow after giving birth.

STATUTORY AUTHORITY

The new rule is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The Commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061.

As a control measure, the Commission by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in §161.054. An agent of the Commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048.

Section 161.061 provides that if the Commission determines that a disease listed in §161.041 of this Code or an agency of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state where livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place.

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 September 20, 2012.

TRD-201204978
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: October 10, 2012
Proposal publication date: July 6, 2012
For further information, please call: (512) 719-0724

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CHAPTER 45. REPORTABLE DISEASES

4 TAC §45.2

The Texas Animal Health Commission (Commission) adopts an amendment to §45.2, concerning Duty to Report, without changes to the proposed text as published in the July 6, 2012, issue of the *Texas Register* (37 TexReg 5064) and will not be republished.

The purpose of this amendment is to add Schmallenberg virus to the list of reportable diseases.

Section 161.101 of the Texas Agriculture Code provides for the duty of a veterinarian, veterinary diagnostic laboratory or a person having care, custody, or control of an animal to report specified animal health diseases to the Commission. The Commission has a specific list of reportable diseases in Chapter 45 of the Commission rules.

Since August 2011, a newly-identified infectious disease has been reported in cattle, sheep, goats, and bison in Europe. This disease was first reported in German dairy cows that exhibited signs of fever, anorexia, reduced milk yield, and loss of condition. Herd morbidities were high (20-70%) over 2-3 weeks, with affected individuals recovering in a few days. Reports of disease among cattle in Germany, and subsequently in the Netherlands, persisted throughout September and into October. By November 2011, farmers began reporting abortions and stillbirths associated with congenital malformations, mostly among sheep but also in goats and cattle. Some dystocias, with no other clinical signs, were observed in mature animals. The virus caused fever, viremia, and diarrhea in a small number of experimentally infected calves. By mid-March 2012, the virus had been identified on more than 2,100 farms in eight European countries. Most infected premises have been sheep farms (85%), followed by cattle (11%) and goat farms (4%) (FluTrackers.com).

This new virus is provisionally named Schmallenberg virus (SBV) after the town in Germany where the first positive samples were found. As of March 2012, cases of Schmallenberg virus infection has been confirmed in Germany, the Netherlands, Belgium, France, the United Kingdom, Luxembourg, Italy, and Spain. Spread of SBV from mainland Europe to Great Britain has been tentatively linked to natural movements of insects from infected areas, similar to the pattern of bluetongue virus in 2008 (European Commission 2012). In experimental challenge trials, three calves inoculated intravenously or subcutaneously with blood that was PCR positive for SBV became infected and had positive PCR results 2-5 days post-inoculation. The viremic stage in cattle seems to be short, as viral detection was negative in all three infected animals 6 days after inoculation, and clinical signs subsided within a few days.

USDA-APHIS-VS has placed additional restrictions on shipments of ruminant semen and embryos (germplasm) originating from the European Union (EU), and from countries that are not formally part of the EU but which follow EU legislation (see list below). These restrictions became effective February 21, 2012, and were placed to address the emergence of Schmallenberg virus in Europe. The virus, thought to be distributed by flying insects such as midges and possibly mosquitoes, is not known to be present in the U.S. and has not been reported to be of human health concern. Infection with the virus causes transient disease in adult cattle, sheep and goats, resulting in production losses, but has also been associated with a high percentage of fetal malformations, abortions, dystocias and death of infected pregnant animals. No treatments or vaccines are currently available, and testing is currently limited in nature.

Shipments of bovine germplasm collected in EU countries after June 1, 2011, are no longer eligible for importation to the U.S. To be eligible for importation, any consignments of bovine germplasm originating from the countries listed below must include a statement on the official export health certificate that they were collected prior to June 1, 2011. All other APHIS import requirements continue to apply.

Importations of live ruminants from the EU are currently prohibited due to bovine spongiform encephalopathy there. Sheep and goat semen protocols are currently being negotiated with the EU, and will be revised to include similar restrictions for Schmallenberg virus. Cervid and camelid germplasm shipments are not affected by these additional restrictions for Schmallenberg virus. No restrictions have been placed by APHIS at this time on any ruminant products or by-products.

No comments were received regarding adoption of the amendment.

STATUTORY AUTHORITY

The amendment is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. Section 161.101 provides that the Commission may adopt rules that require a veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal to report a disease not covered by subsection (a) or (b) if the Commission determines that action to be necessary for the protection of animal health in this state. The Commission shall immediately deliver a copy of a rule adopted under this subsection to the appropriate legislative oversight committees. A rule adopted by the Commission under this subsection expires on the first day after the last day of the first regular legislative session that begins after adoption of the rule unless the rule is continued in effect by act of the legislature. House Bill 4006 relating to veterinarian reports of diseased animals was passed during the 81st Legislative Session and amended the requirements found in §161.101.

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 September 20, 2012.

TRD-201204979
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: October 10, 2012
Proposal publication date: July 6, 2012
For further information, please call: (512) 719-0724

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CHAPTER 49. EQUINE

4 TAC §49.6

The Texas Animal Health Commission (Commission) adopts new §49.6, concerning Piroplasmosis: Area or County Test, without changes to the proposed text as published in the July 6, 2012, issue of the *Texas Register* (37 TexReg 5066) and will not be republished.

The new rule authorizes the Executive Director to issue an order which will classify an area or a county as high risk for holding equine exposed or positive for Piroplasmosis.

Equine Piroplasmosis is a disease of horses and other equine caused by the protozoa *Theileria equi* or *Babesia caballi.* A number of species of ticks are capable of transmitting the disease. At least one species, *Amblyomma cajennense,* is endemic to South Texas and several other southern states. The disease may also be spread between horses by unsafe animal husbandry practices such as sharing needles or equipment that is contaminated with blood. While Piroplasmosis can be a fatal disease, many horses may display vague signs of illness, such as fever, inappetence or jaundice. Equine Piroplasmosis is endemic in many countries around the world. It is considered a foreign animal disease in the United States, though sporadic outbreaks have occurred.

In October 2009, a ranch horse in South Texas was diagnosed with Equine Piroplasmosis. Laboratory results indicated the mare was infected with *Theileria equi.* Additional testing of horses on this ranch revealed a high percentage to be positive for the disease. Additional cases of Piroplasmosis were disclosed in this area of South Texas and in other parts of the state and country through testing of horses that had spent time on the affected ranch. A small number of cases outside the immediate vicinity of the ranch, but in the general area, are believed to have been caused by tick transmission from other horses in an infested pasture. Testing for movement has also disclosed positive horses in two other populations in the U.S. unrelated to the South Texas ranch, Quarter Horse racehorses and horses imported into the United States prior to 2006.

A disease investigation is conducted each time a Piroplasmosis affected horse is disclosed. A recent investigation of two such horses indicated possible exposure to other horses in a common pasture in Kenedy County. Forty-nine horses were tested in the pasture, and nine horses owned by five individuals were found positive for the disease. It is uncertain how these horses became infected. Given that the disease is spread by ticks and this area has a high population of these competent vectors, it is probable that horses used on local ranches for day work became infected and then exposed other horses in the same pasture. It is also possible that an infected imported horse or QH racehorse shared the pasture and introduced infection to the other horses through tick transmission. Establishment of a high risk area and subsequent testing of resident equine would determine the disease status of horses in the area and help assure the Texas equine population is free of Piroplasmosis.

The Commission received one comment in favor of adoption of the new rule.

STATUTORY AUTHORITY

The new rule is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The Commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized by §161.041(b) to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061.

As a control measure, the Commission by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in §161.054. An agent of the Commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048.

Section 161.057 provides the Commission by rule may prescribe criteria for classifying areas in the state for disease control. The criteria must be based on sound epidemiological principles. The Commission may prescribe different control measures and procedures for areas with different classifications. In subsection (b), the Commission by rule may designate as a particular classification an area consisting of one or more counties.

Section 161.005 provides that the Commission may authorize the executive director or another employee to sign written instruments on behalf of the Commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire Commission.

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 September 20, 2012.

TRD-201204980
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: October 10, 2012
Proposal publication date: July 6, 2012
For further information, please call: (512) 719-0724

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 129. STUDENT ATTENDANCE
SUBCHAPTER AA. COMMISSIONER'S RULES

19 TAC §129.1021

The Texas Education Agency (TEA) adopts an amendment to §129.1021, concerning student attendance. The amendment is adopted without changes to the proposed text as published in the July 27, 2012, issue of the *Texas Register* (37 TexReg 5536) and will not be republished. The section describes the method of calculating average daily attendance in school districts with a significant migrant population. The adopted amendment adds provisions to reflect the agency's current practice for determining full-time-equivalent (FTE) counts for special education, bilingual education, and career and technical education allotments for affected school districts and charter schools. The adopted amendment also updates the reference to the database for tracking migrant students.

The statutory authority for the rule, the Texas Education Code (TEC), §42.005(c), requires the commissioner of education to adjust the average daily attendance of school districts with a significant percentage of migrant students. The commissioner currently adjusts not only the average daily attendance but also the FTE counts used in calculating the special education, bilingual education, and career and technical education allotments for these school districts. The adopted amendment updates the rule to reflect this practice by adding new subsection (b) for determining FTE counts.

The adopted amendment also revises the rule to use a general reference to the current database for tracking migrant students instead of the specific name of an obsolete migrant student tracking database.

In addition, minor technical edits and changes in word usage have been made, and the section title has been changed for clarification.

The adopted amendment has no procedural or reporting implications. The adopted amendment has no locally maintained paperwork requirements.

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 July 27, 2012, and ended August 27, 2012. No public comments were received.

The amendment is adopted under the TEC, §42.005(c), which requires the commissioner of education to adjust the average daily attendance of school districts with a significant percentage of migrant students.

The amendment implements the TEC, §42.005(c).

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 September 20, 2012.

TRD-201204969
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: October 10, 2012
Proposal publication date: July 27, 2012
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER B. PROFESSIONAL STANDARDS

22 TAC §501.61

The Texas State Board of Public Accountancy adopts an amendment to §501.61, concerning Accounting Principles, without changes to the proposed text as published in the August 3, 2012, issue of the *Texas Register* (37 TexReg 5702) and will not be republished.

The amendment will add the phrase "whether or not" to clarify that the rule applies to all persons providing accounting services in Texas, including those persons providing services under the practice privilege.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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 September 20, 2012.

TRD-201204970
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: October 10, 2012
Proposal publication date: August 3, 2012
For further information, please call: (512) 305-7842

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CHAPTER 511. ELIGIBILITY

SUBCHAPTER C. EDUCATIONAL REQUIREMENTS

22 TAC §511.51

The Texas State Board of Public Accountancy adopts an amendment to §511.51, concerning Educational Definitions, without changes to the proposed text as published in the August 3, 2012, issue of the *Texas Register* (37 TexReg 5703) and will not be republished.

The amendment will provide the definitions applicable to the accreditation standards required by the Board to sit for the CPA exam including the new definitions of extension and correspondence schools and official transcript.

The Board received one letter of comment which was in support of the rule revision as proposed.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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 September 20, 2012.

TRD-201204971
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: October 10, 2012
Proposal publication date: August 3, 2012
For further information, please call: (512) 305-7842

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22 TAC §511.52

The Texas State Board of Public Accountancy adopts an amendment to §511.52, concerning Recognized Institutions of Higher Education, without changes to the proposed text as published in the August 3, 2012, issue of the *Texas Register* (37 TexReg 5704) and will not be republished.

The amendment will accept courses taken at schools recognized by the Council of Higher Education Accreditation that have a business school accredited by the Association to Advance Collegiate Schools of Business and the Accreditation Council for Business Schools and Programs for the purpose of sitting for the CPA exam.

The Board received one letter of comment which was in support of the rule revision as proposed.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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 September 20, 2012.

TRD-201204972
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: October 10, 2012
Proposal publication date: August 3, 2012
For further information, please call: (512) 305-7842

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22 TAC §511.57

The Texas State Board of Public Accountancy adopts an amendment to §511.57, concerning Qualified Accounting Courses, without changes to the proposed text as published in the August 3, 2012, issue of the *Texas Register* (37 TexReg 5706) and will not be republished.

The amendment recognizes non-traditionally delivered courses that, in fact, have equivalent learning outcomes to an equivalent, traditionally delivered course and permits self-paced and accelerated courses for the purpose of sitting for the CPA exam.

The Board received one letter of comment which was in support of the rule revision as proposed.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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 September 20, 2012.

TRD-201204973
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: October 10, 2012
Proposal publication date: August 3, 2012
For further information, please call: (512) 305-7842

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CHAPTER 512. CERTIFICATION BY RECIPROCITY

22 TAC §512.2

The Texas State Board of Public Accountancy adopts an amendment to §512.2, concerning NASBA Verified Substantially Equivalent Jurisdictions, without changes to the proposed text as published in the August 3, 2012, issue of the *Texas Register* (37 TexReg 5708) and will not be republished.

The amendment will replace the term "individual" with "applicant", replace terms with acronyms that have been defined in §501.55, and restructure the rule to make it easier to understand.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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 September 20, 2012.

TRD-201204974
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: October 10, 2012
Proposal publication date: August 3, 2012
For further information, please call: (512) 305-7842

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CHAPTER 515. LICENSES

22 TAC §515.5

The Texas State Board of Public Accountancy adopts an amendment to §515.5, concerning Reinstatement of a Certificate or License in the Absence of a Violation of the Board's Rules of Professional Conduct, without changes to the proposed text as published in the August 3, 2012, issue of the *Texas Register* (37 TexReg 5709) and will not be republished.

The amendment will clarify the terms by which an individual may request to reinstate a certificate or license and adds a reference to the Act.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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 September 20, 2012.

TRD-201204975
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: October 10, 2012
Proposal publication date: August 3, 2012
For further information, please call: (512) 305-7842

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CHAPTER 521. FEE SCHEDULE

22 TAC §521.1

The Texas State Board of Public Accountancy adopts an amendment to §521.1, concerning Individual License Fees, without changes to the proposed text as published in the August 3, 2012, issue of the *Texas Register* (37 TexReg 5710) and will not be republished.

The amendment will effect the Executive Committee's proposal that the annual individual license fee be increased from $30.00 to $41.00 in order accommodate the agency's budgetary needs beginning this next fiscal year.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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 September 20, 2012.

TRD-201204976
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: October 10, 2012
Proposal publication date: August 3, 2012
For further information, please call: (512) 305-7842

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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING AND ENFORCEMENT RULES

The Texas Board of Professional Geoscientists (Board) adopts amendments to §§851.104, 851.152, and 851.156, concerning the licensure and regulation of Professional Geoscientists. They are adopted without changes to the proposed text. The amendments were published in the June 22, 2012, issue of the *Texas Register* (37 TexReg 4527).

Adopted amendment to §851.104 strikes the words "or agency" to provide clarification to the rule. Adopted amendment to §851.152 clarifies application requirements for Geoscience Firms. The amendment adds the words "sole proprietor" to further clarify its inclusion when referring to "business entity"; it adds the words "non-exempt" and "public" when referring to the regulated practice of geoscience in Texas; it replaces the word "supervision" with the words "responsible charge"; it adds the words "Texas Office of the Secretary of State" when referring to the filing of "assumed name certificates"; it clarifies subsection (i) by removing the words "preliminary documents" and adding wording to specify that Geoscience Firms are responsible for ensuring that documents released by their firm are sealed in accordance with TBPG Rule §851.156. Adopted amendment to §851.156 clarifies the requirements regarding usage of a Professional Geoscientist's seal. It replaces the word "original" with the word "separable"; adds the words "maps, drawings, cross sections or other figures representing geoscientific work"; and removes the words "plans or drawings" and "if the plans or drawings are intended to be or are removed from the report".

The public benefit anticipated as a result of these amendments is that Professional Geoscientist Seal usage and other licensing requirements will be clarified. Additionally, the Board will be able to more effectively regulate the public practice of geoscience in Texas, which will protect and promote public health, safety, and welfare.

No comments from the public were received regarding these amendments.

SUBCHAPTER C. CODE OF PROFESSIONAL CONDUCT

22 TAC §851.104

The adopted amendments are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); by Occupations Code §1002.153 which provides that the Board by rule shall adopt a code of professional conduct that is binding on all license holders; by Occupations Code

§1002.154 which provides that Board shall enforce the Act; and by Occupations Code §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation.

The adopted amendments affect Occupations Code, Chapter 1002.

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 September 18, 2012.

TRD-201204913
Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Effective date: November 1, 2012
Proposal publication date: June 22, 2012
For further information, please call: (512) 936-4405

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SUBCHAPTER D. COMPLIANCE AND ENFORCEMENT

22 TAC §851.152, §851.156

The adopted amendments are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); by Occupations Code §1002.153 which provides that the Board by rule shall adopt a code of professional conduct that is binding on all license holders; by Occupations Code §1002.154 which provides that Board shall enforce the Act; and by Occupations Code §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation.

The adopted amendments affect Occupations Code, Chapter 1002.

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 September 18, 2012.

TRD-201204914
Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Effective date: November 1, 2012
Proposal publication date: June 22, 2012
For further information, please call: (512) 936-4405

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 73. LABORATORIES

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §73.31 and §73.41, the repeal of §§73.51 and 73.53 - 73.55, and new §§73.51, 73.54 and 73.55, concerning fees for laboratory services and fee schedules for clinical testing, newborn screening, and chemical analysis. The amendment to §73.41 is adopted with changes to the proposed text as published in the April 6, 2012, issue of the *Texas Register* (37 TexReg 2318). The amendment to §73.31, the repeal of §§73.51 and 73.53 - 73.55, and new §§73.51, 73.54, and 73.55 are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

Texas Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Texas Government Code, Chapter 2001 (Administrative Procedure Act). Sections 73.31, 73.41, 73.51, 73.54, and 73.55 were reviewed and the department determined that reasons for adopting the sections continue to exist because rules on this subject are needed, although amendments were needed, detailed as follows. This rulemaking package updates a variety of rules related to the department's Laboratory Services Section (LSS) which includes the Austin Laboratory, the Women's Health Laboratory, and the South Texas Laboratory. Section 73.53 was also reviewed and the department determined that the repeal of §73.53 was necessary because the department no longer offers training of laboratorians on a fee-for-service basis. Wholesale changes to §§73.51, 73.54, and 73.55 were necessary because the fee schedules needed to be updated to incorporate additional laboratory tests, update test method references and fees, and to delete laboratory tests that are no longer performed by the department. These extensive substantive changes are why the three rule sections were repealed and reproposed. All of these adopted revisions comply with Texas Health and Safety Code, §§12.031, 12.032, and 12.0122 that allow the department to charge fees to a person who receives public health services from the department (which explicitly includes laboratory services), in an amount up to the cost to the department for providing that service. Since the last rules revision in 2007, the department has experienced a variety of increased costs associated with providing laboratory services, including technology for laboratory testing, supplies and test kits, shipping of specimens and, additionally, the LSS's ancillary services required to support testing and meet regulatory requirements (e.g., federal Clinical Laboratory Improvement Amendments (CLIA) certification).

Senate Bill (SB) 80, 82nd Legislature, Regular Session, 2011, requires that the department develop, document and implement procedures for setting fees for laboratory services, including updating and implementing a cost allocation methodology to analyze the department's costs and update the fee schedule as needed, all in accordance with Texas Health and Safety Code, §12.032(c). The LSS has developed and documented a cost accounting methodology and determined the costs for each test performed. The methodology for developing cost per test included calculating the specific costs of performing the test or analysis, as well as factoring in the administrative and overhead costs necessary to operate the state laboratories in question. It is these figures together which determined the revised fee amount for each of the tests in these fee schedules. In order to determine the specific cost for each test or analysis, the LSS performed a

work load unit study for every procedure or test offered by the laboratory. A work load unit was defined as a measurement of staff time, consumables and equipment required to perform each procedure from the time the sample enters the laboratory until the time the results are reported. More than 3,000 procedures performed by the department's laboratory were included in this analysis. These procedures translate to approximately 700 different tests listed in these adopted rule amendments. The figures plugged into the methodology were reviewed by an independent cost accountant and the department's Chief Financial Officer prior to the fee amounts being proposed in this rulemaking action.

SECTION-BY-SECTION SUMMARY

Section 73.31(a) was amended to improve readability and more clearly state that specimens submitted must meet the requirements of the DSHS Laboratory Manual of Reference Services (manual) in order to be accepted by the department for testing. An amendment to the subsection has also been adopted which states that the department's manual is posted on the LSS website. The amendment to subsection (b) reflects the actual practice of the department to reject specimens that do not meet the requirements outlined in the manual referenced previously. LSS is certified to perform testing on humans (e.g., specimens taken from humans) under the federal Centers for Medicare and Medicaid Services' (CLIA) requirements. To maintain this certification, the LSS must meet certain CLIA operational standards. Similarly, for testing that the LSS performs on other types of samples, there are other operational standards which must be met: (e.g., Environmental Protection Agency (EPA) and The National Environmental Laboratory Accreditation Conference (NELAC) Institute (TNI) standards for analysis of environmental samples; and the Food and Drug Administration's standards for the analysis of food, shellfish and milk). The acceptance criteria in the department's manual are written to be consistent with the operational standards discussed previously.

Section 73.41(a) was amended to explain that fees for some services are established by rule while others (i.e., services not listed in the rule fee schedules) may be established by contract between the department and the submitter. These changes better reflect the underlying statutory authority for services sold under this section, which is found at Texas Health and Safety Code, §§12.0122, 12.031, and 12.032, to clarify associated processes related to the logistics of such sales, and also to improve the clarity and readability of the rule language. This paragraph now includes language that was not included in the proposed rule. This language clarifies that tests listed as being performed by a particular department laboratory may be performed at any other department laboratory at the department's discretion.

Section §73.41(b) was amended by updating the definition of laboratory services, deleting the definition of special projects and reformatting and renumbering the section accordingly. These changes better match the underlying statutory authority, provide greater clarity and improve readability. The definition of "special projects" was deleted because it is unnecessary and also to avoid confusion with activities the department may conduct under separate statutory authority.

Section 73.41(c) was amended by including language to more clearly state that charges for laboratory services were calculated to recover the department's costs associated with such activities and that the fees and any contract executed for the sale of laboratory services reflect the department's costs.

Some language in §73.41(e) was deleted because it was redundant and unnecessary, given the reorganization of this section. Further, the amended language moved matters relating to the logistics of charges for the sale of laboratory services (e.g., payment; obtaining copies of fee schedules) to this subsection and to new subsection (f) from its previous location in §73.51, to reflect the reorganization of both sections. Changes to this language were made to avoid redundancy, given the reorganization of both rule sections and the wording of the underlying statutes, and to improve clarity and readability.

Amendments to §73.51 reflect the reorganization of §73.41 and §73.51. The changes to the title of this section reflect the revised contents of the section, and incorporates wording previously found in §73.41, subsection (b), where the Previous language was deleted. Formatting throughout this section has been updated to accomplish the reorganization.

Section 73.51(a) was deleted as redundant and unnecessary, given the reorganization of this section and of §73.41.

Section 73.51(b) was deleted because of the reorganization of the section and because the wording "unless the context clearly indicates otherwise" created an ambiguity to the definitions. Previous §73.51(b)(1) was renumbered as §73.51(a). Previous §73.51(b)(2) was renumbered as §73.51(b) and amended by deleting the names of specific chlorinated pesticides and poly-chlorinated biphenyls (PCBs) in drinking water. These chemicals were divided into two groups, "regulated and non-regulated" in new §73.51(b)(1) and (2), improving clarity and readability. Previous §73.51(b)(3) was deleted because this analysis was performed only for a special project that has been completed since the last rulemaking process.

Reorganized §73.51(3) now contains the definition of gamma emitting isotopes, with revisions, previously listed at §73.51(b)(4). This definition identifies isotopes within a specific range of electron energies rather than listing the individual isotopes, which improves clarity, user-friendliness and readability. Previous §73.51(b)(5) was renumbered as §73.51(d). Previous §73.51(b)(6) was renumbered as §73.51(e). Previous §73.51(b)(7) was renumbered as §73.51(f). Previous §73.51(b)(8) was deleted because this analysis was performed only for a special project that has been completed since the last rulemaking process. Previous §73.51(c) was deleted as redundant and unnecessary, given the proposed reorganization of this section and of §73.41, and also based on the wording of the underlying enabling statutory provisions. Previous §73.51(d), (e), and (f) were deleted, because language regarding these subjects was moved to rule §73.41 as part of the proposed reorganization of both sections. Previous §73.51(g) and (h) were deleted given the reorganization of this section and of §73.41 and also because the language was merely duplicative of the underlying statutory language.

Previous §73.51(b)(9) was renumbered as §73.51(g). Previous §73.51(b)(9)(A) was renumbered as §73.51(g)(1) and includes minor edits to the names of chemical compounds which will be identified in air samples. Organic compounds typically have several correct names. These changes were made to ensure that the same chemical names are used consistently for all volatile organic compound test methods performed by the LSS. Previous §73.51(b)(9)(B) was renumbered as §73.51(g)(2). Previous §73.51(b)(9)(B)(i) and (ii) were renumbered as §73.51(g)(2)(A) and (B) respectively. These subparagraphs were also amended by updating the list of compounds specified under each definition, in order to reflect changes to EPA regulations pursuant

to the federal Safe Drinking Water Act that have been introduced since the last rules revision. Previous §73.51(b)(9)(B)(iii) was deleted because this analysis was performed only for a special project that has been completed since the last rulemaking process. Previous §73.51(b)(9)(B)(iv) is renumbered as §73.51(g)(2)(C).

New §73.51(h) - (n) adds definitions for chemical analyses being added into the rules. New laboratory tests or changes to test methods have been added for a variety of reasons including changes in state and federal regulatory requirements, and the availability of new technology and/or instrumentation which makes older methods obsolete.

Previous §73.54 was repealed and new language is adopted for §73.54. This language reflects a reorganization of the previous language by listing tests performed at each of the three department laboratories separately, and by listing the tests for each laboratory to mirror the organization of the fee schedule in the department's manual. These changes were made to improve clarity, readability and user-friendliness of the rule. Throughout this section certain tests were added or deleted for a variety of reasons, including the availability of new technology and/or instrumentation which makes older methods obsolete. Tests were added or deleted in §73.54(a)(2) as the result of the cost analysis process. For example, there may have been a single fee for the analysis of similar bacteria. However, when costs were calculated for each different bacterium commonly tested it was determined that the cost for the identification varied with the organism. Therefore, a price for the identification of each bacterium is now listed in the adopted language and the single, undifferentiated prices for the analysis were deleted. Fees in this section were calculated, as part of these amendments, to recover the department's costs associated with providing these laboratory services, per Texas Health and Safety Code, §12.0032 (see full discussion herein).

Previous §73.55 was amended by deleting the opening statement, "Fees for chemical analyses and physical testing shall not exceed the following amounts." This deletion was necessary to reflect the fee calculation methodology in SB 80 (as discussed herein). Throughout this section, some laboratory tests were deleted and new laboratory tests or new test methods and their accompanying fees have been inserted. The majority of the chemical analyses performed by the LSS are to determine compliance with federal and state Safe Drinking Water regulations. Most of the methods deleted were non-drinking water methods that have not been requested since the last rule making process in 2007. New laboratory tests or changes to test methods have been added for a variety of reasons, including changes in state or federal regulatory requirements, and the availability of new technology and/or instrumentation which makes older methods obsolete. The adopted fee amounts are consistent with the SB 80 calculation methodology, and with underlying statutory authority, all as discussed herein. Section 73.55(1) was amended to update name of the test from "analysis of organic compounds in air" to "analysis of volatile organic compounds in air" which is consistent with nomenclature used in other laboratory methods. This language replaces previous §73.55(1) and subparagraphs (A) - (C), making that old language redundant.

Previous §73.55(2)(A)(i)(I) was amended by updating the reference to the edition of Standard Methods used for this analysis. Previous §73.55(2)(A)(i)(III) and (IV) was deleted because these contaminants are determined as part of §73.55(2)(A)(i)(I) therefore these subsections were redundant. Previous §73.55(2)(A)(i)(V) - (XII) were renumbered as (III) - (X) respectively. Previous subclauses (VII), (X), (XI) were amended by updating the reference to the edition of Standard Methods used for these analyses. Section 73.55(2)(A)(i)(XI) adds a new method for the analysis of chlorite. Previous §73.55(2)(A)(i)(XIII) - (XXII) were renumbered as (XII) - (XXI) respectively. In addition, previous subclauses (XIII), (XVI) were amended by updating the reference to the edition of Standard Methods used for these analyses. Previous (XXI) was amended by changing the method used for this analysis to reflect current LSS practice. Previous §73.55(2)(A)(i)(XV) was amended by changing the name of the analysis from "conductivity" to "specific conductance" because "specific conductance" is used by The NELAC Institute on the LSS certificate of accreditation. Previous §73.55(2)(A)(i)(XXIII) was deleted because this testing was performed for the EPA Unregulated Contaminate Monitoring Rule. The monitoring period for this rule ended in 2010 so this testing is no longer required by the EPA. Previous §73.55(2)(A)(i)(XXIV), (XXV), and (XXVI) were amended because the methods used to perform these analyses have changed since the last rulemaking process. Previous §73.55(2)(A)(i)(XXVII) was deleted because the department no longer performs this analysis. This is a non-drinking water analysis that has not been requested since the last rulemaking process. Previous §73.55(2)(A)(i)(XXVIII) as amended by updating the reference to the edition of Standard Methods used for this analysis. Previous §73.55(2)(A)(i)(XXIX) was deleted because the department no longer receives requests for this analysis. Previous §73.55(2)(A)(i)(XXX) and (XXXI) were renumbered as (XXVI) and (XXVII) respectively. Previous §73.55(2)(A)(ii) was amended by updating the EPA method and the reference to the edition of Standard Methods used for this analysis.

Previous §73.55(2)(B)(iii)(III) was deleted because this analysis was performed specifically for the Texas Commission on Environmental Quality (TCEQ) lead copper program and TCEQ no longer sends the LSS samples for the lead copper analysis. Previous §73.55(2)(B)(iii)(IV) and (V) were renumbered as (III) and (IV) respectively. Section 73.55(2)(B)(iii)(IV) was amended by changing the name of the analysis to match the name in Standard Methods.

Previous §73.55(2)(C)(i) and (iii) were amended to include the methods now used to perform these analyses. Subsection (i) was also amended to spell out the abbreviation of "PCB." Previous §73.55(2)(C)(vii) was amended by deleting "and dalapon" because identification of this compound is no longer required by TCEQ and this test was in the department's fee schedule because of previous requests for the analysis of this compound by TCEQ. Previous §73.55(2)(C)(viii) was deleted because this test is not required for drinking water compliance and has not been requested since the last rulemaking process in 2007. Previous §73.55(2)(C)(ix) was renumbered as (viii) and was amended by replacing "methylcarbamoyloximes and n-methylcarbamates (carbamate) pesticides" with "carbamates insecticides" to more correctly identify the analysis and by updating the method used to perform this analysis. The spelling of the word "insecticides" was also corrected from the proposed text. Previous §73.55(2)(C)(x) was deleted because it has been replaced by the method described in the amendment to previous §73.55(2)(C)(ix). Previous §73.55(2)(C)(xi) was renumbered as (ix) and amended by removing "screening by perchlorination" from the name of the analysis because it is redundant. A new §73.55(2)(C)(x) was added to list a new

method for the analysis of synthetic organic contaminants group 5. Previous §73.55(2)(C)(xi) was amended by adding the instrument used for the analysis. Previous §73.55(2)(C)(xii) was amended to add an additional method for this analysis. Previous §73.55(2)(C)(xiv) was deleted because it is the same test described in §73.55(2)(C)(xii) and was therefore redundant. Previous §73.55(2)(C)(xv) was renumbered as (xiii).

Previous §73.55(2)(D)(iv) and (v) were amended to update the method used for this analysis. Previous §73.55(2)(D)(vii) was deleted because thorium is not listed in the current drinking water testing requirements. Previous §73.55(2)(D)(viii) was renumbered as (vii). Previous §73.55(2)(D)(ix) was renumbered as (viii) and amended to update the method used for this analysis. Previous §73.55(2)(D)(x) was renumbered as (ix).

Previous §73.55(3)(A)(i) was amended by providing the full name of the organization in addition to the acronym used in the previous clause. New §73.55(3)(A)(ii), (iii), and (iv) adds the analysis of benzoate, BRIX and cereal respectively. Previous §73.55(3)(A)(ii) was renumbered as (v). Previous §73.55(3)(A)(iii) was renumbered as (vi) and amended by updating the method used for this analysis. Previous §73.55(3)(A)(iv) and (v) were renumbered as (vii) and (viii) respectively. New §73.55(3)(A)(ix) adds a new method for the detection of food coloring. Previous §73.55(3)(A)(vi), (vii) and (viii) were renumbered as (x), (xi) and (xii) respectively. Previous §73.55(3)(A)(ix) was renumbered as (xiii) and amended by updating the method used to perform this analysis. New §73.55(3)(A)(xiv) adds a new method for phosphate determination. Previous §73.55(3)(A)(x) and (xi) were renumbered as (xv) and (xvi) respectively and amended by changing the names of the methods used to perform these analyses to accurately reflect the names used by the United States Department of Agriculture. Previous §73.55(3)(A)(xii) was renumbered as (xvii). New §73.55(3)(A)(xviii) and (xix) adds new methods for the analysis of soya and sulfite, respectively. Previous §73.55(3)(A)(xiii) was renumbered as (xx).

Previous §73.55(3)(B) was amended by eliminating analytical techniques that have become obsolete and are no longer used by the department, and by explaining that each remaining analytical technique requires a separate sample preparation with a separate fee for each preparation. Previous §73.55(3)(B)(ii)(I) and (II) was amended by updating the methods used for the analyses. Previous §73.55(3)(B)(ii)(III) was deleted because the techniques and methods listed are no longer performed by the department. Previous §73.55(3)(B)(ii)(IV) was renumbered as (III).

Previous §73.55(4)(A) was amended to explain that each analytical technique used for the analysis of a metal in soil and solids requires a separate sample preparation and each preparation has a separate fee. It further explains that the determination of leachable metals in solid samples requires a solid leachate sample preparation, as well as analysis of the leachate using non-potable water analytical methods, and the cost of the analysis will be the solid leachate sample preparation fee plus the required non-potable water preparation fee(s) and the per-element test fee(s). New §73.55(4)(A)(ii) adds a test/fee for a solid leachate for metals analysis. Previous §73.55(4)(A)(ii) was renumbered as (iii). Previous §73.55(4)(A)(ii)(I) - (V) were deleted because these analytical techniques are obsolete and no longer used by the department. Previous §73.55(4)(A)(ii)(VI) was renumbered as (I) and amended by updating the method used to perform this analysis. Previous §73.55(4)(A)(ii)(VII) was deleted because the term "non-routine" is ambiguous. The analysis of a single metal using specific analytical instrumentation was listed in previous §73.55(4)(A)(ii)(IX) and (XI). Previous §73.55(4)(A)(ii) (VIII) was deleted because the analysis for silver, is the same as any other single metal analysis described in previous §73.55(4)(A)(ii)(IX) and (XI). Previous §73.55(4)(A)(ii)(IX) was renumbered as (II) and amended by updating the method used to perform this analysis. Previous §73.55(4)(A)(ii)(X) was deleted because the technology is obsolete and the department no longer performs these methods. Previous §73.55(4)(A)(ii)(XI) was renumbered as (III) and amended by updating the technology and method used to perform this analysis.

Previous §73.55(4)(B) was amended by adding details on when a sample preparation fee applies, and to state that the total cost of an analysis will include the cost of sample preparation (if applicable) and the analytical method fee. Some minor revisions were made throughout subparagraph (B) to improve readability, achieve consistency of format, and to capitalize the names of the substances being tested.

Previous §73.55(4)(B)(i) was amended by changing "alpha spectrometry preparation" to "sample preparation" because the procedure is not specific to alpha spectrometry, and by updating the method used for this preparation. New §73.55(4)(B)(ii) adds the analysis of americium isotopes. Previous §73.55(4)(B)(ii) - (xi) were renumbered as (iii) - (xii), respectively, and amended by updating the method used for each respective analysis.

Previous §73.55(5) was amended by deleting the phrase "organic compounds and/or" because the laboratory no longer performs analysis of organic compounds in fish. These analyses were performed for a specific project which has been completed since the last rule making process. Previous §73.55(5)(B)(ii)(I) and (II) were amended by updating the methods used to perform these analyses. Previous §73.55(5)(B)(ii)(III) was deleted because the technology is obsolete and the department no longer performs these methods. Previous §73.55(5)(B)(ii)(IV) was renumbered as (III) and amended to update the method used by the laboratory. Previous §73.55(5)(B)(iii) was deleted because this analysis was for a particular project which has been completed since the last rule making process.

Previous §73.55(5)(C) and clauses (i) - (v) were deleted because the department no longer performs organic analyses on tissue and vegetation samples. Previous §73.55(5)(D) was renumbered as (C) and amended by explaining when a sample preparation fee applies, and also that the total cost of an analysis will include the cost of sample preparation (if applicable) and the analytical method fees. Previous §73.55(5)(C)(i) was amended by changing "alpha spectrometry preparation" to "sample preparation" because the procedure is not specific to alpha spectrometry, and by updating the method used for this preparation. New §73.55(5)(C)(ii) adds the analysis of americium isotopes. Previous §73.55(5)(D)(ii) - (vi) were renumbered as (iii) - (vii), respectively, and amended by updating the method used for each analysis. New §73.55(5)(C)(viii) adds the analysis for Radium-228 in tissue and vegetation. Previous §73.55(5)(D)(vii) - (x) were renumbered as (ix) - (xii), respectively. In addition, previous §73.55(5)(D)(viii) - (x) were amended by updating the methods used for these analyses.

Previous §73.55(6) was amended by changing the description of samples in this subsection from "water and wastewater" to "non-potable" water to match the language in the fields of accreditation offered by The NELAC Institute. Previous §73.55(6)(A)(i) and (ii) was amended by updating the methods used for these analyses.

Previous §73.55(6)(B) was amended by changing the description of samples in this subsection from water "and/or wastewater" samples to "non-potable" water samples to match the language in the fields of accreditation offered by The NELAC Institute, and by adding a sentence clarifying that a sample that requires analysis by two different techniques will require two sample preparations. This amendment also clarifies that the total cost of the analysis will include sample preparation fee(s) plus a per element fee of each metal analyzed. Previous §73.55(6)(B)(ii)(II) was deleted because silver is now analyzed using the "single metal, ICP" method that is described in previous §73.55(6)(B)(ii)(III). Previous §73.55(6)(B)(ii)(III) was renumbered as (II) and amended by updating the method used for the analysis. Previous §73.55(6)(B)(ii)(IV) was deleted because these techniques and methods are obsolete and no longer performed by the department. Previous §73.55(6)(B)(ii)(V) was renumbered as (III) and amended by updating the method used for this analysis.

Previous §73.55(6)(C) was reformatted to improve readability. The first word in each of the clauses (i) - (xi) was capitalized as part of the reformatting. In addition, subparagraph (C) was amended by explaining when a sample preparation fee applies that the total cost of an analysis will include the cost of sample preparation (if applicable) and the analytical method fee. Previous §73.55(6)(C)(i) was amended by changing "alpha spectrometry preparation" to "sample preparation" because the procedure is not specific to alpha spectrometry, and by updating the method used for this preparation. New §73.55(6)(C)(ii) adds the analysis of americium isotopes. New §73.55(6)(C)(iii) has been added as part of the reformatting of the section. The analysis of gamma emitting isotopes has been moved to this location in the text and previous §73.55(6)(C)(iv) was deleted to improve readability. Previous §73.55(6)(C)(ii) was renumbered as (iv). Previous §73.55(6)(C)(iii) was renumbered as (v). Previous §73.55(6)(C)(v), (vi) and (vii) were renumbered as (vi), (vii) and (xiii), respectively. These clauses were amended by updating the methods used to perform these analyses. Previous §73.55(6)(C)(viii) was renumbered as (ix). Previous §73.55(6)(C)(ix) was renumbered as (x) and amended by updating the method used for this analysis. Previous §73.55(6)(C)(x) was renumbered as (xi). Previous §73.55(6)(C)(xi) was renumbered as (xii) and amended by updating the method used for this analysis.

Previous §73.55(7) was amended by replacing previous text "wipes/filters/cartridges" with the phrase "wipe, filter or cartridge" to provide clarity and improve readability. Previous §73.55(7)(A), lead analysis by FLAA, was deleted because the technique listed for this analysis is obsolete and no longer performed by the department. However, the analysis of lead in a solid sample using a different technology is listed in §73.55(4)(A)(iii)(III). Previous §73.55(7)(B) was renumbered as (A) and amended by adding an explanation of when a sample preparation fee applies and how the total cost of the analysis is calculated. The addition of this statement required that the section be reformatted to improve readability. Previous §73.55(7)(B)(i) was amended by changing "alpha spectrometry preparation" to "sample preparation" because the procedure is not specific to alpha spectrometry, and by updating the method used for this preparation. New §73.55(7)(B)(ii) adds the analysis of americium isotopes. Previous §73.55(7)(B)(ii) was deleted because this analysis is not required for wipe, filter or cartridge samples. New §73.55(7)(B)(iii) adds the analysis of gamma emitting isotopes. Previous §73.55(7)(B)(iii) and (iv) were renumbered as (iv) and (v), respectively. Previous §73.55(7)(B)(vi) and (vii) were amended by capitalizing the first word of each clause as part of the new format and updating the method used for these analyses. New §73.55(7)(B)(viii) adds the analysis of Radium-228. Previous §73.55(7)(B)(viii) - (xi) were renumbered as (x) - (xii), respectively. Additionally, these clauses were amended by capitalizing the first words of each clause as part of the new format and by updating the methods used for these analyses.

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 commenter was from the Lower Colorado River Authority (LCRA), on behalf of its Environmental Laboratory Services (ELS), and submitted the comments. The commenter was not against the rules in their entirety; however, the commenter suggested recommendations for change as discussed in the summary of comments. The commenter was not in favor of fee changes in the rules for analytical tests associated with the TCEQ Drinking Water Quality.

Comment: Concerning §73.55(2), the LCRA states that historically, both the LCRA ELS and the LSS have charged public water systems (PWSs) the same "reasonable" fees for samples collected by the TCEQ under the Drinking Water Quality Program.

Response: The department's laboratory fees are derived pursuant to statutory requirements, as opposed to any consideration of coordinating the fee amounts with the LCRA to meet an unspecified "reasonable" standard. The statutory requirements pertaining to setting the department's laboratory fees make no mention of the LCRA or any other laboratory. The commission is now adopting rules which reflect fees calculated to recoup its costs, on a test-by-test basis, as described in detail elsewhere in this preamble. No change was made as a result of this comment.

Comment: Concerning §73.55(2), the LCRA stated that "although some chemical analysis fees in the proposed rule are significantly increased, many have decreased as much as 77% with an overall decrease in fees of 35%."

Response: The LCRA did not identify the individual tests they reviewed to make these assumptions; therefore the department is unable to specifically address the comment. The department can say that there are exactly 24 tests mandated by the TCEQ Drinking Water Quality Program which the LSS performs on their behalf. Of these 24 tests, four now increase in price when compared to the previous fee schedule and 20 decrease in price. Only one test decreased by 77%--specifically the test for Haloacetic acids, EPA Method 522.2. The actual overall decrease for these 24 tests is 26%. No PWSs provided negative feedback regarding any portion of these rule amendments.

Since the last rules revision in 2007, the department's laboratory has experienced a number of changes that have affected fees, including changes in costs for supplies, test kits, shipping, petroleum-based products (such as gloves), as well as reduced legislative appropriations. Test volumes, as well as technological advances in testing methods, are additional factors that impact costing. Texas Health and Safety Code, §12.032(c) provides for fees for public health services that recover the cost to the department to provide the service. Additionally, SB 80, 82nd Legislature, Regular Session, 2011 required the department to develop, document and implement procedures for setting fees

for laboratory services, including updating and implementing a cost allocations methodology to analyze the department's costs and update the fee schedule as needed, all in accordance with Texas Health and Safety Code, §12.032(c). The cost allocation methodology, developed by a contract Certified Public Accountant that was hired by the department specifically for this purpose, takes into account all costs associated with performing each laboratory testing service offered by the department's LSS. Any pricing comparisons between the new fees now being adopted and the 2007 fees must take into account all the factors described previously. No change was made as a result of this comment.

Comment: Concerning §73.55(2), the LCRA alleges that "the proposed rule provides conflicting statements which question the application of the cost accounting methodology utilized to determine chemical analysis fees."

Response: The department disagrees that any conflicting statements have been made. The statements in the proposal preamble regarding increased costs and funding reductions are true, and were provided as background information. The preamble went on to clearly state that the specific fees for each test were calculated to reflect the actual cost for the department to provide that test, using a consistent formula to capture both the direct costs associated with that test and the indirect costs associated with providing an appropriate laboratory in which to perform the test in question. No change was made as a result of this comment.

Comment: Concerning §73.55(2), the LCRA stated that "in a February 23, 2012, memo to the department's State Health Services Council regarding the proposed rule, the department's LSS indicated the cost allocation methodology is based on 2010 sample volumes" and "in the case of perchlorate by EPA Method 314 under §73.55(2)(A)(i)(XXI) the fee increase of 1733% from $55.00 to $1008.60 is based on two samples." The LCRA continues to state that "it is unlikely that 'reasonable' fees would be based on only two samples."

Response: The methodology for developing cost per test included calculating the specific cost of performing the test or analysis and the administrative and overhead cost necessary to operate the LSS. It is these figures together which determined the revised fee amount for each of the tests in the fee schedule. In order to determine the specific cost for each test the LSS performed a work load unit study for every procedure or test offered. A work load unit was defined as a measurement of staff time, consumables and equipment required to perform each procedure on an individual specimen or sample from the time the sample enters the laboratory until test results are reported. The final fee schedule now being adopted also reflects, as part of the formula used to derive it, the number of specimens tested for a particular procedure or test in 2010. This year was used because it was the last full year of data available to the department for use in its calculations for this rule making process, which commenced in 2011. No change was made as a result of this comment.

Comment: Concerning §73.55(2), the LCRA stated that "the proposed fees are in a few cases above the fair market price for the analysis of drinking water samples in the environmental testing industry (i.e., cyanide, bromide, chlorite, total organic carbon, herbicides, etc.)."

Response: The statutory provisions governing the setting of the department's laboratory fees do not include the consideration of what other labs charge for the same services. The new department fee schedule was calculated based on costs to the department associated with each test, along with the indirect costs for having laboratories in which to conduct the test. In addition, the department acknowledged in its proposal preamble that there could be a negative financial impact to PWSs that meet the definition of a "small business" or "micro-business." Given that department laboratory fees have not gone up since 2007, the agency believes that PWSs will understand that periodically the fee amounts have to be adjusted and that those adjustments will raise the cost of some testing. This supposition is borne out by the fact that no negative comments were received by the department regarding this rulemaking from any PWSs. No change was made as a result of this comment.

Comment: Concerning §73.55(2), the LCRA states that "the proposed rule establishes fees which are in many cases below a fair market price for the analysis of drinking water samples in the environmental testing industry. For example, the department's LSS currently offers Haloacetic Acids for a fee of $230.00, the proposed fee is $53.72 (see proposed rule §73.55(2)(C)(vii)) and the average market fee is $190.00 based on laboratories offering drinking water analysis. As other laboratories perform these same services under the TCEQ Drinking Water Quality Program, any requirement to match the department's LSS fees may have a detrimental effect in the market."

Response: As stated previously, the statutory provisions which control how the department's laboratory fees are to be calculated do not include any factor to reflect what any other laboratories charge for the same tests. Nor do those statutory provisions mention consideration of how the fees set may impact other laboratories. Additionally, the department is not aware of any requirement for other laboratories that perform these same services under the TCEQ Drinking Water Quality Program to match the fee amounts that the department charges at any given time. But even if such a requirement existed, it would not impact how the Texas Health and Safety Code speaks to the department's LLS fee calculations. No change was made as a result of this comment.

Comment: Concerning §73.55(2), the LCRA states that the "department's LSS advertises on its website it is available to provide services within the open market. With the overall reductions in chemical testing fees, the department may force other laboratory operations out of the market place as the fees are not 'reasonable' to cover typical laboratory costs."

Response: The department does offer noncompliance testing (i.e., testing outside of that required by TCEQ Drinking Water Quality Program) at the price on our published fee schedule for analysis of drinking water (including bottled water) samples. However, the volume of this testing is very low because submitters realize that sending such samples to our laboratory is more labor-intensive and likely more costly than if they send the sample to a commercial laboratory. The department's LSS does not provide services such as sample containers, preservatives and free shipping of these items to the customer. Nor does the fee for such tests include a quality assurance summary or the opportunity for submitters to request custom formatting of test reports that are transmitted to them electronically. All of these services are commonly provided by other laboratory operations in the market place. No change was made as a result of this comment.

Comment: Concerning §73.55(2), the LCRA expressed concerns about a statement on the department's LSS website that

states it is the "Principal Texas State Drinking Water Laboratory." They are concerned that this statement may suggest that the department has an agreement or contract with TCEQ to support the program as well as authority in the program. Furthermore, the LCRA is concerned that "PWSs may assume that the department has authority over TCEQ drinking water compliance fees and dispute these fees to TCEQ on the basis that their budgetary limitations and financial status were not considered prior to the rule change."

Response: EPA requirements for State Primacy say that "The Safe Drinking Water Act (SDWA) includes a requirement that EPA establish and enforce standards (MCLs, treatment techniques, monitoring) that public drinking water systems must adhere to. States and Indian Tribes are given primary enforcement responsibility (e.g., primacy) for public PWSs in their state if they meet certain requirements." As part of the program delegation, the EPA requires that a state "have a laboratory that will serve as the State's 'principle' lab that is certified by the EPA." The department's LSS has been identified by TCEQ as the State's "principle lab" for many years. The LSS is certified by the EPA and accredited by The NELAC Institute. Nothing on the LSS website states or implies that the department has authority over the TCEQ Drinking Water Quality Program or that there is a formal agreement with TCEQ for testing required for this program. The department has no written agreement with TCEQ to perform testing for the Drinking Water Quality Program. No change was made as a result of this comment.

Comment: Concerning §73.55(2), the LCRA states that TCEQ posts laboratory testing fees for PWSs on the TCEQ website for the Texas Drinking Water Watch and that the fees on this website reflect the 2007 fees rather than the new ones now being adopted. They expressed concerns that "no mention of a proposed fee change is indicated to the PWSs utilizing this site to determine budgets. In addition, the TCEQ clearly states all compliance samples are submitted to either the LCRA ELS or the department's LSS. As such, there is a potential impact to the LCRA ELS, TCEQ and PWSs if the fees the department's LSS charges vary from the PWSs budget fees and the TCEQ posted fees."

Response: It is logical that any TCEQ website which lists laboratory fees in Texas associated with the state Drinking Water Quality Program would list, at any given time, those fees which are current. Now that the department has updated its fees through this rulemaking, the TCEQ website will presumably be updated to reflect the new department fee schedule. The fact that an outside agency has posted department LSS fees on a website, as a service to its customers, is no justification for arguing that these fees may then never deviate from those amounts. The department conducted outreach, notifying stakeholders that rules concerning fees for laboratory services were being revised and that initial stakeholder input, followed by the official 30-day comment period, would be accepted. This letter to stakeholders explained that the proposed rules implement portions of SB 80 of the 82nd Legislature, Regular Session, 2011, which requires that the department develop, document and implement procedures for setting fees using a documented methodology which would analyze the department's costs and update the laboratory fee schedule as necessary to cover the cost of providing the service. As a result, fees for some tests would be higher, some would be lower and some would stay the same in comparison to the current fee levels (last revised in 2007). The outreach letter was posted on the LSS website and sent to submitters in December 2011 and January 2012. The PWSs, LCRA, and TCEQ were included in this distribution of information. No change was made as a result of this comment.

Comment: Concerning §73.55(2), the LCRA states that "In December 2011, the LCRA entered into a Memorandum of Understanding (MOU) with the department's LSS (DSHS Contract no. 2012-040231-001) regarding the department's Continuity of Operations Plan. This MOU is for the LCRA ELS to provide backup chemical testing services of the department's LSS. At the time of the negotiated contract, the department's LSS did not disclose the proposed rule change and related fees based on a cost allocation study. In addition, the MOU states that the department's LSS will honor the LCRA ELS fees." The LCRA continues by saying that "in many cases the LCRA fees are higher than the department's proposed fees, the LCRA ELS is concerned that the department's LSS may pass the cost difference on to PWSs since absorbing costs would impact the department cost recovery by the cost allocation methodology."

Response: This comment does not properly characterize how events would take place if it were necessary to implement the MOU. The MOU states "that the LCRA shall perform analysis of drinking water, water compliance monitoring samples and non-potable water and solids as requested by the department's LSS, as provided under this agreement, in the event that the department's LSS is or becomes incapable and/or overwhelmed due to an emergency." The agreement continues to say that "the LCRA shall invoice sample submitters directly, with prices in accordance with the LCRA's fee schedule in effect at that time, and will receive payments directly from those submitters." The department will not be involved with collection of fees for testing under the MOU. No change was made as a result of this comment.

The rule text in §73.41 was revised to clarify that tests listed as being performed by a particular department laboratory may be performed at any other department laboratory at the department's discretion.

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.

25 TAC §§73.31, 73.41, 73.51, 73.54, 73.55

STATUTORY AUTHORITY

The amendments and new sections are adopted under the Texas Health and Safety Code, §12.031 and §12.032 which allow the department to charge fees to a person who receives public health services from the department, §12.034 which requires the department to establish collection procedures, §12.035 which required the department to deposit all money collected for fees and charges under §12.032 and §12.033 in the state treasury to the credit of the department's public health service fee fund, and §12.0122 which allows the department to enter into a contract for laboratory services; and Texas Government Code, §531.0055 and Texas 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 Texas Health and Safety Code, Chapter 1001.

§73.41. Sale of Laboratory Services.

(a) Purpose. This section details the procedures concerning the sale of laboratory services by the Department of State Health Services (department). Certain of these services are set out by rule with specific charges for each listed service, as found in §73.54 and §73.55 of this title (relating to Fee Schedule for Clinical Testing and Newborn Screening and Fee Schedule for Chemical Analyses). Provision of those listed services by the department may or may not involve a contract, at the department's discretion. Other services, not found in those fee schedules, that the department elects to sell will be memorialized in a contract between the department and the purchaser of such service(s). Entities which the department may contract with for the sale of laboratory services are limited to those found at Health and Safety Code, §12.0122. At the department's discretion, tests designated to be performed at a particular department laboratory may be performed at any of the department laboratories.

(b) Definition of laboratory services. Laboratory services include the sale of the following services: the evaluation and/or testing of samples, and the subsequent reporting of test or evaluation results for samples submitted to the laboratory; certification, accreditation or approval of milk and shellfish laboratories and milk analysts; and special projects. Laboratory Services, as limited by Health and Safety Code, §12.0122, do not include services related to tissue and cytology specimens except for pap smears for recipients under federally funded programs.

(c) Charges. Fees for the sale of laboratory services found in the fee schedules at §73.54 and §73.55 of this title were calculated to recover the department's costs associated with such activities. When laboratory services outside of those fee schedules are sold under this section, the contract executed for that sale shall include charges for the services in question which recover the department's costs associated with such activities.

(d) Other contracts. This section does not affect department contracts that are not governed by Health and Safety Code, §12.0122.

(e) Fees. A schedule of all fees is available upon request from the Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 776-7318. It is also available online in the Manual of Reference Services at http://www.dshs.state.tx.us/lab.

(f) Payment of charges.

(1) The department will determine whether a charge must be paid with submission of the specimen or whether the department will bill later for the charge, unless otherwise stated in this section.

(2) A charge paid is non-refundable.

(3) Failure to pay a charge in a timely manner may result in the department's refusal to accept specimens or samples until all delinquent charges are paid.

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 September 20, 2012.

TRD-201204994
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: October 10, 2012
Proposal publication date: April 6, 2012
For further information, please call: (512) 776-6972

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25 TAC §§73.51, 73.53 - 73.55

STATUTORY AUTHORITY

The repeals are adopted under the Texas Health and Safety Code, §12.031 and §12.032 which allow the department to charge fees to a person who receives public health services from the department, §12.034 which requires the department to establish collection procedures, §12.035 which required the department to deposit all money collected for fees and charges under §12.032 and §12.033 in the state treasury to the credit of the department's public health service fee fund, and §12.0122 which allows the department to enter into a contract for laboratory services; and Texas Government Code, §531.0055 and Texas 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 Texas 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 September 20, 2012.

TRD-201204995
Lisa Hernandez
General Counsel
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CHAPTER 229. FOOD AND DRUG
SUBCHAPTER L. LICENSURE OF FOOD MANUFACTURERS, FOOD WHOLESALERS, AND WAREHOUSE OPERATORS

25 TAC §229.182

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts an amendment to §229.182 concerning the licensure of food manufacturers, food wholesalers, and warehouse operators. The amendment to §229.182 is adopted with changes to the proposed text as published in the May 4, 2012, issue of the *Texas Register* (37 TexReg 3343).

BACKGROUND AND PURPOSE

The amendment is necessary to comply with Senate Bill (SB) 81, 82nd Legislature, Regular Session, 2011, which enacted an amendment to Health and Safety Code, §431.2211, to state that a person is not required to license if that person harvests, packages, or washes raw fruits or vegetables for shipment at the location of harvest. Whole produce distributors previously exempt from licensing will be required to license if they harvest, package or wash whole fruits and vegetables outside of the location

of harvest. Grammatical corrections and department contact information are also being updated.

SECTION-BY-SECTION SUMMARY

The amendment to §229.182 brings the rule into compliance with SB 81, which amended Health and Safety Code, §431.2211, revising the licensing exemption of whole produce distributors.

Section 229.182(b)(3) revises the rule reference for the licensing of wholesale distributor of drugs from "§229.252(a)(1)" to "§229.249(a)."

Section 229.182(b)(7) revises the name of the agency responsible for Internet application processing from "Texas Online Authority" to "the Department of Information Resources." This change reflects the abolishment of the Texas Online Authority and the transfer of its powers and duties to the Department of Information Resources as a result of House Bill 2048, 79th Legislature, Regular Session, 2005, which amended Government Code, Chapter 2054.

Section 229.182(c) deletes the website address "www.tdh.state.tx.us/bfds/lic/apps.html" and provides the current website address "www.dshs.state.tx.us/fdlicense/apps.shtm" to update the location where a license/registration form can be obtained on the Internet.

Section 229.182(h)(2)(C) deletes the mailing address "1100 West 49th Street, Austin, Texas 78756-3182" and provides the current mailing address "Regulatory Licensing Unit, Food and Drug Licensing Group, Mail Code 2835, P.O. Box 149347, Austin, Texas 78714-9347."

Section 229.182(i)(1) deletes the word "or ships" and adds the words "or" and "for shipment at the location of harvest" to update the licensing exemption of whole produce distributors.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period. However, the name of the agency was revised to reflect the abolishment of the Texas Online Authority and the transfer of its powers and duties to the Department of Information Resources in §229.182(b)(7).

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 amendment is authorized by Health and Safety Code, §12.0111, which requires the department to charge fees for issuing or renewing a license; §12.0112, which requires the term of each license issued to be two years; 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.

§229.182. Licensing/Registration Fee and Procedures.

(a) License/registration required.

(1) A person who manufactures food must obtain a food manufacturer's license for each place of business as described in subsection (b)(1) or (2) of this section; also, a food manufacturer who distributes its own food, and/or food from another manufacturer must only obtain a food manufacturer's license. When calculating the amount of the licensing fee, the manufacturer must include the total for all food manufactured and wholesaled from the place of business.

(2) A person who distributes food, but who does not manufacture food, must obtain a food wholesaler's license for each place of business as described in subsection (b)(3) or (4) of this section.

(3) A person who distributes food, but who does not manufacture food, and who chooses to store that food with a warehouse operator licensed under subsection (b)(8) or (9) of this section, must register as a food wholesaler under subsection (b)(7) of this section.

(4) A person who distributes food and drugs, food and medical devices, or food and drugs and medical devices, must obtain a wholesaler with combination products license, as described in subsection (b)(5) or (6) of this section, for each place of business; this license is required even if the products are stored in a separate warehouse or with a warehouse operator licensed under subsection (b)(8) or (9) of this section.

(5) A warehouse operator storing food for a registered food wholesaler must obtain a warehouse operator license as described in subsection (b)(8) or (9) of this section for each such warehouse. A warehouse operator who distributes only food is required to obtain only a warehouse operator license. A warehouse operator who distributes combination products (food and drugs, food and medical devices, or food, drugs, and medical devices) and is also required to obtain a wholesaler's license under subsection (b)(5) or (6) of this section will be issued only one license. The license fee to be paid will be the higher of the two applicable fees.

(6) A warehouse operated by a food manufacturer which is totally separate from any manufacturing location, including locations from which foods are held for limited periods of time for distribution, must obtain a warehouse operator license as described in subsection (b)(8) or (9) of this section for each such warehouse.

(7) A retail food store that also manufactures food and is required to be permitted by the Department of State Health Services (department) pursuant to Health and Safety Code, Chapter 437, and the Texas Food Establishment Regulations, §229.370 and §229.371 of this title (relating to Permitting Retail Food Establishments), will be issued only one license or permit. The license or permit fee to be paid will be the higher of the two applicable fees.

(8) A wholesaler who distributes combination products and who is also required to be licensed as a warehouse operator under this section will be issued only one license. The license fee to be paid will be the higher of the two applicable fees.

(9) A food manufacturer required to be licensed exclusively pursuant to Health and Safety Code, Chapter 432, relating to Food, Drug, Device and Cosmetic Salvage, Chapter 433, relating to Meat and Poultry Inspection, Chapter 435, relating to Dairy Products, Chapter 436, relating to Aquatic Life, or Chapter 440, relating to Frozen Desserts, is not required to license pursuant to this chapter.

(b) Licensing and registration fees.

(1) Food manufacturer. No person may operate or conduct business as a food manufacturer in this state without first obtaining a license from the department. Licenses issued under this subsection expire two years from the start date of the regulated activity. All applicants for a new or renewal food manufacturer's license shall pay a license fee.

(A) For each place of business having gross annual manufactured food sales of $0.00 - $9,999.99, the fees are:

(i) $100 for a two-year license;

(ii) $100 for a two-year license that is amended due to a change of ownership; and

(iii) $50 for a two-year license that is amended during the current licensure period due to minor changes.

(B) For each place of business having gross annual manufactured food sales of $10,000 - $24,999.99, the fees are:

(i) $150 for a two-year license;

(ii) $150 for a two-year license that is amended due to a change of ownership; and

(iii) $75 for a two-year license that is amended during the current licensure period due to minor changes.

(C) For each place of business having gross annual manufactured food sales of $25,000 - $99,999.99, the fees are:

(i) $250 for a two-year license;

(ii) $250 for a two-year license that is amended due to a change of ownership; and

(iii) $125 for a two-year license that is amended during the current licensure period due to minor changes.

(D) For each place of business having gross annual manufactured food sales of $100,000 - $199,999.99, the fees are:

(i) $560 for a two-year license;

(ii) $560 for a two-year license that is amended due to a change of ownership; and

(iii) $280 for a two-year license that is amended during the current licensure period due to minor changes.

(E) For each place of business having gross annual manufactured food sales of $200,000 - $999,999.99, the fees are:

(i) $900 for a two-year license;

(ii) $900 for a two-year license that is amended due to a change of ownership; and

(iii) $450 for a two-year license that is amended during the current licensure period due to minor changes.

(F) For each place of business having gross annual manufactured food sales of $1 million - $9,999,999.99, the fees are:

(i) $1,120 for a two-year license;

(ii) $1,120 for a two-year license that is amended due to a change of ownership; and

(iii) $560 for a two-year license that is amended during the current licensure period due to minor changes.

(G) For each place of business having gross annual manufactured food sales greater than or equal to $10 million, the fees are:

(i) $1,680 for a two-year license;

(ii) $1,680 for a two-year license that is amended due to a change of ownership; and

(iii) $840 for a two-year license that is amended during the current licensure period due to minor changes.

(2) Food wholesaler. No person may operate or conduct business as a food wholesaler in this state without first obtaining a food wholesaler's license from the department. Licenses issued under this subsection expire two years from the start date of the regulated activity. Except as provided for in paragraph (4) of this subsection, all food wholesalers shall pay a license fee.

(A) For each place of business having gross annual food sales of $0.00 - $199,999.99, the fees are:

(i) $250 for a two-year license;

(ii) $250 for a two-year license that is amended due to a change of ownership; and

(iii) $125 for a two-year license that is amended during the current licensure period due to minor changes.

(B) For each place of business having gross annual food sales of $200,000 - $499,999.99, the fees are:

(i) $450 for a two-year license;

(ii) $450 for a two-year license that is amended due to a change of ownership; and

(iii) $225 for a two-year license that is amended during the current licensure period due to minor changes.

(C) For each place of business having gross annual food sales of $500,000 - $999,999.99, the fees are:

(i) $680 for a two-year license;

(ii) $680 for a two-year license that is amended due to a change of ownership; and

(iii) $340 for a two-year license that is amended during the current licensure period due to minor changes.

(D) For each place of business having gross annual food sales of $1 million - $9,999,999.99, the fees are:

(i) $900 for a two-year license;

(ii) $900 for a two-year license that is amended due to a change of ownership; and

(iii) $450 for a two-year license that is amended during the current licensure period due to minor changes.

(E) For each place of business having gross annual food sales of greater than or equal to $10 million, the fees are:

(i) $1,350 for a two-year license;

(ii) $1,350 for a two-year license that is amended due to a change of ownership; and

(iii) $675 for a two-year license that is amended during the current licensure period due to minor changes.

(3) Wholesaler with combination products. A person who is required to be licensed as a food wholesaler under this section and who is also required to be licensed as a wholesale distributor of drugs under §229.249(a) of this title (relating to Licensure Fees) or as a device distributor under §229.439(a)(1) of this title (relating to Licensure Fees) shall pay a combined licensure fee for each place of business. The licensure fee shall be based on the combined gross annual sales of these regulated products (foods, drugs, and/or devices).

(A) For each place of business having combined gross annual sales of $0.00 - $199,999.99, the fees are:

(i) $520 for a two-year license;

(ii) $520 for a two-year license that is amended due to a change of ownership; and

(iii) $260 for a license that is amended during the current licensure period due to minor changes.

(B) For each place of business having combined gross annual sales of $200,000 - $499,999.99, the fees are:

(i) $780 for a two-year license;

(ii) $780 for a two-year license that is amended due to a change of ownership; and

(iii) $390 for a license that is amended during the current licensure period due to minor changes.

(C) For each place of business having combined gross annual sales of $500,000 - $999,999.99, the fees are:

(i) $1,040 for a two-year license;

(ii) $1,040 for a two-year license that is amended due to a change of ownership; and

(iii) $520 for a license that is amended during the current licensure period due to minor changes.

(D) For each place of business having combined gross annual sales of $1 million - $9,999,999.99, the fees are:

(i) $1,300 for a two-year license;

(ii) $1,300 for a two-year license that is amended due to a change of ownership; and

(iii) $650 for a license that is amended during the current licensure period due to minor changes.

(E) For each place of business having combined gross annual sales greater than or equal to $10 million, the fees are:

(i) $1,950 for a two-year license;

(ii) $1,950 for a two-year license that is amended due to a change of ownership; and

(iii) $975 for a license that is amended during the current licensure period due to minor changes.

(4) Food wholesaler registration. Except as provided in paragraph (3) of this subsection, a food wholesaler is not required to obtain a license under this section for a place of business if all of the food distributed from that place of business will be stored in a warehouse licensed under this section. A food wholesaler that is not required to obtain a license for a place of business under this section shall register each place of business with the department pursuant to subsection (d)(2) of this section, but only one registration fee must be paid by each such food wholesaler. A food wholesaler who meets this subsection's requirements shall pay a registration fee of $100. A registration issued under this subsection expires two years from the start date of the regulated activity.

(5) Warehouse operator. No person may operate or conduct business as a warehouse operator in this state without first obtaining a license from the department. Licenses issued under this subsection expire two years from the start date of the regulated activity. License fees are based on the maximum amount of square feet dedicated to food storage during the licensing period. A warehouse operator shall pay a license fee.

(A) For each place of business having food storage of 0 - 6,000 square feet, the fees are:

(i) $350 for a two-year license;

(ii) $350 for a two-year license that is amended due to a change of ownership; and

(iii) $175 for a two-year license that is amended during the current licensure period due to minor changes.

(B) For each place of business having food storage of 6,001 - 24,000 square feet, the fees are:

(i) $700 for a two-year license;

(ii) $700 for a two-year license that is amended due to a change of ownership; and

(iii) $350 for a two-year license that is amended during the current licensure period due to minor changes.

(C) For each place of business having food storage of 24,001 - 75,000 square feet, the fees are:

(i) $1,050 for a two-year license;

(ii) $1,050 for a two-year license that is amended due to a change of ownership; and

(iii) $525 for a two-year license that is amended during the current licensure period due to minor changes.

(D) For each place of business having food storage of 75,001 - 250,000 square feet, the fees are:

(i) $1,400 for a two-year license;

(ii) $1,400 for a two-year license that is amended due to a change of ownership; and

(iii) $700 for a two-year license that is amended during the current licensure period due to minor changes.

(E) For each place of business having food storage of 250,001 or more square feet, the fees are:

(i) $2,000 for a two-year license;

(ii) $2,000 for a two-year license that is amended due to a change of ownership; and

(iii) $1,000 for a two-year license that is amended during the current licensure period due to minor changes.

(6) A firm that has more than one business location may request a one-time proration of fees when applying for a license for each new location. Upon approval by the department, the expiration date of the license for the new location will be established the same as the firm's previously licensed locations.

(7) For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Department of Information Resources, to recover costs associated with application and renewal application processing through tex.gov.

(8) All license/registration fees paid under this section are non-refundable.

(9) If the license/registration category changes during the license period, the license shall be renewed in the proper category at the time of renewal.

(c) License/registration forms. License/registration forms may be obtained from the department, located at 1100 West 49th Street, Austin, Texas 78756-3182, or from the website at www.dshs.state.tx.us/fdlicense/apps.shtm.

(d) License/registration application. All food manufacturers, food wholesalers, and warehouse operators shall file a license application on a form authorized by the department.

(1) The application form shall be signed and verified, and shall contain the following information:

(A) the name of the legal entity to be licensed, including the name under which the business is conducted;

(B) the physical address of the place of business;

(C) the mailing address of the place of business;

(D) if a sole proprietorship, the name of the proprietor; if a partnership, the names of all partners; if a corporation, the name of the corporation, the date and place of incorporation and name and address of its registered agent in the state; or if any other type of association, the names of the principals of such association;

(E) the names of those individuals in an actual administrative capacity which, in the case of a sole proprietorship shall be the managing proprietor; in a partnership, the managing partner; in a corporation, the officers and directors; in any other association, those in a managerial capacity; and

(F) a list of categories of gross annual sales or square footage as applicable, which must be marked and adhered to by the licensee in the determination and paying of the license fee.

(2) Food wholesalers who meet the requirements to register under subsection (b)(7) of this section, must submit a registration form authorized by the department which shall be signed and verified, and contain the following information:

(A) the name of the legal entity to be registered, including the name under which the business is conducted;

(B) the name, telephone number, and physical addresses of the licensed warehouses where the food wholesaler's food products are or will be stored;

(C) the physical address where the food wholesaler's distribution records are located and available for review upon inspection;

(D) the mailing address and telephone number where the food wholesaler may be contacted; and

(E) a description of the type of food products being distributed by the food wholesaler.

(e) Two or more establishments. If the food manufacturer, food wholesaler, or warehouse operator operates more than one place of business, each place of business shall be licensed separately by listing the name and address of each place of business on the license application.

(f) Issuance of license/registration. The department may license/register a manufacturer, food wholesaler, or warehouse operator who meets the requirements of this section and §229.183 of this title (relating to Minimum Standards for Licensure/Registration).

(1) The initial license/registration shall be valid for two years from the date the license/registration was issued.

(2) The renewal license/registration shall be valid for two years from the date the license/registration was issued.

(3) A current license/registration shall only be issued when all past due fees and late fees are paid.

(g) Renewal of license/registration.

(1) For each licensing/registration period, the food manufacturer, food wholesaler, or warehouse operator shall renew its license/registration as applicable following the requirements of this section and §229.183 of this title.

(2) A person who holds a license/registration issued by the department under the Health and Safety Code shall renew the license/registration by filing an application for renewal on a form authorized by the department accompanied by the appropriate licensing/registration fee. A licensee/registrant must file for renewal before the expiration date of the current license. A person who files a renewal application after the expiration date must pay an additional $100 as a delinquency fee.

(3) Failure to submit the renewal during the licensing/registration period may subject the food manufacturer, food wholesaler, or warehouse operator to the offense provisions under the Health and Safety Code, Chapter 431, to the provision of §229.184 of this title (relating to the Refusal, Revocation, or Suspension of License/Registration), and to the provisions of §229.222 of this title (relating to Enforcement).

(h) Amendment of license/registration.

(1) Fees. A license or registration that is amended during the licensing or registration period, including a change of name, ownership (change in legal entity), or a notification of a change in the location of a licensed or registered place of business required under the Health and Safety Code, §431.2251, will require a new application and submission of license or registration fees as outlined in subsection (b) of this section.

(2) Change in name, ownership, status, or location of business.

(A) Not later than the 31st day before the date of the change in the name, status, or location of a licensed/registered place of business, the license/registration holder shall provide written notice to the department of the intended change. The notice shall include, as applicable:

(i) The new name of the legal entity to be licensed or registered, including the name under which the business is conducted;

(ii) The physical and mailing address of the new location;

(iii) The name and physical address of the licensed warehouse where the food wholesaler's food products will be stored;

(iv) The physical address where the food wholesaler's distribution records are located and available for review upon inspection; and

(v) The mailing address and telephone number where the food wholesaler may be contacted.

(B) Not later than the 10th day after completion of the change of location, the licensee or registrant shall forward to the department the name and residence address of the individual in charge of the new place of business.

(C) Notice is considered adequate if the licensee or registrant provides the intent and verification notices to the department by certified mail, return receipt requested, mailed to the department at Regulatory Licensing Unit, Food and Drug Licensing Group, Mail Code 2835, P.O. Box 149347, Austin, Texas 78714-9347.

(i) This section does not apply to:

(1) a person, firm, or corporation that harvests, packages, or washes raw fruits or vegetables for shipment at the location of harvest;

(2) a direct seller who is not otherwise engaged in manufacturing;

(3) a person engaged solely in the distribution of alcoholic beverages in sealed containers by holders of licenses or permits issued under the Alcoholic Beverage Code, Chapters 19, 20, 21, 23, 64, or 65;

(4) a food service establishment or a commissary which distributes food primarily intended for immediate consumption on the premises of a retail outlet under common ownership unless the business regularly engages in the labeling, combining, and purifying of food which is either sold for resale or packaged for sale in other than individual portions; or

(5) a restaurant that provides food for immediate human consumption to a political subdivision or to a licensed nonprofit organization if the restaurant would not otherwise be considered a food wholesaler.

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 September 21, 2012.

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Lisa Hernandez
General Counsel
Department of State Health Services
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Proposal publication date: May 4, 2012
For further information, please call: (512) 776-6972

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CHAPTER 230. SPECIFIC ADDITIONAL REQUIREMENTS FOR DRUGS

SUBCHAPTER B. LIMITATIONS ON SALES OF PRODUCTS CONTAINING EPHEDRINE, PSEUDOEPHEDRINE, AND NORPSEUDOEPHEDRINE

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §230.11 and §230.15, the repeal of §230.16, and new §§230.16 - 230.18, concerning the limitations on sales of products containing ephedrine, pseudoephedrine, and norpseudoephedrine. The sections are adopted without changes to the proposed text as published in the April 6, 2012, issue of the *Texas Register* (37 TexReg 2338) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The amendments, repeal, and new sections are necessary to implement legislative changes to the Health and Safety Code. Health and Safety Code, Chapter 486, was amended by House Bill 1137, 82nd Legislature, Regular Session, 2011, regarding the retail sale of drug products containing ephedrine, pseudoephedrine and norpseudoephedrine. The purposes of the rules are to amend definitions; modify restrictions on sales of the drug products; mandate the use of a non-departmental real-time electronic monitoring system; provide for temporary exemptions to the mandate; and establish privacy protections for electronic data.

Current law requires non-pharmacy retailers of ephedrine, pseudoephedrine and norpseudoephedrine to obtain a Certificate of Authority (COA) with the department. These retailers are required to track sales of ephedrine, pseudoephedrine, and norpseudoephedrine containing drug products using electronic or paper records. Information collected by the retailer includes name of the person making the purchase, date of purchase, product name, and number of grams purchased. Texas law requires certain limitations on the quantity of drug products sold and the department has the authority to review those records.

SECTION-BY-SECTION SUMMARY

Amended §230.11(b)(8) revises the definition of "over-the-counter sale" in order to correspond with the new quantity limits of substances in drug products established in §230.15(b).

Section 230.11(b)(9) adds the definition of "real-time electronic logging system."

The amendment to §230.15(a)(1)(A) now requires the person making a purchase of drug products containing ephedrine, pseudoephedrine and norpseudoephedrine to display a government-issued identification.

The amendment to §230.15(a)(2) stipulates that the business establishment selling the product will also have to document the date of birth and address of the purchaser, the time of the purchase and the type of identification displayed, as well as the number on the identification.

Amended §230.15(a)(3) requires a business establishment selling the products to transmit the sale information using the real-time logging system as defined in §230.11(b)(9).

New §230.15(b) prohibits the sale within any calendar day, of more than 3.6 grams of ephedrine, pseudoephedrine, norpseudoephedrine or any combination of those substances; and within a 30-day period, of more than 9 grams of ephedrine, pseudoephedrine, norpseudoephedrine or any combination of those substances.

New §230.15(c) requires businesses to maintain each record of sale until at least the second anniversary of the date the record was made. Upon request, records shall be provided to local, state or federal law enforcement agencies, including the United States Drug Enforcement Administration.

New §230.15(d) states that a business that has used a real-time electronic logging system for longer than two years does not need to comply with §230.15(c).

New §230.15(e) states that a business that has used a real-time electronic logging system for longer than two years shall destroy all papers maintained under this section unless prohibited by law.

Section 230.16 in its entirety is repealed in order to replace the section with a new §230.16, which will detail the requirements for establishing a real-time electronic monitoring system. The text of the repealed §230.16 is revised and rewritten under new §230.17. The purpose of the repeal is to renumber affected sections and improve the flow of the subchapter.

New §230.16(a) has new language regarding the transmission of sales information to a real-time electronic logging system. Be-

fore completing an over-the-counter sale of a product containing ephedrine, pseudoephedrine, or norpseudoephedrine, a business establishment shall transmit the information in a record to a real-time electronic logging system.

New §230.16(b) states that a business establishment cannot complete the sale if the real-time electronic logging system returns a report that the purchaser would obtain an amount of ephedrine, pseudoephedrine, norpseudoephedrine, or a combination of those substances greater than the allowable amount.

New §230.16(c) allows an employee of a business establishment to use an override mechanism if the employee has a reasonable fear of imminent bodily injury or death from the person attempting to obtain the drug products.

New §230.16(d) requires the administrators of a real-time electronic logging system, when requested, to make available to the Texas Department of Public Safety a copy of each record of an over-the-counter sale of a product containing ephedrine, pseudoephedrine, or norpseudoephedrine when the record is submitted by a business establishment located in this state.

New §230.16(e) states that a pharmacy that engages in over-the-counter sales of the drug products may apply to the State Board of Pharmacy for a temporary exemption from the requirement of using a real-time electronic logging system under this subchapter. Such exemption cannot exceed 180 days.

New §230.16(f) allows a business establishment that engages in over-the-counter sales of the drug products to request from the department a temporary exemption from the requirement of using a real-time electronic logging system under this subchapter. Such exemption cannot exceed 180 days.

New §230.16(g) states that a business establishment granted a temporary exemption under this section must continue to keep records of sales as they did before enactment of these amendments.

New §230.16(h) states that an exemption granted under this section does not relieve a business establishment of any duty other than the duty to use a real-time electronic logging system.

New §230.16(i) states that a business establishment that experiences a mechanical or electronic failure of the real-time electronic logging system shall maintain a written record or an electronic record that satisfies the requirements this section and enter the information in the real-time electronic logging system as soon as practicable after the system becomes operational.

New §230.16(j) requires the administrators of a real-time electronic logging system to provide real-time access to the information in the system to the Department of Public Safety if that agency executes a memorandum of understanding with the administrators.

New §230.17(a) allows the department to impose an administrative penalty for a violation of the Health and Safety Code, Chapter 486, or this subchapter.

New §230.17(b) sets the amount of the administrative penalty up to $1,000 per violation per day, not to exceed $20,000 for a violation of a continuing nature.

New §230.17(c) sets a penalty based on the following: the seriousness of the violation; the threat to health or safety; the history of previous violations; an amount necessary to deter a future violation; whether the violator demonstrated a good faith effort to correct the violation; and any other matter that justice may require.

New §230.17(d) and (e) set forth the procedure for the department's notice of a violation and for a person's response to the notice.

New §230.17(f) states that hearings will be held at the State Office of Administrative Hearings and will be conducted under Government Code, Chapter 2001.

New §230.18 defines the privacy protections for information entered or stored in a real-time electronic logging system.

New §230.18(a) documents where privacy protections for an individual are codified under Title 21, Code of Federal Regulations, §1314.45.

New §230.18(b) allows business establishments to disclose information only to the United States Drug Enforcement Administration and other federal, state, and local law enforcement agencies.

New §230.18(c) states that business establishments may not use information for any purpose other than for a disclosure that complies with the requirement of the subchapter.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

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.

25 TAC §§230.11, 230.15 - 230.18

STATUTORY AUTHORITY

The amendments and new rules are authorized by Health and Safety Code, §486.003, which provides the Executive Commissioner of the Health and Human Services Commission with the authority to adopt rules to enforce the chapter; 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 September 21, 2012.

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Lisa Hernandez
General Counsel
Department of State Health Services
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Proposal publication date: April 6, 2012
For further information, please call: (512) 776-6972

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25 TAC §230.16

STATUTORY AUTHORITY

The repeal is authorized by Health and Safety Code, §486.003, which provides the Executive Commissioner of the Health and Human Services Commission with the authority to adopt rules to enforce the chapter; 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.

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Lisa Hernandez
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER H. CANCELLATION, DENIAL, AND NONRENEWAL OF CERTAIN PROPERTY AND CASUALTY INSURANCE COVERAGE

28 TAC §§5.7001, 5.7002, 5.7009

The Texas Department of Insurance adopts amendments to 28 Texas Administrative Code §§5.7001, 5.7002, and 5.7009, concerning cancellation, denial, and nonrenewal of certain property and casualty insurance coverage. The amendments are adopted with changes to the proposed text as published in the July 20, 2012, issue of the *Texas Register* (37 TexReg 5402).

REASONED JUSTIFICATION. The amendments are necessary to clarify when an insurer may send a notice of cancellation to the insured for nonpayment of premium under Insurance Code Chapter 551, Subchapter C. The amendments also update §§5.7001, 5.7002, and 5.7009 for consistency with Insurance Code Chapter 551, Subchapter C. Additionally, the amendments update statutory references resulting from nonsubstantive revisions of the Insurance Code, amend existing text for clarification, correct grammar, and update internal references.

Amendments to §5.7001 conform the applicability provisions for consistency with Insurance Code §551.101 and §551.102. An amendment to §5.7001(a)(2) changes "homeowners or farm and ranch owners policies" to "homeowners or farm or ranch owners policies" for consistency with Insurance Code §551.102(2). Amendments to §5.7001(a)(3) add standard fire policies insuring the contents of an apartment as provided under Insurance Code §551.102(3)(B). Amendments to §5.7001(a)(4) delete outdated terms, move pertinent text, and reword language for consistency with §5.7001(a)(4)(A) - (D). Amendments to §5.7001(a)(4) add insurance policies covering property and casualty coverage, other than a fidelity, surety, or guaranty bond, to governmental units under the applicability listing as provided under Insurance Code §551.102(4). Amendments to §5.7001(a)(4) also add §5.7001(a)(4)(C)(ix) to include "a communication district" in the list of political subdivisions of this state subject to Insurance Code Chapter 551, Subchapter C, as provided under Insurance Code §551.102(4)(C)(ix). Amendments to §5.7001 add subsection (d) to clarify the meaning of "insurer" and "company" used throughout Subchapter H for the purpose of the listed policies under subsection (a). The amendments to §5.7001(a) also update statutory references resulting from nonsubstantive revisions of the Insurance Code, amend existing text for clarification, and correct grammar.

Amendments to §5.7002 conform the cancellation provisions for consistency with Insurance Code §551.104. The amendment to §5.7002(a) updates the statutory period in which an insurer may cancel a personal automobile policy for the reasons provided in Insurance Code §551.104(b)(1-3) and (d). Insurance Code §551.104(g) provides that an insurer may cancel a personal automobile insurance policy if it has been in effect for less than 60 days. Thus, an insurer may only cancel a personal automobile policy if it has been in effect for more than 59 days, for the reasons listed in Insurance Code §551.104(b)(1-3) and (d).

The amendment to §5.7002(a)(3) adds "or any other law governing the business of insurance in this state" for consistency with Insurance Code §551.104(b)(3). As an additional reason that an insurer may cancel a policy after the specified number of days, the amendment to §5.7002(a) adds paragraph (4) to provide "the insured submits a fraudulent claim" for consistency with Insurance Code §551.104(b)(2). Amendments to §5.7002(a) also amend existing text for clarification, correct grammar, and update internal references.

The amendment to §5.7002(b) updates the statutory periods in which an insurer may cancel a homeowners policy and other listed types of policies under Insurance Code §551.102 and 28 TAC §5.7001(a) for the reasons provided under subsection (c) of §5.7002. Section 5.7002(b) does not apply to a personal automobile policy. Insurance Code §551.104(g) provides that an insurer may cancel any insurance policy, other than a personal automobile or homeowners insurance policy, if the policy has been in effect for less than 90 days. Thus, other than a personal automobile policy or homeowners insurance policy, an insurer may only cancel a policy listed under Insurance Code §551.102 and 28 TAC §5.7001(a), if it has been in effect for more than 89 days, for the reasons listed under Insurance Code §551.104(b) and (c).

In addition, Insurance Code §551.104(g) provides that an insurer may cancel a homeowners insurance policy, if the policy has been in effect for less than 60 days, for the reasons provided under Insurance Code §551.104(g)(1) and (2). Thus, an insurer may only cancel a homeowners insurance policy, if it has been in effect for more than 59 days, for the reasons listed under Insurance Code §551.104(b) and (c).

An amendment to §5.7002(b) moves paragraphs (1) - (3) to new subsection (c) of §5.7002 to list the reasons that an insurer may

cancel any of the policies under §5.7002(b) for consistency with Insurance Code §551.104(b) and (c). An amendment to paragraph (2) of §5.7002(c) adds language for consistency with Insurance Code §551.104(c). The amendment to paragraph (3) of §5.7002(c) adds "or any other law governing the business of insurance in this state" for consistency with Insurance Code §551.104(b)(3). New §5.7002(c)(4) is added for consistency with Insurance Code §551.104(b)(2) by providing, as an additional reason that an insurer may cancel a policy after the specified number of days, "the insured submits a fraudulent claim."

Additionally, the amendment to §5.7002 adds new subsection (d) to provide that "an insurer may not date or send the notice of cancellation for nonpayment of premium until after the premium due date" for consistency with Insurance Code §551.104(e). This amendment also clarifies when an insurer may give notice of a cancellation for nonpayment of a premium.

Insurance Code §551.104(e) provides that cancellation of a policy under subsection (b), (c), or (d) does not take effect until the 10th day after the date the insurer mails notice of the cancellation to the insured. This amendment clarifies that an insurer may not give notice of a cancellation for nonpayment of a premium if the premium payment from the insured is not yet due. Insurance Code §551.104(b)(1) permits an insurer to cancel a policy for nonpayment of the premium. If an insurer wishes to cancel a policy for nonpayment of a premium, it must separately mail the insured notice to inform the insured of the cancellation only after the insured has failed to timely pay the premium. The cancellation of a policy is not effective until the 10th day after the date the insurer mails the notice of the cancellation to the insured. Amendments to §5.7002(b) also amend existing text for clarification, correct grammar, and update internal references.

Amendments to §5.7009 are necessary to update statutory references resulting from nonsubstantive revisions of the Insurance Code, amend existing text for clarification, correct grammar, and update internal references.

The department has made nonsubstantive changes to the proposed language in the text of the rule as adopted. These changes made to the proposed text do not materially alter issues raised in the proposal, introduce new subject matter, or add costs or requirements to persons other than those previously on notice.

Amendments to §5.7001(b) make nonsubstantive changes to the proposed language in the text of the rule as adopted. These changes delete unnecessary and repetitive use of the phrase "of this title" and internal references to the titles of sections identified in subsection (a).

Amendments to §5.7001(b)(1) make nonsubstantive changes to the proposed language in the text of the rule as adopted. These changes delete unnecessary and repetitive use of the phrase "of this title" and internal references to the titles of sections identified in subsection (b).

An amendment to §5.7001(b)(2) makes a nonsubstantive change to the proposed language in the text of the rule as adopted. This change deletes a repetitive internal reference to the title of a section identified in subsection (a).

Amendments to §5.7001(c) also make nonsubstantive changes to the proposed language in the text of the rule as adopted. Amendments to §5.7001(c) delete unnecessary and repetitive use of the phrase "of this title" and internal references to the titles of sections identified in subsection (a). These changes replace "board" with "Texas Department of Insurance" to update internal references.

HOW THE SECTIONS WILL FUNCTION. Section 5.7001 establishes which insurers are subject to the subchapter. Section 5.7002 establishes the statutory period for cancellation, the reasons for cancellation, and the time period for when an insurer may give notice of a cancellation for nonpayment of a premium. Section 5.7009 addresses Insurance Code Chapter 4051, Subchapter H, concerning companies and their agents.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Section 5.7002(d)

Comment: A commenter states that most businesses, including insurers, are increasingly moving to the use of electronic communications with their customers for ease of doing business. The commenter references Insurance Code Chapter 35, enacted by House Bill 1951, 82nd Legislature, Regular Session (2011), and Commissioner's Bulletin No. B-0002-02, which address electronic commerce. The commenter states that the rulemaking for §§5.7001, 5.7002, and 5.7009 provides an opportunity to begin implementing Chapter 35 by adding language that electronic notice is permissible. Specifically, the commenter recommends adding "in accordance with Sec. 35.003, Tex. Ins. Code, the required notice may be provided in writing or electronically" to the amended language in §5.7002(d).

Agency Response: The department agrees with the comment; however, a change in the text is not necessary because §5.7002(d) does not limit the notice to mail or require delivery of a paper notice. The section only provides the notice must comply with the period specified in that section. Insurance Code §35.002(b) provides that to the extent of any conflict between another provision of the Insurance Code and a provision of Chapter 35, the provision of Chapter 35 controls. Thus, the insurer may mail the notice as provided in Insurance Code §551.104(e) or, if the insurer and its policyholder have agreed to transact business electronically, the insurer may send the notice electronically in compliance with Insurance Code, Chapter 35 and department rules implementing Chapter 35.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For with changes: Nationwide Insurance and Financial Service.

STATUTORY AUTHORITY. The amendments are adopted pursuant to Insurance Code §551.112 and §36.001. Section 551.112 provides that the commissioner may adopt rules relating to the cancellation and nonrenewal of insurance policies. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

§5.7001. Applicability.

(a) Sections 5.7002 - 5.7012 of this title (relating to Cancellations; Calculation of Time Period; Certain Acts Regarded as Cancellation; Special One-Year Rule Applicable Only to Personal Automobile Policies; Discontinuing the Writing of Certain Lines or Classes, Withdrawing from a Geographical Area, or Withdrawing from an Agency; Renewal of Policies; Records Required; Insurance Code Chapter 4051, Subchapter H; Endorsement Forms; Violations; and Reason for Declination, Cancellation, or Nonrenewal) apply to companies or insurers writing the following types of insurance policies which become effective on or after February 1, 1972, and to no other policies, except as otherwise provided in this section:

(1) personal automobile policies. Except for §5.7012 of this title, these sections do not apply to any automobile policy written through the Texas Automobile Insurance Plan;

(2) homeowners or farm or ranch owners policies;

(3) standard fire policies insuring:

(A) a one-family dwelling or a duplex; or

(B) the contents of a one-family dwelling, a duplex, or an apartment; or

(4) insurance policies providing property and casualty coverage, other than a fidelity, surety, or guaranty bond to governmental units. A governmental unit means the State of Texas and all of the several agencies of government which collectively constitute the government of the State of Texas, specifically including:

(A) this state;

(B) an agency of this state;

(C) a political subdivision of this state, including:

(i) a municipality or county;

(ii) a school district or junior college district;

(iii) a levee improvement district, drainage district, or irrigation district;

(iv) a water improvement district, water control and improvement district, or water control and preservation district;

(v) a freshwater supply district;

(vi) a navigation district;

(vii) a conservation and reclamation district;

(viii) a soil conservation district;

(ix) a communication district;

(x) a river authority; and

(xi) councils and courts; or

(D) any other governmental agency whose authority derives from the laws and constitution of this state.

(b) Sections 5.7004, 5.7008, 5.7009, 5.7010, 5.7011, 5.7013 of this title (relating to Notice Requirements for Cancellation and Nonrenewal for General Liability and Certain Automobile Insurance Policies), and §5.7014 of this title (relating to Exceptions to Cancellation and Nonrenewal Notice Requirements for General Liability and Certain Automobile Insurance Policies) are applicable to companies or insurers writing the following types of insurance policies which become effective on or after April 7, 1986, and to no other policies, except as otherwise provided in this section.

(1) General liability policies including, but not limited to, excess liability policies, excess loss liability policies (umbrella), errors and omissions liability policies, and all miscellaneous liability policies. Section 5.7013 and §5.7014 of this title are not applicable to any general liability policy written through the Texas Medical Liability Insurance Underwriting Association pursuant to the Texas Insurance Code, Article 21.49-3.

(2) Automobile policies except personal automobile, automobile physical damage single interest, automobile mechanical breakdown, and mobilowners policies. Except for §5.7012 of this title, these sections are inapplicable to any automobile policy written through the Texas Automobile Insurance Plan.

(c) Section 5.7006 and §5.7012 of this title apply to all property and casualty policies regulated by the Texas Department of Insurance pursuant to the Texas Insurance Code, Chapter 5.

(d) For the purpose of subsection (a) of this section, "insurer" and "company" have the same meaning as assigned to "insurer" in Insurance Code §551.101.

§5.7002. Cancellations.

(a) An insurer may cancel a personal automobile policy if it has been in effect for more than 59 days for only the following reasons:

(1) the failure of the insured to discharge his or her obligation in the payment of premium for the policy or any installment thereof, whether payable directly to the company or its agent or indirectly under any premium finance plan or extension of credit;

(2) the suspension or revocation of the driver's license or motor vehicle registration of the named insured or of any other operator who either resides in the same household or customarily operates an automobile insured under the policy. Provided, however, a company may not cancel if the policyholder consents to the attachment of an endorsement eliminating coverage when the driver whose license is suspended or revoked is operating the vehicle;

(3) the department determines that the continuation of the policy would violate or place the company in violation of the Insurance Code or any other law governing the business of insurance in this state; or

(4) the insured submits a fraudulent claim.

(b) An insurer may cancel a homeowners insurance policy if it has been in effect for more than 59 days for only the reasons provided under subsection (c) of this section. An insurer may cancel any of the following policies that have been in effect for more than 89 days for only the reasons provided under subsection (c) of this section:

(1) farm or ranch owners policies;

(2) standard fire policies insuring:

(A) a one-family dwelling or a duplex; or

(B) the contents of a one-family dwelling, a duplex, or an apartment; or

(3) insurance policies providing property and casualty coverage, other than a fidelity, surety, or guaranty bond, to:

(A) this state;

(B) an agency of this state;

(C) a political subdivision of this state, including:

(i) a municipality or county;

(ii) a school district or junior college district;

(iii) a levee improvement district, drainage district, or irrigation district;

(iv) a water improvement district, water control and improvement district, or water control and preservation district;

(v) a freshwater supply district;

(vi) a navigation district;

(vii) a conservation and reclamation district;

(viii) a soil conservation district;

(ix) a communication district;

(x) a river authority; and

(xi) councils and courts; or

(D) any other governmental agency whose authority derives from the laws and constitution of this state.

(c) An insurer may cancel any of the policies under subsection (b) of this section for only the following reasons:

(1) the failure of the insured to discharge his or her obligation in the payment of premium for the policy or any installment thereof, whether payable directly to the company or its agent or indirectly under any premium finance plan or extension of credit;

(2) increase in hazard within the control of the insured which would produce an increase in the premium rate of the policy;

(3) the department determines that the continuation of the policy would violate or place the company in violation of the Insurance Code or any other law governing the business of insurance in this state; or

(4) the insured submits a fraudulent claim.

(d) An insurer may not date or send the notice of cancellation for nonpayment of premium until after the premium due date.

§5.7009. Insurance Code Chapter 4051, Subchapter H.

Insurance Code Chapter 4051, Subchapter H, deals with the relations between companies and their agents. Insurance Code Chapter 4051, Subchapter H, also contains provisions relative to cancellations and renewals of policies written through agencies which are subsequently terminated. All provisions of these sections shall be interpreted so as to give full effect to Insurance Code Chapter 4051, Subchapter H. Insurance Code Chapter 4051, Subchapter H, shall not be interpreted to impair any obligations which the company owes to the policyholder, even though the agent has no authority to act on behalf of the company.

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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Sara Waitt
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 29. PRACTICE AND PROCEDURE

37 TAC §29.11

The Texas Department of Public Safety (the department) adopts the repeal of §29.11, concerning Entry of Appearance; Continuance. This repeal is adopted without changes to the proposed text as published in the August 3, 2012, issue of the *Texas Register* (37 TexReg 5724) and will not be republished.

The entry of appearance is the procedure by which administrative cases filed at the State Office of Administrative Hearings (SOAH) may be dismissed based on the respondent's failure to enter an appearance prior to the hearing. This rule was originally adopted in response to SOAH's adoption of 1 TAC §155.55, which provided the authority for this procedure. Subsection (e) of SOAH's rule authorized licensing agencies to use the informal dismissal procedure on the condition the agency had adopted a rule that complied with SOAH's requirements. However, SOAH has since repealed 1 TAC §155.55, so there is no longer any authority for the department's §29.11 or the requirement of an entry of appearance prior to the SOAH hearing.

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.

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 September 24, 2012.

TRD-201205033
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: October 14, 2012
Proposal publication date: August 3, 2012
For further information, please call: (512) 424-5848

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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.

Agency Rule Review Plans

Texas Department of Public Safety

Title 37, Part 1

TRD-201205032
Filed: September 24, 2012

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Proposed Rule Reviews

Texas Department of Agriculture

Title 4, Part 1

The Texas Department of Agriculture (the department) proposes to review Texas Administrative Code, Title 4, Part 1, Chapter 17, concerning Marketing and Promotion, Subchapter A, concerning Texas Commodity Referendum Law; Subchapter B, concerning Livestock Export Facilities; Subchapter C, concerning GO TEXAN and Design Mark; Subchapter D, concerning Certification of Farmers Market; Subchapter E, concerning Texas-Israel Exchange Research Program; Subchapter F, concerning Texas Wine Marketing Assistance Program; Subchapter G, concerning GO TEXAN Partner Program Rules; Subchapter H, concerning Texas Shrimp Marketing Program; Subchapter I, concerning Texas Equine Incentive Program; and Subchapter J, concerning GO TEXAN Wildlife Program under Texas Government Code, §2001.039. Section 2001.039 requires state agencies to review and consider for re-adoption each of their rules every four years. The review must include an assessment of whether the original justification for the rules continues to exist.

As part of the review process, the department proposes amendments to Chapter 17, Subchapter B, §§17.30 - 17.33, Subchapter C, §§17.51 - 17.53, 17.55 - 17.57, 17.59 - 17.60, and Subchapter D, §17.73; new §§17.61, 17.62 and 17.63, and new Subchapter J, §§17.600 - 17.604; and the repeal of §17.54 and existing §§17.600 - 17.610. The proposal may be found in the Proposed Rules section of this issue of the *Texas Register.*

The assessment of Title 4, Part 1, Chapter 1, Subchapters A - J, by the department at this time indicates that, with the exception of the proposed amendments, new sections, and repeals in Subchapters B, C, D, and J, the reason for re-adopting without changes all other sections in these subchapters continues to exist.

The department is accepting comment on the review of Chapter 17, Subchapters A - J. Comments on the review must be submitted within 30 days following the publication of this notice in the *Texas Register* to Bryan Daniel, Chief Administrator, Trade and Business Development, P.O. Box 12847, Austin, Texas 78711.

TRD-201205085
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: September 24, 2012

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The Texas Department of Agriculture (the department) proposes to review Texas Administrative Code, Title 4, Part 1, Chapter 29, concerning Economic Development, Subchapter A, concerning Economic Development Program; Subchapter B, concerning GO TEXAN Rural Community Program Rules; Subchapter C, concerning GO TEXAN Certified Retirement Community Program; Subchapter D, concerning Texas Rural Investment Fund Program; and Subchapter E, concerning Rural Economic Development and Investment Program, pursuant to the Texas Government Code, §2001.039. Section 2001.039 requires state agencies to review and consider for re-adoption each of their rules every four years. The review must include an assessment of whether the original justification for the rules continues to exist.

As part of the review process, the department proposes amendments to Chapter 29, Subchapter A, §29.3, the repeal of Subchapter B, §§29.20 - 29.33 and the repeal of Subchapter C, §§29.50 - 29.56. The proposal may be found in the proposed rule section of this publication of the *Texas Register.*

The assessment by the department of Chapter 29, Subchapters A - E, indicates that with the exception of the proposed amendment of Subchapter A, §29.3, and the repeal of Subchapters B and C, the reason for re-adopting without changes all remaining sections in Chapter 29 continues to exist.

The department is accepting comment on the review of Chapter 29, Subchapters A - E. Comments on the review must be submitted within 30 days following the publication of this notice in the *Texas Register.* Comments on Chapter 29, Subchapters A - E, may be submitted to Bryan Daniel, Chief Administrator, Trade and Business Development, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711.

TRD-201205086
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: September 24, 2012

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State Board of Dental Examiners

Title 22, Part 5

The Texas State Board of Dental Examiners (SBDE) files this notice of intention to review Texas Administrative Code, Title 22, Chapter 100, concerning General Provisions. This review is pursuant to §2001.039 of the Texas Government Code, pertaining to agency review of existing rules.

Comments relating to whether these rules should be repealed, re-adopted, or re-adopted with changes must be received within 30 days from publication of this rule review in the *Texas Register,* and may be submitted to Nycia Deal, Staff Attorney, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-0977.

To ensure consideration, comments must clearly specify the particular section of the rule to which they apply. General comments should be labeled as such. Comments should include proposed alternative language as appropriate.

Chapter 100. General Provisions.

§100.1. Introduction.

§100.2. Purpose and Functions.

§100.3. Organization and Structure.

§100.4. Officers.

§100.5. Meetings.

§100.10. Executive Director.

§100.20. Final Board Decisions in Contested Cases.

TRD-201205037
Glenn Parker
Executive Director
State Board of Dental Examiners
Filed: September 24, 2012

♦ ♦ ♦

The Texas State Board of Dental Examiners (SBDE) files this notice of intention to review Texas Administrative Code, Title 22, Chapter 112, concerning Visual Dental Health Inspections. This review is pursuant to §2001.039 of the Texas Government Code, pertaining to agency review of existing rules.

Comments relating to whether these rules should be repealed, re-adopted, or re-adopted with changes must be received within 30 days from publication of this rule review in the *Texas Register,* and may be submitted to Nycia Deal, Staff Attorney, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-0977.

To ensure consideration, comments must clearly specify the particular section of the rule to which they apply. General comments should be labeled as such. Comments should include proposed alternative language as appropriate.

Chapter 112. Visual Dental Health Inspections.

§112.1. Definitions.

§112.2. Visual Dental Health Inspection.

TRD-201205038
Glenn Parker
Executive Director
State Board of Dental Examiners
Filed: September 24, 2012

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 4 TAC §17.51(8)

Figure: 30 TAC §305.69(k)

Modifications	Class
A. General Permit Provisions	
1. Administrative and informational changes	1
2. Correction of typographical errors	1
3. Equipment replacement or upgrading with functionally equivalent components (e.g., pipes, valves, pumps, conveyors, controls)	1
4. Changes in the frequency of or procedures for monitoring, reporting, sampling, or maintenance activities by the permittee:	
a. To provide for more frequent monitoring, reporting, sampling, or maintenance	1
b. Other changes	2
5. Schedule of compliance	
a. Changes in interim compliance dates, with prior approval of the executive director	1[1]
b. Extension of final compliance date	3
6. Changes in expiration date or permit to allow earlier permit expiration, with prior approval of the executive director	1[1]
7. Changes in ownership or operational control of a facility, provided the procedures of §305.64(g) of this title (relating to Transfer of Permits) are followed	1[1]
8. Six months or less extension of the construction period time limit applicable to commercial hazardous waste management units in accordance with §305.149(b)(2) or (4) of this title (relating to Time Limitation for Construction of Commercial Hazardous Waste Management Units)	2
9. Greater than six-month extension of the commercial hazardous waste management unit construction period time limit in accordance with §305.149(b)(3) or (4) of this title	3
10. Any extension in accordance with §305.149(b)(3) of this title of a construction period time limit for commercial hazardous waste management units which has been previously authorized under §305.149(b)(2) of this title	3
11. Changes to remove permit conditions that are no longer applicable (i.e., because the standards upon which they are based are no longer applicable to the facility)	1[1]

B. General Facility Standards

1. Changes to waste sampling or analysis methods:

a. To conform with agency guidance or regulations.....1

b. To incorporate changes associated with F039 (multi-source leachate) sampling or analysis methods.....1[1]

c. To incorporate changes associated with underlying hazardous constituents in ignitable or corrosive wastes.....1[1]

d. Other changes.....2

2. Changes to analytical quality assurance/control plan:

a. To conform with agency guidance or regulations.....1

b. Other changes.....2

3. Changes in procedures for maintaining the operating record.....1

4. Changes in frequency or content of inspection schedules.....2

5. Changes in the training plan:

a. That affect the type or decrease the amount of training given to employees.....2

b. Other changes.....1

6. Contingency plan:

a. Changes in emergency procedures (i.e., spill or release response procedures).....2

b. Replacement with functionally equivalent equipment, upgrade, or relocate emergency equipment listed.....1

c. Removal of equipment from emergency equipment list.....2

d. Changes in name, address, or phone number of coordinators or other persons or agencies identified in the plan.....1

7. Construction quality assurance (CQA) plan:

a. Changes that the CQA officer certifies in the operating record will provide equivalent or better certainty that the unity components meet the design specifications.....1

b. Other Changes.....2

Note: When a permit modification (such as introduction of a new unit) requires a change in facility plans or other general facility standards, that change shall be reviewed under the same procedures as the permit modification.

C. Groundwater Protection

1. Changes to wells:

a. Changes in the number, location, depth, or design of upgradient or downgradient wells of permitted groundwater monitoring system.....2

b. Replacement of an existing well that has been damaged or rendered inoperable, without change to location, design, or depth of the well.....1

2. Changes in groundwater sampling or analysis procedures or monitoring schedule, with prior approval of the executive director.....1[1]

3. Changes in statistical procedure for determining whether a statistically significant change in groundwater quality between upgradient and downgradient wells has occurred, with prior approval of the executive director.....1[1]

4. Changes in point of compliance.....2

5. Changes in indicator parameters, hazardous constituents, or concentration limits (including alternate concentration limits (ACLs)):

a. As specified in the groundwater protection standard.....3

b. As specified in the detection monitoring program.....2

6. Changes to a detection monitoring program as required by §335.164(8) of this title (relating to Detection Monitoring Program), unless otherwise specified in this appendix.....2

7. Compliance monitoring program:

a. Addition of compliance monitoring program pursuant to §335.164(7)(D) of this title, and §335.165 of this title (relating to Compliance Monitoring Program).....3

b. Changes to a compliance monitoring program as required by §335.165(13) of this title, unless otherwise specified in this appendix.....2

8. Corrective action program:

a. Addition of a corrective action program pursuant to §335.165(11)(B) of this title and §335.166 of this title (relating

to Corrective Action Program).....3

b. Changes to a corrective action program as required by §335.166(8) of this title, unless otherwise specified in this appendix.....2

D. Closure

1. Changes to the closure plan:

a. Changes in estimate of maximum extent of operations or maximum inventory of waste on-site at any time during the active life of the facility, with prior approval of the executive director.....1[1]

b. Changes in the closure schedule for any unit, changes in the final closure schedule for the facility, or extension of the closure period, with prior approval of the executive director.....1[1]

c. Changes in the expected year of final closure, where other permit conditions are not changed, with prior approval of the executive director.....1[1]

d. Changes in procedures for decontamination of facility equipment or structures, with prior approval of the executive director.....1[1]

e. Changes in approved closure plan resulting from unexpected events occurring during partial or final closure, unless otherwise specified in this appendix.....2

f. Extension of the closure period to allow a landfill, surface impoundment or land treatment unit to receive nonhazardous wastes after final receipt of hazardous wastes under 40 Code of Federal Regulations (CFR), §264.113(d) and (e).....2

2. Creation of a new landfill unit as part of closure.....3

3. Addition of the following new units to be used temporarily for closure activities:

a. Surface impoundments.....3

b. Incinerators.....3

c. Waste piles that do not comply with 40 CFR §264.250(c).....3

d. Waste piles that comply with 40 CFR §264.250(c).....2

e. Tanks or containers (other than specified below).....2

f. Tanks used for neutralization, dewatering, phase separation, or component separation, with prior approval of the executive director.....1[1]

g. Staging Pile 2

E. Post-Closure

1. Changes in name, address, or phone number of contact in post-closure plan.....1

2. Extension of post-closure care period.....2

3. Reduction in the post-closure care period.....3

4. Changes to the expected year of final closure, where other permit conditions are not changed.....1

5. Changes in post-closure plan necessitated by events occurring during the active life of the facility, including partial and final closure.....2

F. Containers

1. Modification or addition of container units:

a. Resulting in greater than 25% increase in the facility's container storage capacity, except as provided in F(1)(c) and F(4)(a) of this appendix.....3

b. Resulting in up to 25% increase in the facility's container storage capacity, except as provided in F(1)(c) and F(4)(a) of this appendix.....2

c. Or treatment processes necessary to treat wastes that are restricted from land disposal to meet some or all of the applicable treatment standards or to treat wastes to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR §268.8(a)(2)(ii), with prior approval of the executive director. This modification may also involve addition of new waste codes or narrative descriptions of wastes. It is not applicable to dioxincontaining wastes (F020, 021, 022, 023, 026, 027, and 028).....1[1]

2. Modification of container units, as follows:

a. Modification of a container unit without increasing the capacity of the unit.....2

b. Addition of a roof to a container unit without alteration of the containment system.....1

3. Storage of different wastes in containers, except as provided in F(4) of this appendix:

a. That require additional or different management practices from those authorized in the permit.....3

b. That do not require additional or different management practices from those authorized in the permit.....2

Note: See §305.69(g) of this title (relating to Solid Waste Permit Modification at the Request of the Permittee) for modification procedures to be used for the management of newly listed or identified wastes.

4. Storage or treatment of different wastes in containers:

a. That require addition of units or change in treatment process or management standards, provided that the wastes are restricted from land disposal and are to be treated to meet some or all of the applicable treatment standards, or that are to be treated to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR §268.8(a)(2)(ii), with prior approval of the executive director. This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028).....1[1]

b. That do not require the addition of units or a change in the treatment process or management standards, and provided that the units have previously received wastes of the same type (e.g., incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028).....1

5. Other changes in container management practices (e.g., aisle space, types of containers, segregation).....2

G. Tanks

1. Modification or addition of tank units or treatment processes, as follows:

a. Modification or addition of tank units resulting in greater than 25% increase in the facility's tank capacity, except as provided in G(1)(c), G(1)(d), and G(1)(e) of this appendix.....3

b. Modification or addition of tank units resulting in up to 25% increase in the facility's tank capacity, except as provided in G(1)(d) and G(1)(e) of this appendix.....2

c. Addition of a new tank (no capacity limitation) that will operate for more than 90 days using any of the following physical or chemical treatment technologies: neutralization, dewatering, phase separation, or component separation.....2

d. After prior approval of the executive director, addition of a new tank (no capacity limitation) that will operate for up to 90 days using any of the following physical or chemical treatment technologies:

neutralization, dewatering, phase separation, or component separation.....1[1]

e. Modification or addition of tank units or treatment processes necessary to treat wastes that are restricted from land disposal to meet some or all of the applicable treatment standards or to treat wastes to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR §268.8(a)(2)(ii), with prior approval of the executive director. This modification may also involve addition of new waste codes. It is not applicable to dioxincontaining wastes (F020, 021, 022, 023, 026, 027, and 028).....1[1]

2. Modification of a tank unit or secondary containment system without increasing the capacity of the unit.....2

3. Replacement of a tank with a tank that meets the same design standards and has a capacity within +/-10% of the replaced tank provided:.....1

a. The capacity difference is no more than 1,500 gallons;

b. The facility's permitted tank capacity is not increased; and

c. The replacement tank meets the same conditions in the permit.

4. Modification of a tank management practice.....2

5. Management of different wastes in tanks:

a. That require additional or different management practices, tank design, different fire protection specifications, or significantly different tank treatment process from that authorized in the permit, except as provided in G(5)(c) of this appendix.....3

b. That do not require additional or different management practices, tank design, different fire protection specifications, or significantly different tank treatment process from that authorized in the permit, except as provided in G(5)(d) of this appendix.....2

c. That require addition of units or change in treatment processes or management standards, provided that the wastes are restricted from land disposal and are to be treated to meet some or all of the applicable treatment standards or that are to be treated to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR §268.8(a)(1)(ii), with prior approval of the executive director. The modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027,and 028).....1[1]

d. That do not require the addition of units or a change in the treatment process or management standards, and provided that the

units have previously received wastes of the same type (e.g., incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028).....1

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

H. Surface Impoundments

1. Modification or addition of surface impoundment units that result in increasing the facility's surface impoundment storage or treatment capacity.....3

2. Replacement of a surface impoundment unit.....3

3. Modification of a surface impoundment unit without increasing the facility's surface impoundment storage or treatment capacity and without modifying the unit's liner, leak detection system, or leachate collection system.....2

4. Modification of a surface impoundment management practice.....2

5. Treatment, storage, or disposal of different wastes in surface impoundments:

a. That require additional or different management practices or different design of the liner or leak detection system than authorized in the permit.....3

b. That do not require additional or different management practices or different design of the liner or leak detection system than authorized in the permit.....2

c. That are wastes restricted from land disposal that meet the applicable treatment standards or that are treated to satisfy the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR §268.8(a)(2)(ii), and provided that the unit meets the minimum technological requirements stated in 40 CFR §268.5(h)(2). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028).....1

d. That are residues from wastewater treatment or incineration, provided that disposal occurs in a unit that meets the minimum technological requirements stated in 40 CFR §268.5(h)(2), and provided further that the surface impoundment has previously received wastes of the same type (for example, incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028).....1

6. Modifications of unconstructed units to comply with 40 CFR §§264.221(c), 264.222, 264.223, and 264.226(d).....1[1]

7. Changes in response action plan:

a. Increase in action leakage rate.....3

b. Change in a specific response reducing its frequency or effectiveness.....3

c. Other Changes.....2

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

I. Enclosed Waste Piles. For all waste piles except those complying with 40 CFR §264.250(c), modifications are treated the same as for a landfill. The following modifications are applicable only to waste piles complying with 40 CFR §264.250(c).

1. Modification or addition of waste pile units:

a. Resulting in greater than 25% increase in the facility's waste pile storage or treatment capacity.....3

b. Resulting in up to 25% increase in the facility's waste pile storage or treatment capacity.....2

2. Modification of waste pile unit without increasing the capacity of the unit.....2

3. Replacement of a waste pile unit with another waste pile unit of the same design and capacity and meeting all waste pile conditions in the permit.....1

4. Modification of a waste pile management practice.....2

5. Storage or treatment of different wastes in waste piles:

a. That require additional or different management practices or different design of the unit.....3

b. That do not require additional or different management practices or different design of the unit.....2

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

6. Conversion of an enclosed waste pile to a containment building unit.....2

J. Landfills and Unenclosed Waste Piles

1. Modification or addition of landfill units that result in increasing the facility's disposal capacity.....3

2. Replacement of a landfill.....3

3. Addition or modification or a liner, leachate collection system, leachate detection system, run-off control, or final cover system.....3

4. Modification of a landfill unit without changing a liner, leachate collection system, leachate detection system, run-off control, or final cover system.....2

5. Modification of a landfill management practice.....2

6. Landfill different wastes:

a. That require additional or different management practices, different design of the liner, leachate collection system, or leachate detection system.....3

b. That do not require additional or different management practices, different design of the liner, leachate collection system, or leachate detection system.....2

c. That are wastes restricted from land disposal that meet the applicable treatment standards or that are treated to satisfy the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR §268.8(a)(2)(ii), and provided that the landfill unit meets the minimum technological requirements stated in 40 CFR §268.5(h)(2). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028).....1

d. That are residues from wastewater treatment or incineration, provided that disposal occurs in a landfill unit that meets the minimum technological requirements stated in 40 CFR §268.5(h)(2), and provided further that the landfill has previously received wastes of the same type (for example, incinerator ash). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028).....1

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

7. Modifications of unconstructed units to comply with 40 CFR §§264.251(c), 264.252, 264.253, 264.254(c), 264.301(c), 264.302, 264.303(c), and 264.304.....1[1]

8. Changes in response action plan:

a. Increase in action leakage rate.....3

b. Change in a specific response reducing its frequency or effectiveness.....3

c. Other changes.....2

K. Land Treatment

1. Lateral expansion of or other modification of a land treatment unit to increase areal extent.....3

2. Modification of run-on control system.....2

3. Modify run-off control system.....3

4. Other modifications of land treatment unit component specifications or standards required in the permit.....2

5. Management of different wastes in land treatment units:

a. That require a change in permit operating conditions or unit design specifications.....3

b. That do not require a change in permit operating conditions or unit design specifications.....2

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

6. Modification of a land treatment management practice to:

a. Increase rate or change method of waste application.....3

b. Decrease rate of waste application.....1

7. Modification of a land treatment unit management practice to change measures of pH or moisture content, or to enhance microbial or chemical reactions.....2

8. Modification of a land treatment unit management practice to grow food chain crops, or add to or replace existing permitted crops with different food chain crops, or to modify operating plans for distribution of animal feeds resulting from such crops.....3

9. Modification of operating practice due to detection of releases from the land treatment unit pursuant to 40 CFR §264.278(g)(2).....3

10. Changes in the unsaturated zone monitoring system, resulting in a change to the location, depth, or number of sampling points, or that replace unsaturated zone monitoring devices or components thereof with devices or components that have specifications different from permit requirements.....3

11. Changes in the unsaturated zone monitoring system that do not result in a change to the location, depth, or number of sampling points, or that replace unsaturated zone monitoring devices or components thereof with devices or components having specifications not different from permit requirements.....2

12. Changes in background values for hazardous constituents in soil and soilpore liquid.....2

13. Changes in sampling, analysis, or statistical procedure.....2

14. Changes in land treatment demonstration program prior to or during the demonstration.....2

15. Changes in any condition specified in the permit for a land treatment unit to reflect results of the land treatment demonstration, provided performance standards are met, and the executive director's prior approval has been received.....1[1]

16. Changes to allow a second land treatment demonstration to be conducted when the results of the first demonstration have not shown the conditions under which the wastes can be treated completely, provided the conditions for the second demonstration are substantially the same as the conditions for the first demonstration and have received the prior approval of the executive director.....1[1]

17. Changes to allow a second land treatment demonstration to be conducted when the results of the first demonstration have not shown the conditions under which the waste can be treated completely, where the conditions for the second demonstration are not substantially the same as the conditions for the first demonstration.....3

18. Changes in vegetative cover requirements for closure.....2

L. Incinerators, Boilers and Industrial Furnaces

1. Changes to increase by more than 25% any of the following limits authorized in the permit: A thermal feed rate limit; a feedstream feed rate limit; a chlorine feed rate limit, a metal feed rate limit, or an ash feed rate limit. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means.....3

2. Changes to increase by up to 25% any of the following limits authorized in the permit: A thermal feed rate limit; a feedstream feedrate limit; chlorine/chloride feed rate limit, a metal feed rate limit, or an ash feed rate limit. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means.....2

3. Modification of an incinerator, boiler, or industrial furnace unit by changing the internal size of geometry of the primary or secondary combustion units, by adding a primary or secondary combustion unit, by substantially changing the design of any component used to remove HCl/Cl2, metals or particulate from the combustion gases, or by changing other features of the incinerator, boiler, or industrial furnace that could affect its capability to meet the regulatory performance standards. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means.....3

4. Modification of an incinerator, boiler, or industrial furnace unit in a manner that would not likely affect the capability of the unit to meet the regulatory

performance standards but which would change the operating conditions or monitoring requirements specified in the permit. The executive director may require a new trial burn to demonstrate compliance with the regulatory performance standards.....2

5. Operating requirements:

a. Modification of the limits specified in the permit for minimum or maximum combustion gas temperature, minimum combustion gas residence time, oxygen concentration in the secondary combustion chamber, flue gas carbon monoxide and hydrocarbon concentration, maximum temperature at the inlet to the particulate matter emission control system, or operating parameters for the air pollution control system. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means.....3

b. Modification of any stack gas emission limits specified in the permit, or modification of any conditions in the permit concerning emergency shutdown or automatic waste feed cutoff procedures or controls.....3

c. Modification of any other operating condition or any inspection or recordkeeping requirement specified in the permit.....2

6. Burning different wastes:

a. If the waste contains a principal organic hazardous constituent (POHC) that is more difficult to burn than authorized by the permit or if burning of the waste requires compliance with different regulatory performance standards than specified in the permit. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means.....3

b. If the waste does not contain a POHC that is more difficult to burn than authorized by the permit and if burning of the waste does not require compliance with different regulatory performance standards than specified in the permit.....2

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly regulated wastes and units.

7. Shakedown and trial burn:

a. Modification of the trial burn plan or any of the permit conditions applicable during the shakedown period for determining operational readiness after construction, the trial burn period, or the period immediately following the trial burn.....2

b. Authorization of up to an additional 720 hours of waste burning during the shakedown period for determining operational readiness after construction, with the prior approval of the executive director.....1[1]

c. Changes in the operating requirements set in the permit for conducting a trial burn, provided the change is minor and has received the prior approval of the executive director.....1[1]

d. Changes in the ranges of the operating requirements set in the permit to reflect the results of the trial burn, provided the change is minor and has received the prior approval of the executive director.....1[1]

8. Substitution of an alternate type of nonhazardous waste fuel that is not specified in the permit.....1

9. Technology changes needed to meet standards under Title 40 CFR Part 63 (Subpart EEE - National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors), provided the procedures of §305.69(i) of this title are followed.....1[1]

10. Changes to Resource Conservation and Recovery Act permit provisions needed to support transition to §113. 620 of this title and 40 CFR Part 63, Subpart EEE (National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors) provided the procedures of 40 CFR §270.42(k) are followed.....1[1]

M. Corrective Action

1. Approval of a corrective action management unit pursuant to 40 CFR §264.552.....3

2. Approval of a temporary unit or time extension for a temporary unit pursuant to 40 CFR §264.553.....2

3. Approval of a staging pile or staging pile operating term extension pursuant to 40 CFR §264.554.....2

N. Containment Buildings

1. Modification or addition of containment building units:

a. Resulting in greater than 25% increase in the facility's containment building storage or treatment capacity.....3

b. Resulting in up to 25% increase in the facility's containment building storage or treatment capacity.....2

2. Modification of a containment building unit or secondary containment system without increasing the capacity of the unit.....2

3. Replacement of a containment building with a containment building that meets the same design standards provided:

a. The unit capacity is not increased.....1

b. The replacement containment building meets the same conditions in the permit.....1

4. Modification of a containment building management practice.....2

5. Storage or treatment of different wastes in containment buildings:

a. That require additional or different management practices.....3

b. That do not require additional or different management practices.....2

O. Burden Reduction

1. Development of one contingency plan based on Integrated Contingency Plan Guidance pursuant to 40 CFR §264.52(b).....1

2. Changes to recordkeeping and reporting requirements pursuant to: 40 CFR §§264.56(i), 264.343(a)(2), 264.1061(b)(1) and (d), 264.1062(a)(2), 264.196(f), 264.100(g), and 264.113(e)(5).....1

3. Changes to inspection frequency for tank systems pursuant to 40 CFR §264.195(b).....1

4. Changes to detection and compliance monitoring program pursuant to 40 CFR §§264.98(d), (g)(2), and (g)(3), 264.99(f), and (g).....1

Figure: 30 TAC §335.1(138)(D)(iv)

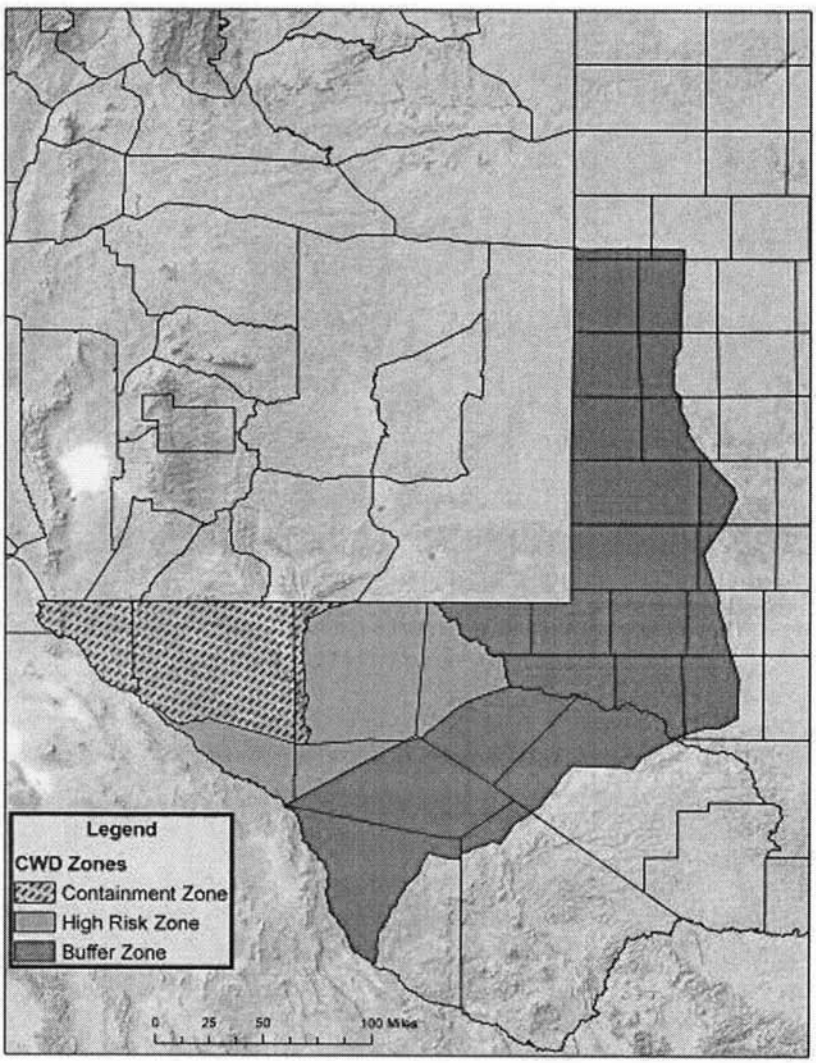
TABLE 1

	Use Constituting Disposal S.W. Def. (D)(i)(1)	Energy Recovery/Fuel S.W. Def. (D)(ii)(2)	Reclamation S.W. Def. (D)(iii)(3)[2]	Speculative Accumulation S.W. Def. (D)(iv)(4)
Spent materials (listed hazardous and not listed characteristically hazardous)	*	*	*	*
Spent materials (nonhazardous)[1]	*	*	*	*
Sludges (listed hazardous in 40 CFR §261.31 or §261.32)	*	*	*	*
Sludges (not listed characteristically hazardous)	*	*		*
Sludges (nonhazardous)[1]	*	*		*
By-products (listed hazardous in 40 CFR §261.31 or §261.32)	*	*	*	*
By-products (not listed characteristically hazardous)	*	*		*
By-products (nonhazardous)[1]	*	*		*
Commercial chemical products (listed, not listed characteristically hazardous, and nonhazardous)	*	*		
Scrap metal that is not excluded under §335.1(138)(A)(iv) of this title (hazardous)	*	*	*	*
Scrap metal other than excluded scrap metal (see §335.17(9) of this title) (nonhazardous)[1]	*	*	*	*

NOTE: The terms "spent materials," "sludges," "by-products," "scrap metal," and "excluded scrap metal" are defined in §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials).

[1] These materials are governed by the provisions of §335.24(h) of this title only.
[2] Except as provided in 40 CFR §261.4(a)(17) for mineral processing secondary materials.

Figure: 31 TAC Chapter 65 - Preamble



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.

Comptroller of Public Accounts

Certification of the Average Taxable Price of Gas and Oil - August 2012

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined as required by Tax Code, §202.058, that the average taxable price of crude oil for reporting period August 2012, is $67.68 per barrel for the three-month period beginning on May 1, 2012, and ending July 31, 2012. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of August 2012, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined as required by Tax Code, §201.059, that the average taxable price of gas for reporting period August 2012, is $2.14 per mcf for the three-month period beginning on May 1, 2012, and ending July 31, 2012. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of August 2012, from a qualified Low-Producing Well, is eligible for 100% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of West Texas Intermediate crude oil for the month of August 2012, is $94.16 per barrel. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from oil produced during the month of August 2012, from a qualified low-producing oil well.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of gas for the month of August 2012, is $2.81 per MMBtu. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall exclude total revenue received from gas produced during the month of August 2012, from a qualified low-producing gas well.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-201205021
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: September 21, 2012

♦ ♦ ♦

Local Sales Tax Rate Changes Effective October 1, 2012

An additional 1/4 percent city sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective October 1, 2012 in the cities listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Cresson (Hood Co)	2111042	.017500	.080000
Cresson (Johnson Co)	2111042	.012500	.075000
Cresson (Parker Co)	2111042	.017500	.080000
Crystal City (Zavala Co)	2254012	.020000	.082500
Panhandle (Carson Co)	2033010	.017500	.080000

An additional 1/2 percent city sales and use tax for property tax relief will become effective October 1, 2012 in the cities listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
McLendon Chisholm (Rockwall Co)	2199065	.020000	.082500
Providence Village (Denton Co)	2061355	.015000	.077500

An additional 1/2 percent city sales and use tax that includes the adoption of a 1/4 percent sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code and adoption of an additional 1/4 percent city sales and use tax for property tax relief will become effective October 1, 2012 in the city listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Lucas (Collin Co)	2043143	.015000	.077500

The additional 1/2 percent sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 504 of the Texas Local Government Code, Type A Corporation will be reduced to 1/4 percent and the adoption of an additional 1/4 percent sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective October 1, 2012 in the city listed below. There will be no change in the local rate or total rate.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Muleshoe (Bailey Co)	2009010	.020000	.082500

The additional 1/2 percent sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 505 of the Texas Local Government Code, Type B Corporation will be reduced to 1/4 percent and the adoption of an additional 1/4 percent sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective October 1, 2012 in the city listed below. There will be no change in the local rate or total rate.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Watauga (Tarrant Co)	2220282	.020000	.082500

The additional 1/2 percent city sales and use tax improving and promoting economic and industrial development as permitted under Chapter 504 of the Texas Local Government Code, Type A Corporations will be reduced to 1/4 percent and the adoption of an additional 1/4 percent sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 505 of the

Texas Local Government Code, Type B Corporation will become effective October 1, 2012 in the city listed below. There will be no change in the local rate or total rate.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Lamesa (Dawson Co)	2058010	.020000	.082500

The additional 1/2 percent city sales and use tax improving and promoting economic and industrial development as permitted under Chapter 505 of the Texas Local Government Code, Type B Corporations will be reduced to 1/4 percent and the adoption of an additional 1/4 percent sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 504 of the Texas Local Government Code, Type A Corporation will become effective October 1, 2012 in the city listed below. There will be no change in the local rate or total rate.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Trenton (Fannin Co)	2074010	.020000	.082500

A 1/2 percent special purpose district sales and use tax will become effective October 1, 2012 in the special purpose districts listed below.

SPD NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Point Comfort Municipal Development District	5029506	.005000	SEE NOTE 1
Travis County Emergency Services District No. 12	5227640	.005000	SEE NOTE 2

A one percent special purpose district sales and use tax will become effective October 1, 2012 in the special purpose district listed below.

SPD NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Harris County Emergency Services District No. 17	5101847	.010000	SEE NOTE 3

A two percent special purpose district sales and use tax will become effective October 1, 2012 in the special purpose district listed below.

SPD NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Montgomery County Emergency Services District No. 7-A	5170727	.020000	SEE NOTE 4

NOTE 1: The Point Comfort Municipal Development District has the same boundaries as the Point Comfort extraterritorial jurisdiction, which includes the city of Point Comfort. Contact the district representative at 361-987-2661 for additional boundary information.

NOTE 2: The Travis County Emergency Services District No. 12 is located in the northeastern portion of Travis County. The district excludes any area in the cities of Manor and Webberville and the Austin MTA. A very small easterly portion of the city of Pflugerville is located in the district. The unincorporated areas of Travis County in ZIP Codes 78621, 78653, 78660, 78724, 78725 and 78754 are partially located in the Travis County Emergency Services District No. 12. Contact the district representative at 512-272-4502 for additional boundary information.

NOTE 3: The Harris County Emergency Services District No. 17 is located in the north-central portion of Harris County. The district's boundaries for the imposition of sales and use tax exclude areas of the district which are responsible for collecting and remitting sales and use tax to the city of Houston due to a strategic partnership agreement between a utility district and the city of Houston and exclude the Airline Improvement District. The district is located entirely within the Houston MTA. The unincorporated areas of Harris County in ZIP Codes 77014, 77037, 77038, 77060, 77067 and 77090 are partially located in the Harris County Emergency Services District No. 17. Contact the district representative at 713-984-8222 for additional boundary information.

NOTE 4: The Montgomery County Emergency Services District No. 7-A is the unincorporated area in the northwestern portion of the original district and excludes all area in Montgomery County Emergency Services District No. 7. Contact the district representative at 281-689-3112 for additional boundary information.

TRD-201205034
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: September 24, 2012

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Notice of Request for Applications

Pursuant to Chapters 403, 447 and 2305, Texas Government Code; and the State Energy Plan (SEP) and related legal authority and regulations, the Comptroller of Public Accounts (Comptroller), State Energy Conservation Office (SECO), announces this Request for Applications (RFA #ISD-G2-2012) and Notice of Funding Availability for approximately $3.8 million in grant funding and invites applications from eligible interested Independent School Districts (ISDs) for grant funds for the ISD Grants Program of the State Energy Conservation Office (SECO). Applications are not required to include any match. Comptroller reserves the right to award more than one grant under the terms of this RFA. If a grant award is made under the terms of the RFA, Grantee will be expected to begin performance of the grant agreement on or about December 5, 2012, or as soon thereafter as practical.

Contact: For general questions about these instructions or the application form, please submit your question in writing to Jason C. Frizzell, Assistant General Counsel, Contracts, via facsimile to: (512) 463-3669. The RFA will be published after 10:00 a.m. Central Time (CT) on Friday, October 5, 2012, and posted on the Electronic State Business Daily (ESBD) at: http://esbd.cpa.state.tx.us after 10:00 a.m. CT on Friday, October 5, 2012. The application and sample grant agreement will be posted on the following website shortly thereafter at: http://www.seco.cpa.state.tx.us/funding/

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and Non-mandatory Letters of Intent must be received at the above-referenced address (Issuing Office), not later than 2:00 p.m. (CT) on Monday, October 15, 2012. Prospective applicants are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Non-mandatory Letters of Intent must be addressed to the attention of Mr. Frizzell and must be signed by an official of the entity. On or about Friday, October 19, 2012, or as soon thereafter as practical, Comptroller expects to post responses to questions on the ESBD. Late Non-mandatory Letters of Intent and Questions will not be considered under any circumstances. Applicants shall be solely responsible for verifying timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Applications must be delivered to the Issuing Office to the attention of the Assistant General Counsel, Contracts, no later than 2:00 p.m. (CT), on Monday, November 5, 2012. Late Applications will not be accepted under any circumstances; Applicants shall be solely responsible for verifying timely receipt of applications in the Issuing Office.

Evaluation Criteria: Applications will be evaluated under the criteria outlined in the grant application and instructions for this RFA. Comptroller reserves the right to accept or reject any or all applications submitted. Comptroller is not obligated to execute a grant agreement on the basis of this notice or the distribution of any RFA. Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or to the RFA.

The anticipated schedule of events pertaining to this RFA is as follows: Issuance of RFA - October 5, 2012, after 10:00 a.m. CT; Non-Mandatory Letters of Intent and Questions Due - October 15, 2012, 2:00 p.m. CT; Official Responses to Questions posted - October 19, 2012, or as soon thereafter as practical; Applications Due - November 5, 2012, 2:00 p.m. CT; Grant Agreement Execution - December 5, 2012, or as soon thereafter as practical; Commencement of Project - December 5, 2012, or as soon thereafter as practical.

TRD-201205112
Jason C. Frizzell
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 26, 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 10/01/12 - 10/07/12 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 10/01/12 - 10/07/12 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.

TRD-201205076
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 24, 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 ("ERS") with regard to the contract awarded for ERS's Request for Proposal to Provide an Administrator for the Board of Trustee Election; Requisition No. 327-96258-120518.

The contract was awarded to Survey & Ballot Systems, Inc., 7653 Anagram Drive, Eden Prairie, MN 55344-7311. The cost of the contract is $175,420.00 for the FY2013 and FY2015 elections.

TRD-201205087
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: September 24, 2012

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Request for Proposal to Provide Third-Party Administration Services for the Short and Long Term Disability Benefits Plan for the Texas Employees Group Benefits Program

In accordance with Texas Insurance Code, Chapter 1551, the Employees Retirement System of Texas ("ERS") is issuing a Request for Proposal ("RFP") seeking a qualified Third-Party Administrator ("TPA") to provide administration of a Short and Long Term Disability Benefits Plan for Participants covered under the Texas Employees Group Benefits Program ("GBP") beginning September 1, 2013 through an initial term of August 31, 2017. The TPA shall provide administrative services for the level of benefits required in the RFP and meet other requirements that are in the best interest of ERS, the GBP, its Participants and the state of Texas, and shall be required to execute a Contractual Agreement ("Contract") provided by, and satisfactory to, ERS.

A TPA wishing to respond to this request shall: 1) Maintain its principal place of business and provide all products and/or services including, but not limited to: call center, billing, eligibility, and programming, etc. within the United States of America, and shall have a valid Certificate of Authority and a third-party administrative license to do business in Texas as a TPA from the Texas Department of Insurance ("TDI") and be in good standing with all agencies of the state of Texas, including TDI; 2) Have been providing coverage, administrative services, claim processing, to group benefit plans, at least one of which will have an enrollment of 10,000 covered employees working in multiple locations; and 3) The TPA shall have a minimum capital and surplus in the amount of $50 million and have been doing business in Texas for three (3) years as evidenced by a 2010 audited financial statement.

The RFP will be available on or after October 5, 2012 from ERS' website and will include documents for the TPA's review and response. To access the secured portion of the RFP website, the interested TPA shall email its request to the attention of iVendor Mailbox at: **ivendorquestions@ers.state.tx.us.** The email request shall reflect (1) TPA's legal name; (2) Point of contact's full name; (3) Street address; (4) Phone and fax numbers; and (5) Email address for the organization's direct point of contact.

Upon receipt of this information, a user ID and password will be issued to the requesting organization that will permit access to the secured RFP.

General questions concerning the RFP and/or ancillary bid materials should be sent to the iVendor Mailbox where the responses, if applicable, are updated frequently. The submission deadline for all RFP questions submitted to the iVendor Mailbox is October 26, 2012, at 4:00 p.m. CT.

To be eligible for consideration, the TPA is required to submit a total of seven (7) sets of the Proposal in a sealed container. One (1) printed original shall be labeled as an "Original" and include fully executed documents, as appropriate, **signed in blue ink** and without amendment or revision. Three (3) additional printed copies labeled "copy" of the Proposal, including all required exhibits, shall be provided in printed format. Finally, two (2) complete copies of the entire Response shall be submitted on CD-ROMs in Excel or Word format. No PDF documents (with the exception of sample GBP-specific marketing materials, financial statements, and audited financial materials) may be reflected on the CD-ROMs. All materials shall be received by ERS no later than 12:00 Noon (CT) on November 16, 2012.

ERS will base its evaluation and selection of a TPA on factors including, but not limited to the following, which are not necessarily listed in order of priority: compliance with the RFP, operating requirements, and experience serving large group programs, past experience, administrative quality, program fees and other relevant criteria. Each Proposal will be evaluated both individually and relative to the Proposal of other qualified TPAs. Complete specifications will be included within the RFP.

ERS reserves the right to reject any and/or all Proposals and/or call for new Proposals if deemed by ERS to be in the best interests of ERS, the GBP, its Participants and the state of Texas. ERS also reserves the right to reject any Proposal submitted that does not fully comply with the RFP's instructions and criteria. ERS is under no legal requirement to execute a Contract on the basis of this notice or upon issuance of the RFP and will not pay any costs incurred by any entity in responding to this notice or in connection with the preparation thereof. ERS reserves the right to vary all provisions set forth at any time prior to execution of a Contract where ERS deems it to be in the best interest of ERS, the GBP, its Participants and the state of Texas.

TRD-201205094
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: September 25, 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 November 5, 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 November 5, 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: BELL-MILAM-FALLS WATER SUPPLY CORPORATION; DOCKET NUMBER: 2012-0946-PWS-E; IDENTIFIER: RN101233922; LOCATION: Cameron, Bell County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(s)(1), by failing to calibrate the facility's well meters at least once every three years; 30 TAC §290.42(e)(3)(G), by failing to obtain an exception, in accordance with 30 TAC §290.39(l), prior to using any primary disinfectant other than chlorine; 30 TAC §290.43(e) and §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the good working condition and general appearance of the facility's systems and equipment and by failing to ensure the fence around the facility is intruder-resistant; 30 TAC §290.44(d) and §290.46(r), by failing to maintain and operate the facility to provide a minimum pressure of 35 pounds per square inch throughout the distribution system at all times; and 30 TAC §290.46(m)(4), by failing to maintain all water treatment units, storage and pressure maintenance facilities, distribution system lines, and related appurtenances in a watertight condition; PENALTY: $789; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(2) COMPANY: Car Spa, Incorporated dba Car Spa 018; DOCKET NUMBER: 2012-1278-PST-E; IDENTIFIER: RN101435295; LOCATION: Plano, Collin County; TYPE OF FACILITY: car wash 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); PENALTY: $3,750; ENFORCEMENT COORDINATOR: Linda Ndoping, (512) 239-2569; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: CHAN LUCKY STAR, INCORPORATED dba Lucky Star Grocery; DOCKET NUMBER: 2012-0900-PST-E; IDENTIFIER: RN102251741; LOCATION: Palestine, Anderson 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); PENALTY: $2,500; ENFORCEMENT COORDINATOR: Andrea Linson, (512) 239-1482; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(4) COMPANY: City of Alice; DOCKET NUMBER: 2012-1664-WQ-E; IDENTIFIER: RN101478279; LOCATION: Alice, Jim Wells County; TYPE OF FACILITY: municipal utilities; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Multi-Sector General Permit (stormwater); PENALTY: $875; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(5) COMPANY: City of Brownsville; DOCKET NUMBER: 2012-0829-PST-E; IDENTIFIER: RN103059283; LOCATION: Brownsville, Cameron County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a delivery certificate by submitting a properly completed underground storage tank (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 §334.50(b)(1)(A) and TWC, §26.3475(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 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(6) COMPANY: City of Lockney; DOCKET NUMBER: 2011-1387-MWD-E; IDENTIFIER: RN101916930; LOCATION: Lockney, Floyd County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and TCEQ Permit Number WQ0010211001, Monitoring Requirements Number 5, by failing to accurately calibrate all automatic flow measuring or recording devices and all totalizing meters for measuring flows, at least annually unless authorized by the executive director for a longer period; TWC, §26.121(a)(1), 30 TAC §305.125(1) and TCEQ Permit Number WQ0010211001, Effluent Limitations and Monitoring Requirements Section A, by failing to comply with permitted effluent limitations; 30 TAC §305.125(1) and §309.13(c)(1), and TCEQ Permit Number WQ0010211001, Special Provisions (SP) Number 15, by failing to meet the buffer zone requirements from a private well to the land application area; 30 TAC §305.125(1) and TCEQ Permit Number WQ0010211001, SP Number 3, by failing to properly operate and maintain all facilities and systems of treatment and control; 30 TAC §305.125(1) and §319.4, and TCEQ Permit Number WQ0010211001, Effluent Limitations and Monitoring Requirements Section B and Monitoring Requirements Number 1, by failing to conduct flow monitoring of irrigation at a minimum of five times per week and maintain records on a monthly basis; and 30 TAC §305.125(1) and TCEQ Permit Number WQ0010211001, SP Number 16, by failing to implement the May 12, 2008, Groundwater Quality Assessment Plan in accordance with all schedules; PENALTY: $20,475; Supplemental Environmental Project offset amount of $16,380 applied to Texas Association of Resource Conservation and Development Areas, Incorporated - Cleanup of Unauthorized Trash Dumps; ENFORCEMENT COORDINATOR: JR Cao, (512) 239-2543; REGIONAL OFFICE:

5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7092.

(7) COMPANY: City of Marlin; DOCKET NUMBER: 2012-1112-PWS-E; IDENTIFIER: RN102886892; LOCATION: Marlin, Falls County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes based on the running annual average; PENALTY: $441; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(8) COMPANY: City of Paducah; DOCKET NUMBER: 2012-0806-WQ-E; IDENTIFIER: RN101919595; LOCATION: Paducah, Cottle County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge stormwater associated with construction activities; PENALTY: $1,337; ENFORCEMENT COORDINATOR: Jill Russell, (512) 239-4564; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(9) COMPANY: Devon Gas Services, L.P.; DOCKET NUMBER: 2012-1276-AIR-E; IDENTIFIER: RN101330959; LOCATION: Chico, Wise County; TYPE OF FACILITY: compressor station; RULE VIOLATED: 30 TAC §122.121 and §122.130(b) and Texas Health and Safety Code, §382.054 and §382.085(b), by failing to obtain a federal operating permit; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Donald R. Cole and Susan Cole dba Blue Ridge Water System; DOCKET NUMBER: 2012-0244-PWS-E; IDENTIFIER: RN104709860; LOCATION: Weatherford, Parker County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.271(b) and §290.274(a) and (c), by failing to timely mail or directly deliver one copy of the Consumer Confidence Report (CCR) to each bill paying customer by July 1 of each year and by failing to timely submit to the TCEQ by July 1 of each year a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with compliance monitoring data; 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to timely submit a Disinfectant Level Quarterly Operating Report to the executive director each quarter by the tenth day of the month following the end of the quarter; 30 TAC §290.51(a)(3) and TWC, §5.702, by failing to pay public health service fees for TCEQ Financial Administration Account Number 91840159 for Fiscal Years 2009 - 2012; and 30 TAC §290.122(c)(2)(A), by failing to post public notification for failure to collect routine monitoring samples for the month of June 2010; PENALTY: $677; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: GRANBURY QUICK CORPORATION dba Quick Track; DOCKET NUMBER: 2012-1335-PST-E; IDENTIFIER: RN100718360; LOCATION: Granbury, Hood 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 UST system; PENALTY: $3,879; ENFORCEMENT COORDINATOR: Kristyn Bower, (512) 239-2616; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(12) COMPANY: Hamid Nikbeh dba K-P Food Store; DOCKET NUMBER: 2012-0998-PST-E; IDENTIFIER: RN101539922; LOCATION: Dallas, 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 (UST) system; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(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 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $6,120; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Hub City Convenience Stores, Incorporated dba Fast Stop 18; DOCKET NUMBER: 2012-1016-PST-E; IDENTIFIER: RN102045432; LOCATION: Hereford, Deaf Smith 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 timely 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 delivery certificate before accepting delivery of a regulated substance into the USTs; and 30 TAC §334.50(b)(2), by failing to provide release detection for the piping associated with the UST system; PENALTY: $4,858; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: Jack A. Terhune dba Jack's Flying Service; DOCKET NUMBER: 2012-0853-PST-E; IDENTIFIER: RN102037470; LOCATION: Perryton, Ochiltree County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(B)(ii), by failing to submit a properly completed underground storage tank (UST) registration and self-certification form and obtain a delivery certificate in a timely manner; 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 UST; 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 the petroleum UST; 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the UST system; 30 TAC §334.50(b)(1)(A) and (2), and TWC, §26.3475(a) and (c)(1), by failing to monitor the UST 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 UST; 30 TAC §334.51(b)(2) and TWC, §26.3475(c)(2), by failing to equip the UST with spill containment and overfill prevention equipment; and 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $10,327; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(15) COMPANY: Jai Kapish Corporation dba Stop and Shop 3; DOCKET NUMBER: 2012-0857-PST-E; IDENTIFIER:

RN102144805; LOCATION: Rowlett, Dallas 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 §334.50(b)(2) and TWC, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the UST system; and 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; PENALTY: $3,131; ENFORCEMENT COORDINATOR: Heather Brister, (254) 761-3034; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: Kyle Parmer and Patsy Parmer dba Parmer RV Park; DOCKET NUMBER: 2012-0752-PWS-E; IDENTIFIER: RN105674774; LOCATION: Center, Shelby County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(d)(2)(A) and §290.110(b)(4) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to operate the disinfection equipment to continuously maintain a disinfectant residual of 0.2 milligrams per liter of free chlorine throughout the distribution system at all times; 30 TAC §290.39(c) and (h)(1) and THSC, §341.035(a)(1) and (2), by failing to obtain written approval of plans and specifications from the executive director prior to constructing a new public drinking water supply system; and 30 TAC §290.42(j), by failing to use a disinfectant that conforms to American National Standards Institute/National Sanitation Foundation Standard 60; PENALTY: $434; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 403-4076; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(17) COMPANY: Lakshmi, LTD. dba HWY 77 One Stop; DOCKET NUMBER: 2012-1183-PST-E; IDENTIFIER: RN104409370; LOCATION: Kingsville, Kleberg 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)(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 product piping associated with the UST system; PENALTY: $6,692; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(18) COMPANY: M.R.D. GROUP, INCORPORATED dba Shaver Food Mart; DOCKET NUMBER: 2012-1013-PST-E; IDENTIFIER: RN105455901; LOCATION: Houston, Harris 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 timely 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; and 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the UST system; PENALTY: $8,670; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(19) COMPANY: New Birmingham Resources, LLC; DOCKET NUMBER: 2012-0948-MLM-E; IDENTIFIER: RN106065964; LOCATION: Tyler, Smith County; TYPE OF FACILITY: sand mining operation; RULE VIOLATED: TWC, §26.121(a)(1), by failing to prevent the unauthorized discharge of process water into or adjacent to water in the state; and 30 TAC §297.11 and TWC, §11.121, by failing to obtain authorization prior to impounding, diverting, or using state water; PENALTY: $34,124; Supplemental Environmental Project offset amount of $13,650 applied to The Conservation Fund, Bunn's Lake Habitat Acquisition and Preservation Project; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(20) COMPANY: NEW WILLIAMS TRACE ENTERPRISES, INCORPORATED dba Mel's Market; DOCKET NUMBER: 2012-0994-PST-E; IDENTIFIER: RN102388154; LOCATION: Huntsville, Walker 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 UST; 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 the petroleum UST; 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the UST system; and 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the UST for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), and by failing to provide release detection for the piping associated with the UST; PENALTY: $10,763; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5825; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: Phillip Varughese dba Richwood Food Market; DOCKET NUMBER: 2012-1005-PST-E; IDENTIFIER: RN102381936; LOCATION: Houston, Harris 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 UST system; and 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(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); PENALTY: $9,691; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(22) COMPANY: R & R Suleiman LLC dba Chevron Express; DOCKET NUMBER: 2012-1010-PST-E; IDENTIFIER: RN101546026; LOCATION: Dallas, Dallas 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; and 30

TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $3,634; ENFORCEMENT COORDINATOR: Andrea Park, (713) 422-8970; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: Safeway, Incorporated dba Randalls 3070; DOCKET NUMBER: 2012-1170-PST-E; IDENTIFIER: RN102350766; LOCATION: Katy, Harris County; TYPE OF FACILITY: grocery 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: $3,750; ENFORCEMENT COORDINATOR: JR Cao, (512) 239-2543; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: Sanctuary Ventures II L.P. dba Chief's Mobile Home Park; DOCKET NUMBER: 2012-0625-PWS-E; IDENTIFIER: RN106301609; LOCATION: Waxahachie, Ellis County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.39(c) and (h)(1) and Texas Health and Safety Code, §341.035(a)(1) and (2), by failing to obtain written approval of plans and specifications from the executive director prior to constructing a new public drinking water supply system; PENALTY: $50; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(25) COMPANY: SI INVESTMENT CORPORATION dba Cowboy Kwik Stop Number 4; DOCKET NUMBER: 2012-0812-PST-E; IDENTIFIER: RN102456613; LOCATION: Longview, Gregg 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 tank (UST) 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 UST; and 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $4,684; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(26) COMPANY: Southwest Integrated Enterprises, Incorporated; DOCKET NUMBER: 2012-1750-WR-E; IDENTIFIER: RN104071451; LOCATION: Newcastle, Young County; TYPE OF FACILITY: individual; RULE VIOLATED: TWC, §11.081 and §11.121, by failing to obtain the required permit authorization before impounding, diverting, or using state water; PENALTY: $350; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(27) COMPANY: Texas Barge & Boat, Incorporated; DOCKET NUMBER: 2012-1167-AIR-E; IDENTIFIER: RN102037959; LOCATION: Freeport, Brazoria County; TYPE OF FACILITY: barge cleaning and repair; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Texas Health and Safety Code (THSC), §382.085(b), Federal Operating Permit (FOP) Number O1698, Special Terms and Conditions Number 12, and Permit Number 22106, Special Conditions Number 17D(1), by failing to limit the withdrawal rate of the vapor collection system to no more than 27,600 standard cubic feet per hour when emissions are being vented to the flare; and 30 TAC §122.143(4) and §122.145(2)(A), THSC, §382.085(b), and FOP Number O1698, General Terms and Conditions, by failing to report all instances of deviations; PENALTY: $8,542; ENFORCEMENT COORDINATOR: Amancio R. Gutierrez, (512) 239-3921; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(28) COMPANY: UNIVERSAL FINANCE CORPORATION dba LBJ Food Mart Chevron; DOCKET NUMBER: 2012-0770-PST-E; IDENTIFIER: RN101866796; LOCATION: Dallas, Dallas 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 TCEQ delivery certificate by submitting a properly completed underground storage tank (UST) registration and self-certification form within 30 days of the expiration date; and 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 UST; PENALTY: $1,300; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(29) COMPANY: Veslan Properties, Incorporated; DOCKET NUMBER: 2012-0942-PST-E; IDENTIFIER: RN102402914; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide documentation of proper corrosion protection for the underground storage tank system; PENALTY: $3,750; Supplemental Environmental Project offset amount of $1,500 applied to San Antonio River Authority - San Antonio River Water Quality Monitoring Network; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(30) COMPANY: WTL, L.L.C.; DOCKET NUMBER: 2012-1064-AIR-E; IDENTIFIER: RN105713358; LOCATION Pampa, Roberts County; TYPE OF FACILITY: rock crushing plant; RULE VIOLATED: 30 TAC §116.110(a) and Texas Health and Safety Code, §382.0518(a) and §382.085(b), by failing to obtain authorization prior to operating a rock crusher; PENALTY: $1,838; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

TRD-201205091
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 25, 2012

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Notice of Application and Opportunity to Request a Public Meeting for a New Municipal Solid Waste Facility Registration Application No. 40265

Application. Stericycle, Inc. has applied to the Texas Commission on Environmental Quality (TCEQ) for proposed Registration No. 40265, to operate a Type V medical waste processing facility. The proposed facility, Stericycle Garland, will be located at 2821 Industrial Lane, Garland, Texas 75041, in Dallas County. The Applicant is requesting authorization to receive and process medical waste which includes non-hazardous and outdated/off specification pharmaceuticals, seized drugs and confidentiality documents; storing and transferring pathological waste; and Animal and Plant Health Inspection Services (APHIS) waste. The registration application is available for viewing and copying at the Garland Central Public Library, 625 Austin Street, Garland, Dallas County, Texas 75040 and may be viewed online at www.texaspermits.net. The following link to an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice:

http://gis3.tceq.texas.gov/JGoogleMapsExt/Index.jsp?geocodeX=-96.67571617946&geocodeY=32.883245269940005. For exact location, refer to application.

Public Comment/Public Meeting. Written public comments or written requests for a public meeting must be submitted to the Office of Chief Clerk at the address included in the information section below. If a public meeting is held, comments may be made orally at the meeting or submitted in writing by the close of the public meeting. A public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the development is to be located, or if there is a substantial public interest in the proposed development. The purpose of the public meeting is for the public to provide input for consideration by the commission, and for the applicant and the commission staff to provide information to the public. A public meeting is not a contested case hearing. The executive director will review and consider public comments and written requests for a public meeting submitted during the comment period. The comment period shall begin on the date this notice is published and end 60 calendar days after this notice is published. The comment period shall be extended to the close of any public meeting. The executive director is not required to file a response to comments.

Executive Director Action. The executive director shall, after review of an application for registration, determine if the application will be approved or denied in whole or in part. If the executive director acts on an application, the chief clerk shall mail or otherwise transmit notice of the action and an explanation of the opportunity to file a motion to overturn the executive director's decision. The chief clerk shall mail this notice to the owner and operator, the public interest counsel, to adjacent landowners as shown on the required land ownership map and landowners list, and to other persons who timely filed public comment in response to public notice. Not all persons on the mailing list for this notice will receive the notice letter from the Office of the Chief Clerk.

Information. Written public comments or requests to be placed on the permanent mailing list for this application should be submitted to the Office of the Chief Clerk mail code MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically submitted to http://www10.tceq.texas.gov/epic/ecmnts/. If you choose to communicate with the TCEQ electronically, please be aware that your e-mail address, like your physical mailing address, will become part of the agency's public record. For information about this application or the registration process, individual members of the general public may call the TCEQ Public Education Program at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.texas.gov. Further information may also be obtained from Stericycle, Inc. at the address stated above or by calling Mr. Mark Triplett at (972) 931-2374.

TRD-201205114
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 26, 2012

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Notice of Water Quality Applications

The following notices were issued on September 14, 2012 through September 21, 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

VOPAK TERMINAL GALENA PARK INC 1500 Clinton Drive, Galena Park, Texas 77547, which operates Galena Park Terminal, has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0001662000, which authorizes the discharge of stormwater at an intermittent and flow variable rate via Outfall 001, and the discharge of treated wash water and contaminated stormwater at a daily average flow not to exceed 50,000 gallons a day via Outfall 002. The facility is located at 1500 Clinton Drive, south of Interstate Highway (IH) 10, east of IH 610 East Loop, on the north bank of the Houston Ship Channel/Buffalo Bayou, Harris County, Texas 77547.

NORTH ALAMO WATER SUPPLY CORPORATION which operates the Lasara Reverse Osmosis Water Treatment Plant, has applied for a renewal of TPDES Permit No. WQ0004480000, which authorizes the discharge of reverse osmosis reject water, membrane cleaning water, and pipeline washwater. The facility is located on the north side of State Highway 186, approximately 0.6 mile east of the intersection of State Highway 186 and Farm-to-Market Road 1015, and approximately 8.2 miles west of US Highway 77, northeast of the community of Lasara, Willacy County, Texas 78580.

TRS ENVIROGANICS INC AND RICHEY ROAD MUNICIPAL UTILITY DISTRICT have applied to the Texas Commission on Environmental Quality (TCEQ) for renewal of TPDES Sludge Permit No. WQ0004810000 (EPA I.D. No. TXL005016) to authorize the processing of municipal wastewater treatment plant sludge products from numerous facilities in the Houston area. The Richey Road Sludge Processing Facility blends sludge from numerous facilities then dewaters the combined sludge via a belt press prior to disposal at a TCEQ permitted landfill. The belt press processes an average of 238,000 gallons of sludge per day. This permit will not authorize a discharge of pollutants into waters in the State. The sludge processing facility is located at 1820 Candle Ridge Park, Houston, 3,300 feet northeast of the intersection of Hardy Toll Road and WW Thorne Drive, three miles south-southwest of the City of Westfield in Harris County, Texas 77073.

CITY OF HOUSTON has applied for a renewal of TPDES Permit No. WQ0010495133 which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,000,000 gallons per day. The draft permit would authorize 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 1215 Gears Road, approximately 400 feet south of the intersection of Gears Road and Spears Road on the south side of Greens Bayou in Houston in Harris County, Texas 77067.

CITY OF MEADOWS PLACE has applied for a renewal of TPDES Permit No. WQ0011039001, 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 11936 1/2 Monticeto Lane, Meadows Place, approximately 5,000 feet west of the Southwest Freeway (U.S. Highway 59) and 1,000 feet south of Keegans Bayou on the Harris County-Fort Bend County line in Fort Bend County, Texas 77477.

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.state.tx.us. Si desea información en español, puede llamar al 1-800-687-4040.

TRD-201205113

Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 26, 2012

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Post-Remand Order

The State Office of Administrative Hearings issued a Post-Remand Order Remanding the Case and Forwarding the Agreed Order and Comments to the Texas Commission on Environmental Quality on July 31, 2012, in the matter of the Executive Director of the Texas Commission on Environmental Quality v. George DeVries dba DeVries Dairy; SOAH Docket No. 582-12-5909; TCEQ Docket No. 2010-0508-AGR-E. The Commission will consider the Agreed Order and comments received from the Bosque River Coalition and A. Dwain Mayfield regarding George DeVries dba DeVries Dairy in Erath County on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the proposed Agreed Order and comments. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

COMPANY: George DeVries dba DeVries Dairy; DOCKET NUMBER: 2010-0508-AGR-E; TCEQ ID NUMBER: RN100802917; LOCATION: approximately four miles southwest of Stephenville and 6.5 miles northeast of Dublin, Erath County; TYPE OF FACILITY: concentrated animal feeding operation; RULES VIOLATED: 30 TAC §321.31(a), TWC, §26.121(a)(1), and TCEQ Permit Number 03061, V. Conditions of the Permit, by failing to prevent an unauthorized discharge of wastewater from a confined animal feeding operation into or adjacent to water in the state; PENALTY: $8,300; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201205115
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 26, 2012

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TCEQ Docket No. 2012-1903; Notice to Terminate Agreed Order TPDES Permit Number WQ0010353002 with the City of Lubbock

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the termination of Agreed Order (AO) Texas Pollutant Discharge Elimination System (TPDES) with the City of Lubbock (the City) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the termination of the AO, the commission shall allow the public an opportunity to submit written comments on the termination of the AO. TWC, §7.075 requires that notice of the order 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 November 5, 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 Order to Terminate 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 of an Order to Terminate an AO is not required to be published if those changes are made in response to written comments.

This notice issued concerns the termination of an AO issued to and approved by the Texas Water Commission, predecessor to TCEQ, on November 16, 1989. The AO resulted from an enforcement action under the authority of TWC, Chapter 26.

FINDINGS OF FACT

1. The City owns and operates two wastewater treatment facilities: the Lubbock Land Application Site (the LLAS) and the Hancock Land Application Site (the HLAS). In the late 1970's, the City initiated a groundwater remediation plan (plan) to lower the water table mound at the Gray Farm (property purchased by the City in 1986 and now known as the Lubbock Land Application Site or LLAS). The City purchased two sections of land in 1988 (now known as the Hancock Land Application Site or HLAS) that were added to the Gray Farm, providing additional acreage for land application of treated effluent. The City's facilities contain elevated levels of nitrates.

2. The Texas Water Commission Agreed Order was issued on November 16, 1989, as the result of an enforcement action against the City. A copy of that Order can be obtained from Kari Gilbreth, Litigation Division, (512) 239-1320.

3. The Order required the City to perform certain corrective actions and to pay an administrative penalty in the amount of $84,000.00, of which $42,000.00 of this penalty was deferred contingent upon full compliance with the technical requirements contained within the Order.

4. The City paid $42,000.00 of the administrative penalty. The City is in compliance with Ordering Provision Numbers 1 - 6, 9, and 10 of the 1989 Agreed Order.

5. The two outstanding Ordering Provisions (Numbers 7 and 8) in the 1989 Agreed Order have been incorporated into the City's TPDES Permit Number WQ0010353002, Other Requirements, Paragraph Number 18 (the Permit), issued October 26, 2011.

6. The Executive Director recognizes that the City is in compliance with Permit Number WQ0010353002, Other Requirements, Paragraph Number 18. Paragraph Number 18 of the Permit incorporates Ordering Provisions (Numbers 7 and 8) of the 1989 Agreed Order.

7. The Executive Director recognizes that the City is in compliance with Permit Number WQ0010353002, Other Requirements, Paragraph Number 18. Paragraph Number 18 of the Permit incorporates Ordering Provisions (Numbers 7 and 8) of the 1989 Agreed Order.

8. The 1989 Order does not contain a provision to terminate it within any period of time.

CONCLUSIONS OF LAW

As evidenced by Finding of Fact Number 1, the City is subject to the jurisdiction of the TCEQ pursuant to TWC, Chapter 26 and the rules of the commission.

The Commission has jurisdiction of this matter pursuant to TWC, §5.013 because it alleges violations of TCEQ rules.

WRITTEN COMMENTS

Written comments concerning the notice to terminate the AO with the City of Lubbock may be submitted to Kari Gilbreth, MC 175, Office of Legal Services, Texas Commission on Environmental Quality, P.O.

Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-3434. All comments should reference Termination of Agreed Order TPDES Permit Number WQ0010353002. The comment period closes November 5, 2012. Copies of the Agreed Order can be obtained from Kari Gilbreth, (512) 239-1320. For further information, please contact Kari Gilbreth, Litigation Division, (512) 239-1320.

TRD-201205090
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 25, 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: Semiannual Report due July 16, 2012, for Candidates and Officeholders

Joan M. Durkin, 2125 Martin Dr., Ste. 200, Bedford, Texas 76021

Deadline: 8-Day Pre-Election Report due May 21, 2012, for Committees

Kimberly K. Yturri, Conservative Values Coalition, 100 Crescent Ct., Ste. 1620, Dallas, Texas 75201

Deadline: Semiannual Report due July 16, 2012, for Committees

Todd M. Smith, Peace Officers for Perry, 1001 Congress Ave., Ste. 250, Austin, Texas 78701

Byron LeFlore Jr., Committee for Judicial Reform, P.O. Box 469011, San Antonio, Texas 78246-9011

Deadline: Monthly Report due August 5, 2012, for Committees

Richard Christopher Nevills, Bayou PAC, 414 Marshall St. #1, Houston, Texas 77006

Gina M. Gabriano, Alliance of Conservative Texans, 5040 Lorraine Dr., Frisco, Texas 75034

Deadline: Personal Financial Statement due June 29, 2012

Tiffany Dawn Burks, 2658 Merlin Ct., Odenton, Maryland 21113

Michael Allen Mitchell, 491 Mitchell Rd., Henrietta, Texas 76365

Hudson Old, 119 E. 6th St., Mt. Pleasant, Texas 75455

TRD-201204993
David Reisman
Executive Director
Texas Ethics Commission
Filed: September 20, 2012

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Texas Facilities Commission

Request for Proposals #303-4-20355

The Texas Facilities Commission (TFC), on behalf of the Health and Human Services Commission (HHSC), the Department of Family and Protective Services (DFPS), and the Department of Aging and Disability Services (DADS), announces the issuance of Request for Proposals (RFP) #303-4-20355. TFC seeks a five (5) or ten (10) year lease of approximately 12,066 square feet of office space in Rio Grande City, Starr County, Texas.

The deadline for questions is October 15, 2012, and the deadline for proposals is October 29, 2012, at 3:00 p.m. The award date is December 19, 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 a 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=102594.*

TRD-201205088
Kay Molina
General Counsel
Texas Facilities Commission
Filed: September 24, 2012

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General Land Office

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of September 12, 2012, through September 19, 2012. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period extends 30 days from the date published on the Texas General Land Office web site. The notice was published on the web site on September 26, 2012. The public comment period for this project will close at 5:00 p.m. on October 26, 2012.

FEDERAL AGENCY ACTIONS:

Applicant: Southwest Shipyard, LP; Location: The project site is located in Galveston Ship Channel at 1002 Texas Clipper Road, Pelican Island, in Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map titled: Galveston, Texas. Approved jurisdictional determination was used for the project site. NAD 83, Latitude: 29.312721 North; Longitude: - 94.812739 West. Project Description: The applicant proposes to expand an existing shipyard to include a barge launch rail system and construct bank stabilization. The barge launch is required to float newly constructed barges into the ship channel. The bulkhead will stabilize the shoreline and the dredged area will provide adequate depths for the safe launch of the newly constructed barges. The launch will be constructed utilizing 24-inch by 100-foot pre-stressed concrete pile and corrosion inhibiting, coated 24-inch by 68-inch steel launch rails. The applicant proposes to install approximately 476 linear feet of steel bulkhead above the high tide line. The applicant also proposes to hydraulically dredge approximately 0.827-acre of non-vegetated bottom, approximately 10,000 cubic yards, to provide adequate depth immediately adjacent to the proposed launch

rail system. The applicant will coordinate the proposed dredge activities to coincide with Port of Galveston Maintenance dredging activities and will place dredge material in authorized Port of Galveston Placement Areas in conjunction with the coordination of dredge projects. Materials and equipment will be transported to the site via truck and trailer as well as by barge. Access to the site will be accomplished both by roadway and the Galveston Ship Channel. The proposed site is outside of the limits of the Galveston Ship Channel and will not adversely affect navigation during construction. CMP Project No.: 12-0840-F1 Type of Application: U.S.A.C.E. permit application #SWG-2011-00235 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action or activity is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Land Commissioner for review.

Further information on the applications listed above, including a copy of the consistency certifications or consistency determinations for inspection may be obtained from Ms. Kate Zultner, Consistency Review Specialist, P.O. Box 12873, Austin, Texas 78711-2873, or via email at kate.zultner@glo.texas.gov. Comments should be sent to Ms. Zultner at the above address or by email.

TRD-201205122
Larry L. Laine
Chief Clerk/Deputy Land Commissioner
General Land Office
Filed: September 26, 2012

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on October 23, 2012, at 9:00 a.m. to receive public comment on proposed rates for hospice routine home, continuous home, inpatient respite, and general inpatient care. The Medicaid hospice program is operated by the Texas Department of Aging and Disability Services (DADS).

The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC), Title 1, §355.105(g), which require public notice and hearings on proposed Medicaid reimbursements. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Esther Brown by calling (512) 491-1445 at least 72 hours prior to the hearing so appropriate arrangements can be made.

Briefing Package. A briefing package describing the proposed payment rates will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on October 9, 2012. Interested parties also may obtain a copy of the briefing package prior to the hearing by contacting Esther Brown by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Esther Brown, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Esther Brown at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Esther Brown, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-201205099
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: September 25, 2012

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Public Notice

The Texas Health and Human Services Commission (HHSC) intends to submit to the Centers for Medicare and Medicaid Services a request for a renewal to the Non-emergency Medical Transportation (NEMT) waiver program, under the authority of §1915(b) of the Social Security Act. The Non-emergency Medical Transportation waiver program is currently set to expire on March 31, 2013. The proposed effective date for this renewal is April 1, 2013.

The program is designed to: (1) encourage preventive and primary care by ensuring that every client for whom Medicaid is the primary payor has access to necessary medical care and services; (2) arrange for quality and appropriate transportation to necessary medical care and services; (3) maintain access to necessary healthcare and services; (4) maintain cost effectiveness of transportation services; and (5) foster the U.S. Department of Health and Human Services' goal of promoting coordinated human services transportation.

The current service delivery model affords the transportation service area providers flexibility to ensure that client transportation needs are met by providing services directly, subcontracting transportation services, and using alternative transportation service providers to fill in gaps in the service delivery. The continuation of this model supports the use of direct service delivery providers and existing network of transportation providers to meet the client transportation needs. This waiver will not change the Non-emergency Medical Transportation scope or benefit afforded to clients authorized through HHSC's state-managed model. HHSC retains sole authority to approve client services and benefits.

Many areas of the state are rural and have limited access to service providers and transportation services. Because Texas is a large, diverse state, HHSC is open to engaging a variety of service delivery models to ensure that clients receive quality service (including direct delivery of services in areas where the number of qualified providers is low). The current service delivery model is a client-orientated and administratively efficient model and fosters collaboration among governmental, not-for-profit, and for-profit transportation providers.

Maintaining the current service model allows HHSC to operate a successfully proven delivery model, which meets the vastly differing needs of clients and supports coordination efforts at the local level and provides a cost savings to the state.

HHSC requests that the waiver renewal be approved for the period beginning April 1, 2013, through March 31, 2015. This renewal maintains cost neutrality for waiver years 2013 through 2015.

To obtain copies of the proposed waiver application, interested parties may contact JayLee Therrien by mail at Texas Health and Human Services Commission, P.O. Box 85200, mail code H-370, Austin, Texas

78708-5200, phone (512) 491-1388, fax (512) 491-1953, or by e-mail at JayLee.Therrien@hhsc.state.tx.us.

TRD-201204981
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission

Filed: September 20, 2012

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout TX	Express Energy Services Operations, L.P.	L06506	Houston	00	09/11/12
Throughout TX	Pumpco Energy Services, Inc.	L06507	Valley View	00	09/14/12
Webster	Webster Surgical Specialty Hospital, Ltd. dba Houston Physicians Hospital	L06505	Webster	00	09/07/12

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Amarillo	Northwest Texas Healthcare System, Inc. dba Northwest Texas Hospital	L02054	Amarillo	85	09/14/12
Amarillo	The Don and Sybil Harrington Cancer Center	L03053	Amarillo	52	09/10/12
Arlington	GE Healthcare	L05693	Arlington	13	09/10/12
Austin	Texas Oncology, P.A. dba Central Austin Cancer	L06090	Austin	04	09/18/12
Beaumont	Baptist Hospital of Southeast Texas	L00358	Beaumont	136	09/11/12
College Station	Texas A&M University	L00448	College Station	137	09/05/12
Cuero	Cuero Community Hospital	L02448	Cuero	28	09/12/12
Dallas	The University of Texas Southwestern Medical Center at Dallas	L00384	Dallas	113	09/06/12
Denton	Texas Health Presbyterian Hospital Denton	L04003	Denton	48	09/12/12
Denton	Denton Heart Group, P.A.	L05381	Denton	07	09/11/12
El Paso	Tenet Hospitals Limited dba Providence Memorial Hospital	L02353	El Paso	106	09/04/12
El Paso	Tenet Hospitals Limited dba Sierra Medical Center	L02365	El Paso	73	09/04/12
Fort Worth	Radiology Associates	L03953	Fort Worth	67	09/12/12
Fort Worth	Heartplace, P.A.	L05883	Fort Worth	08	09/07/12
Fort Worth	FTS International Services, L.L.C.	L06188	Fort Worth	12	09/13/12
Fort Worth	Georgina K. Sehapayak, M.D.	L06265	Fort Worth	01	09/11/12
Houston	St. Luke's Episcopal Health System Corporation dba St. Luke's Episcopal Health System and Texas Heart Institute	L00581	Houston	96	09/14/12
Houston	Ben Taub General Hospital	L01303	Houston	74	09/07/12
Houston	Cardinal Health	L01911	Houston	150	09/14/12
Houston	SJ Medical Center, L.L.C. dba St. Joseph Medical Center	L02279	Houston	75	09/12/12
Houston	Woodlands-North Houston Cardiovascular Imaging Center	L04253	Houston	26	09/12/12
Houston	Gulf Coast Cancer Center	L05185	Houston	16	09/05/12
Houston	American Diagnostic Tech, L.L.C.	L05514	Houston	80	09/04/12
Houston	Hillcroft Medical Clinic Association	L05618	Houston	07	08/30/12
Houston	NIS Holdings, Inc. dba Nuclear Imaging Services	L05775	Houston	83	09/11/12
Houston	Neurology Clinic	L05971	Houston	06	09/11/12
Irving	Baylor Medical Center at Irving dba Irving Healthcare System	L02444	Irving	95	09/12/12

AMENDMENTS TO EXISTING LICENSES ISSUED (continued):

Irving	Dallas-Ft. Worth Veterinary Imaging Center dba Animal Imaging	L04602	Irving	10	09/06/12
Irving	Health Texas Provider Network dba Cottonwood Cardiology	L06414	Irving	01	09/11/12
Jourdanton	Jourdanton Hospital Corporation dba South Texas Regional Medical Center	L04966	Jourdanton	19	09/12/12
Lewisville	Texas Oncology, P.A. dba Lake Vista Cancer Center	L05526	Lewisville	22	09/11/12
Lubbock	Cardinal Health Nuclear Pharmacy Services	L06290	Lubbock	09	09/12/12
Mesquite	Mesquite Heart Center, P.A.	L05132	Mesquite	18	09/12/12
Midland	Isotech Laboratories, Inc.	L04283	Midland	26	09/06/12
Midland	Texas Oncology, P.A. dba Allison Cancer Center	L04905	Midland	15	09/04/12
Midland	Rising Star Services, L.P.	L06393	Midland	03	09/04/12
Port Arthur	The Medical Center of Southeast Texas, L.P.	L01707	Port Arthur	71	09/11/12
Port Arthur	Gulf Coast Cardiology Group, P.A.	L05393	Port Arthur	17	09/14/12
Richmond	Oakbend Medical Center	L02406	Richmond	56	09/12/12
San Antonio	Methodist Healthcare System of San Antonio, Ltd., L.L.P.	L00594	San Antonio	309	09/04/12
San Antonio	The University of Texas Health Science Center at San Antonio	L01279	San Antonio	140	09/10/12
San Antonio	Accord Medical Management, L.P. dba Nix Health Care System	L03531	San Antonio	33	09/04/12
San Antonio	San Antonio Endovascular and Heart Institute	L05766	San Antonio	08	09/12/12
Spring	2920 Open MRI & Digital Imaging, L.L.C.	L06460	Spring	02	09/05/12
Throughout TX	Permian Nondestructive Testing, Inc.	L06001	Gardendale	14	09/10/12
Throughout TX	Thrubit, L.L.C.	L06030	Houston	14	09/12/12
Throughout TX	Alltech Inspection, Inc. dba TC Inspection, L.L.C.	L06432	Oyster Creek	03	09/11/12
Throughout TX	Intec	L05150	San Antonio	17	09/05/12
Tomball	Tomball Texas Hospital Company, L.L.C. dba Tomball Regional Medical Center	L06472	Tomball	02	09/12/12

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Methodist Health Centers dba Methodist Willowbrook Hospital	L05472	Houston	46	09/10/12
Katy	Cardiology Center of Houston, P.A.	L05400	Katy	09	08/31/12
Odessa	West Texas Imaging Center, P.A.	L04562	Odessa	12	09/04/12
Sherman	Texas Oncology, P.A. dba North Texas Pet Imaging	L05502	Sherman	16	09/11/12

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
College Station	CDS Enterprises, Inc.	L05356	College Station	04	09/10/12
El Paso	Licon Engineering Company, Inc.	L05530	El Paso	11	09/06/12
Throughout TX	Universal Wireline, Inc.	L06355	Snyder	02	09/04/12
Throughout TX	Advanced Inspection Technologies, Inc.	L06423	Spring	06	09/06/12
Victoria	Texas Internal Medicine and Diagnostic Center, P.A.	L06304	Victoria	04	09/11/12

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - Mail Code 2835, P.O. Box 149347, Austin, Texas 78714-9347. For information call (512) 834-6688.

TRD-201205098
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: September 25, 2012

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by SOUTHERN PIONEER PROPERTY & CASUALTY INSURANCE COMPANY, a foreign Fire and/or Casualty company. The home office is in Jonesboro, Arizona.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, MC 305-2C, Austin, Texas 78701.

TRD-201205097
Sara Waitt
General Counsel
Texas Department of Insurance
Filed: September 25, 2012

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Texas Lottery Commission

Instant Game Number 1474 "Veterans Cash"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1474 is "VETERANS CASH". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1474 shall be $2.00 per Ticket.

1.2 Definitions in Instant Game No. 1474.

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: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, STAR SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000 and $20,000.

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. 1474 - 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
STAR SYMBOL	WIN2X
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$1,000	ONE THOU
$20,000	20 THOU

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, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000 or $20,000.

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 (1474), 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: 1474-0000001-001.

K. Pack - A Pack of "VETERANS CASH" Instant Game Tickets contains 125 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One Ticket will be folded over to expose a front and back of one Ticket on each Pack. Please note the books will be in an A, B, C and D configuration.

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 "VETERANS CASH" Instant Game No. 1474 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 "VETERANS CASH" Instant Game is determined once the latex on the Ticket is scratched off to expose 23 (twenty-three) Play Symbols. If a player matches any of YOUR NUMBERS Play Symbols to any of the WINNING NUMBERS Play Symbols, the player wins the prize for that number. If a player reveals a "STAR" Play Symbol, the player wins DOUBLE the prize for that symbol. 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 23 (twenty-three) 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 23 (twenty-three) 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 23 (twenty-three) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 23 (twenty-three) 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. Players can win up to ten (10) times on a Ticket in accordance with the approved prize structure.

B. Adjacent Non-Winning Tickets within a Pack will not have identical play and prize symbol patterns. Two (2) Tickets have identical play and prize symbol patterns if they have the same play and prize symbols in the same positions.

C. Each Ticket will have three (3) different "WINNING NUMBERS" Play Symbols.

D. Non-winning "YOUR NUMBERS" Play Symbols will all be different.

E. No Ticket will ever contain more than two (2) identical non-winning prize symbols.

F. The "STAR" Play Symbol will never appear in the "WINNING NUMBERS" Play Symbol spots.

G. The "STAR" Play Symbol will only appear as dictated by the prize structure.

H. Non-winning prize symbols will never be the same as the winning prize symbol(s).

I. The top prize symbol will appear on every Ticket unless otherwise restricted.

J. No prize amount in a non-winning spot will correspond with the "YOUR NUMBERS" Play Symbol (i.e., 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "VETERANS CASH" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $100, 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 or $100 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 "VETERANS CASH" Instant Game prize of $1,000 or $20,000, 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 "VETERANS CASH" 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 "VETERANS CASH" 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 "VETERANS CASH" 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 6,000,000 Tickets in the Instant Game No. 1474. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1474 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	576,000	10.42
$4	576,000	10.42
$5	144,000	41.67
$10	72,000	83.33
$20	48,000	125.00
$50	28,625	209.61
$100	3,025	1,983.47
$1,000	50	120,000.00
$20,000	8	750,000.00

*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 4.14. 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. 1474 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. 1474, 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-201205095
Bob Biard
General Counsel
Texas Lottery Commission
Filed: September 25, 2012

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Instant Game Number 1482 "Neon 9's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1482 is "NEON 9'S". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1482 shall be $2.00 per Ticket.

1.2 Definitions in Instant Game No. 1482.

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 Instant 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: 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 9 SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000 and $20,000.

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. 1482 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
20	TWY
9 SYMBOL	DOUBLE
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$1,000	ONE THOU
$20,000	20 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the Ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the 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, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000 or $20,000.

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 (1482), 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: 1482-0000001-001.

K. Pack - A Pack of "NEON 9'S" Instant Game Tickets contains 125 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

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 "NEON 9'S" Instant Game No. 1482 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 "NEON 9'S" Instant Game is determined once the latex on the Ticket is scratched off to expose 22 (twenty-two) Play Symbols. If a player matches any of YOUR NUMBERS Play Sym-

bols to either of the WINNING NUMBERS Play Symbols, the player wins the prize for that number. If a player reveals a "9" Play Symbol, the player wins DOUBLE the prize for that symbol! 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 22 (twenty-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 22 (twenty-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 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 22 (twenty-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. Players can win up to ten (10) times on a Ticket in accordance with the approved prize structure.

B. Adjacent Non-Winning Tickets within a Pack will not have identical play and prize symbol patterns. Two (2) Tickets have identical play and prize symbol patterns if they have the same play and prize symbols in the same positions.

C. Each Ticket will have two (2) different "WINNING NUMBERS" Play Symbols.

D. Non-winning "YOUR NUMBERS" Play Symbols will all be different.

E. No Ticket will ever contain more than two (2) identical non-winning prize symbols.

F. The "NINE" Play Symbol will only appear as dictated by the prize structure.

G. Non-winning prize symbols will never be the same as the winning prize symbol(s).

H. The top prize symbol will appear on every Ticket unless otherwise restricted.

I. No prize amount in a non-winning spot will correspond with the "YOUR NUMBERS" play symbol (i.e., 5 and $5).

J. The "NINE" Play Symbol will never appear in the "WINNING NUMBERS" Play Symbol positions.

2.3 Procedure for Claiming Prizes.

A. To claim a "NEON 9'S" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $100, 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 or $100 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 Section 2.3.C of these Game Procedures.

B. To claim a "NEON 9'S" Instant Game prize of $1,000 or $20,000, 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 "NEON 9'S" 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 "NEON 9'S" 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 "NEON 9'S" 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 6,000,000 Tickets in the Instant Game No. 1482. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1482 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	576,000	10.42
$4	624,000	9.62
$5	96,000	62.50
$10	72,000	83.33
$20	48,000	125.00
$50	30,150	199.00
$100	2,500	2,400.00
$1,000	75	80,000.00
$20,000	8	750,000.00

*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 4.14. 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 Commission.

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. 1482 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. 1482, 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-201205096
Bob Biard
General Counsel
Texas Lottery Commission
Filed: September 25, 2012

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Panhandle Regional Planning Commission

Legal Notice

The Panhandle Regional Planning Commission (PRPC) seeks to develop a list of pre-qualified providers who may be solicited on an "as needed" basis to conduct group or individual activities and services for program participants being served through the Workforce Solutions office located in Amarillo, and throughout the 26-county area. The purpose of this solicitation is to gather information from area providers sufficient to identify their qualifications, activities and services of interest, and willingness to provide those services to meet the requirements of inclusion on the PRPC Group and Individual Activities and Services Provider List.

To qualify for inclusion on the list, providers should be a secondary or post-secondary educational institution; licensed career school or college; proprietary school; or other public, private non-profit, and private for-profit entity capable of providing group or individual counseling or one or more of the types of services defined by category by PRPC. In addition, providers must document any special accreditation, licensing, or other credentials that might be legally required to provide the services listed in their information.

A copy of the Request for Information (RFI) is available from Leslie Hardin, Training Coordinator, Workforce Development Division, at (806) 372-3381/(800) 477-4562 or lhardin@theprpc.org. Copies of the RFI may also be obtained at PRPC's offices located at 415 West Eighth Street, Amarillo, Texas. For early consideration, information may be submitted any time prior to 3:00 p.m., Monday, October 15, 2012. Submissions received after that time will be accepted but providers will not be included on the Group and Individual Activities and Services Provider List until the receipt and evaluation of a completed submission.

TRD-201204996
Leslie Hardin
Workforce Development Coordinator
Panhandle Regional Planning Commission
Filed: September 20, 2012

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Legal Notice

The Panhandle Regional Planning Commission (PRPC) seeks to develop a list of qualified training providers to offer training on an "as needed" basis for program participants being served through the Workforce Solutions office located in Amarillo, and throughout the 26-county area. The purpose of this solicitation is to gather information from area training providers sufficient to determine their qualifications, offerings, costs, and willingness to meet the requirements of inclusion on the PRPC Training Provider List.

Providers of such training must be either secondary and post-secondary educational institutions; licensed career schools and colleges; or other public, private non-profit, and private for-profit entities that are specifically exempt from the Texas proprietary school laws. Providers subject to Texas proprietary school laws must show evidence of license or exemption.

A copy of the Request for Information (RFI) is available from Leslie Hardin, Training Coordinator, Workforce Development Division, at (806) 372-3381/(800) 477-4562 or lhardin@theprpc.org. Copies of the RFI may also be obtained at PRPC's offices located at 415 West Eighth Street, Amarillo, Texas. For early consideration, information may be submitted any time prior to 3:00 p.m., Monday, October 15, 2012. Submissions received after that time will be accepted but providers will not be included on the Training Provider List until after the receipt and evaluation of a completed submission.

TRD-201204997
Leslie Hardin
Workforce Development Coordinator
Panhandle Regional Planning Commission
Filed: September 20, 2012

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Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions

Acceptance of Land Donation - Presidio County

Approximately 150 Acres at Big Bend Ranch State Park

In a meeting on November 8, 2012, the Texas Parks and Wildlife Commission (Commission) will consider accepting a donation of a tract of land of approximately 150 acres in Presidio County adjacent to Big Bend Ranch State Park. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Corky Kuhlmann, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at corky.kuhlmann@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

Land Acquisition - Palo Pinto County

Approximately 120 Acres at Palo Pinto Mountains State Park

In a meeting on November 8, 2012, the Texas Parks and Wildlife Commission (Commission) will consider authorizing the acquisition of a tract of land of approximately 120 acres in Palo Pinto County for addition to Palo Pinto Mountains State Park. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

Request for Pipeline Easement - Brazoria County

Two Hydrocarbon Pipelines at the Justin Hurst Wildlife Management Area

In a meeting on November 8, 2012, the Texas Parks and Wildlife Commission (Commission) will consider the granting of an easement to Enterprise Crude Pipeline Company LLC for installation of two (2) hydrocarbon pipelines of 30" and 36" diameter to be directional drilled under a portion of the Justin Hurst Wildlife Management Area (WMA) in Brazoria County. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

TRD-201205119
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: September 26, 2012

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Public Utility Commission of Texas

Notice of Application for a Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 19, 2012, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Totelcom Networks, LLC d/b/a Our Town Internet Services for a Service Provider Certificate of Operating Authority, Docket Number 40764.

Applicant intends to provide data, facilities-based, and resale telecommunications services.

Applicant proposes to provide service throughout the entire State of Texas.

Persons who wish to comment upon 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 no later than October 12, 2012. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free at (800) 735-2989. All comments should reference Docket Number 40764.

TRD-201205105
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 25, 2012

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Notice of Application for a Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 24, 2012, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of TransWorld Network, Corp. for a Service Provider Certificate of Operating Authority, Docket Number 40783.

Applicant intends to provide data, facilities-based, and resale telecommunications services.

Applicant proposes to provide service throughout the entire State of Texas.

Persons who wish to comment upon 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 no later than October 12, 2012. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free at (800) 735-2989. All comments should reference Docket Number 40783.

TRD-201205110
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 25, 2012

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Notice of Application for a Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 25, 2012, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Local Access LLC for a Service Provider Certificate of Operating Authority, Docket Number 40793.

Applicant intends to provide data, facilities-based, and resale telecommunications services.

Applicant proposes to provide service throughout the entire state of Texas.

Persons who wish to comment upon 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 no later than October 12, 2012. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free at (800) 735-2989. All comments should reference Docket Number 40793.

TRD-201205118
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 26, 2012

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On September 19, 2012, a joint application was filed by Infotelecom, LLC to relinquish its service provider certificate of operating authority (SPCOA) Number 60718, and Broadvox-CLEC, LLC to amend its SPCOA Number 60837.

The Application: Joint Application of Infotelecom, LLC to Relinquish its Service Provider Certificate of Operating Authority and Broadvox-CLEC, LLC to Amend its Service Provider Certificate of Operating Authority, Docket Number 40761.

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 phone at (512) 936-7120 or toll-free at 1-888-782-8477 no later than October 5, 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 40761.

TRD-201205106
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 25, 2012

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Notice of Application for Designation as an Eligible Telecommunications Carrier

Notice is given to the public of a petition filed with the Public Utility Commission of Texas on September 17, 2012, for designation as an eligible telecommunications carrier (ETC) in the State of Texas for the limited purpose of offering lifeline service to qualified households, pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of Easy Telephone Services Company d/b/a Easy Wireless for Designation as an Eligible Telecommunications Carrier in the State of Texas for the Limited Purpose of Offering Lifeline Service. Docket Number 40757.

The Application: Easy Telephone Services Company d/b/a Easy Wireless (Easy) seeks ETC designation solely to provide lifeline service to qualifying Texas households as a prepaid wireless carrier. It will not seek access to funds from the federal universal service fund for the purpose of providing service to high cost areas. Easy provides prepaid wireless telecommunications services to consumers by using the Sprint Nextel wireless network and other national facilities-based networks on a wholesale basis to offer nationwide service. In its application, Easy provided a list of rural and non-rural wire centers in its underlying carrier's coverage area for which the company requests ETC designation and serves the entire wire center and where it serves only part of the wire center as shown in Exhibit 4 to the application.

Persons who wish to comment on this application should notify the Public Utility Commission of Texas by October 26, 2012. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989 to reach the commission's toll free number (888) 782-8477. All comments should reference Docket Number 40757.

TRD-201205028
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 21, 2012

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Notice of Application for Designation as an Eligible Telecommunications Carrier

Notice is given to the public of a petition filed with the Public Utility Commission of Texas on September 18, 2012, for designation as an eligible telecommunications carrier (ETC) in the State of Texas for the limited purpose of offering lifeline service to qualified households, pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of TAG Mobile, LLC for Designation as an Eligible Telecommunications Carrier in the State of Texas

on a Wireless Basis for the Limited Purpose of Offering Lifeline Service. Docket Number 40759.

The Application: TAG Mobile seeks ETC designation solely to provide lifeline service to qualifying Texas households as a prepaid wireless carrier. It will not seek access to funds from the federal universal service fund for the purpose of providing service to high cost areas. TAG Mobile is a common carrier and a reseller of commercial mobile radio service throughout the United States. TAG Mobile requests designation as an ETC in the non-rural portions of the State of Texas throughout TAG Mobile's service area. TAG Mobile provided a list of wire centers for which the company requests ETC as shown in Exhibit A-1 of the application.

Persons who wish to comment on this application should notify the Public Utility Commission of Texas by October 26, 2012. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989 to reach the commission's toll-free number (888) 782-8477. All comments should reference Docket Number 40759.

TRD-201205029
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 21, 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 September 18, 2012, to amend a certificate of convenience and necessity for a proposed transmission line in Bowie County, Texas.

Docket Style and Number: Application of Southwestern Electric Power Company to Amend a Certificate of Convenience and Necessity for a Proposed 345-kV Double-Circuit Transmission Line within Bowie County. Docket Number 40685.

The Application: Southwestern Electric Power Company's (SWEPCO) proposed project is designated as the 345-kV Double-Circuit Transmission Line Project. It will be designed capable of supporting two 345-kV circuits but will initially be operated with only one 345-kV circuit installed. The proposed project will connect the Valliant Substation in McCurtain County, Oklahoma, to the Northwest Texarkana Substation, which is located northwest of Texarkana near Red Lick, Texas. The SWEPCO line that is the subject of this application will extend to the Texas-Oklahoma border and connect to the AEP Oklahoma Transmission Company portion of the project at the Red River. This application is limited to the portion of the project that is located within Bowie County, Texas. The total estimated cost for the project ranges from approximately $60.8 million to $65.7 million depending on the route chosen.

The proposed project is presented with 22 alternate routes and is estimated to be approximately 40 to 43 miles in length. Any of the routes or route segments presented in the application could, however, be approved by the commission.

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 November 2, 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 40685.

TRD-201205030
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 21, 2012

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Notice of Application to Amend Designation as an Eligible Telecommunications Carrier

Notice is given to the public of a petition filed with the Public Utility Commission of Texas on September 21, 2012, to amend designation as an eligible telecommunications carrier (ETC) in the State of Texas for the limited purpose of offering lifeline service to qualified households, pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of Nexus Communications, Inc. to Amend Designation as an Eligible Telecommunications Carrier for the Limited Purpose of Offering Lifeline Service. Docket Number 40778.

The Application: In Docket Number 32277, Nexus Communications, Inc. (Nexus) received ETC designation throughout the geographic areas of Texas served by AT&T Texas and Verizon Southwest as shown on Exhibit D of the application. The company now seeks to amend its ETC designation to offer lifeline service to receive federal universal service support for wireless services. Nexus will not seek access to funds from the federal universal service fund for the purpose of providing service to high cost areas.

Nexus purchases wireless minutes from Verizon Wireless. Nexus seeks designation in all non-rural wire centers covered in whole or in part by its underlying carrier's wireless service. These wire centers are served by the non-rural ILECs AT&T Texas, Verizon Southwest and CenturyLink. In its application, Nexus provided a list of wire centers for which the company requests ETC designation as shown in Exhibit A to the application.

Persons who wish to comment on this application should notify the Public Utility Commission of Texas by October 26, 2012. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989 to reach the commission's toll-free number (888) 782-8477. All comments should reference Docket Number 40778.

TRD-201205108
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 25, 2012

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Notice of Application to Relinquish Designations as Eligible Telecommunications Carriers

Notice is given to the public of an application filed with the Public Utility Commission of Texas on September 21, 2012, to relinquish designations as an eligible telecommunications carrier (ETC).

Docket Title and Number: Application of Alltel Communications, LLC d/b/a Verizon Wireless and WWC Texas RSA Limited Partnership to Relinquish Designations as Eligible Telecommunications Carriers (ETC) Pursuant to P.U.C. Substantive Rule §26.418(i). Docket Number 40774.

The Application: Alltel Communications, LLC d/b/a Verizon Wireless (Alltel) and WWC Texas RSA Limited Partnership d/b/a Verizon Wireless (WWC) (collectively Verizon Wireless) are requesting relinquishment of their ETC designations in response to actions of the Federal Communications Commission (FCC) to eliminate Verizon Wireless' federal high-cost universal service fund (USF) support. Verizon Wireless stated that relinquishment of ETC status will have no impact on Verizon Wireless' network coverage in Texas. Verizon Wireless plans to continue to provide wireless service in Texas as a non-ETC. Verizon Wireless will grandfather existing lifeline subscribers on a company-provided discount for one year.

Verizon Wireless stated that following relinquishment of its ETC designation, each of the ILEC wire centers identified in Exhibit A of the application will continue to be served by at least one ETC. As a result, Verizon Wireless, in its ETC capacity, does not provide service in an area that is not served by another ETC. Verizon Wireless requests that the relinquishment be approved effective December 31, 2012.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All correspondence should refer to Docket Number 40774.

TRD-201205107
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 25, 2012

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Notice of Petition for Restoration of Universal Service Funding

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on September 17, 2012, for restoration of universal service funding pursuant to Public Utility Regulatory Act, §56.025 and P.U.C. Substantive Rule §26.406.

Docket Style and Number: Application of Hill Country Telephone Cooperative, Inc. to Recover Funds From the Texas Universal Service Fund Pursuant to P.U.C. Substantive Rule §26.406. Docket Number 40755.

The Application: Hill Country Telephone Cooperative, Inc. (HCTC) seeks recovery of funds from the Texas Universal Service Fund (TUSF) due to Federal Communications Commission (FCC) actions which have resulted in a reduction in the Federal Universal Service Fund (FUSF) revenues available to HCTC. The petition requests that the commission restore approximately $517,485.00 to HCTC. In addition, HCTC seeks an adjustment to local service rates to business customers to offset the reduction in FUSF support. The proposed rate increases would result in projected additional revenues of $34,116.00 for 2012 with a proposed effective date of November 1, 2012. Should the rate increase not be approved, HCTC requests recovery from the TUSF for the entire projected impact of $551,601.00.

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. A deadline for intervention in this proceeding will be established. 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 40755.

TRD-201205027
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 21, 2012

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Revised Notice of Application for Designation as an Eligible Telecommunications Carrier

Notice is given to the public of a petition filed with the Public Utility Commission of Texas on September 12, 2012, for designation as an eligible telecommunications carrier (ETC), pursuant to 47 U.S.C. §214(e) and P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of Global Connection Inc., of America d/b/a Stand Up Wireless for Designation as an Eligible Telecommunications Carrier in the State of Texas. Docket Number 40739.

The Application: Stand Up Wireless seeks ETC designation solely to participate in the universal service fund's (USF) lifeline program as a prepaid wireless carrier; Stand Up Wireless will not seek access to funds from the USF for the purpose of providing service to high cost areas. Pursuant to 47 United States Code §214(e), the commission, either upon its own motion or upon request, shall designate qualifying common carriers as ETCs for service areas set forth by the commission. In its application, Stand Up Wireless provides a list of non-rural AT&T Texas, Verizon Southwest, and Central Telephone Company of Texas d/b/a CenturyLink wire centers in its underlying carriers' (Sprint PCS and Verizon Wireless) coverage areas for which the company requests ETC designation. Stand Up Wireless indicates where its underlying carrier(s) serves the entire wire center and where it serves only part of the wire center.

Persons who wish to comment on this application should notify the Public Utility Commission of Texas by October 26, 2012. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 or you may call the Public Utility Commission's Customer Protection Division 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 to reach the commission's toll-free number (888) 782-8477. All comments should reference Docket Number 40739.

TRD-201205111
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 25, 2012

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Revised 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 September 7, 2012, to amend a certificate of convenience and necessity for a proposed transmission line in Comal and Guadalupe Counties, Texas.

Docket Style and Number: Application of LCRA Transmission Services Corporation to Amend its Certificate of Convenience and Necessity for the Proposed EC Mornhinweg to Parkway 138-Kv Transmission Line in Comal and Guadalupe Counties. Docket Number 40684.

The Application: The application of LCRA Transmission Services Corporation, Inc. (LCRA TSC) is to amend a certificate of convenience and necessity (CCN) for the proposed construction of a new 138-kilovolt (kV) transmission line in Comal and Guadalupe Counties. The proposed project is designated as the EC Mornhinweg to Parkway Transmission Line Project. The design voltage rating for this project is 138-kV, and the operating voltage is also 138-kV. The new circuit will connect the existing Guadalupe Valley Electric Cooperative (GVEC)-owned Parkway Substation (Parkway) located just west of Schertz Parkway (south of Wiederstein Road) in Guadalupe County to the new New Braunfels Utilities (NBU) ECM Substation under construction in the vicinity of FM 482 (east of Schwab Road and north of IH35) in Comal County. The entire project will be approximately 8 to 11 miles in length, depending on the final route selected. LCRA TSC will install new equipment at both the new NBU ECM Substation and the existing Parkway Substation. In addition, if Route 10 or a similar route using Alternate Route Segments L1, N1, 01, and C1 (a direct path across IH-35 from the ECM Substation to the existing LCRA TSC Transmission Right-of-way (ROW)) is selected by the PUC, LCRA TSC requests that the portion between the ECM Substation and the existing ROW be approved and certificated by the PUC for a second 138-kV circuit to be added as needed in the future.

The total estimated cost for the project ranges from approximately $12 million to $30 million depending on the route chosen. The proposed project is presented with 14 alternate routes. 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 October 22, 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 40684.

TRD-201205109
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 25, 2012

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Texas Department of Transportation

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Texas Administrative Code, Title 43, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following website:

http://www.txdot.gov/public_involvement/hearings_meetings/schedule.htm.

Or visit www.txdot.gov, click on Public Involvement, click on Hearings and Meetings, and then click on Hearings and Schedule.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 1-800-68-PILOT.

TRD-201205116
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 26, 2012

♦ ♦ ♦

Public Notice of Draft Environmental Impact Statement - Loop 375 Border Highway West Extension Project, from Racetrack Drive to US 54, El Paso County, Texas

Pursuant to Texas Administrative Code, Title 43, §2.103(d), the Texas Department of Transportation (department) is announcing to the public the availability of the Draft Environmental Impact Statement (DEIS) dated September 2012, for the proposed construction of the **Loop 375 Border Highway West Extension Project,** from **Racetrack Drive** (near Doniphan Road and New Mexico (NM) 273 west of downtown) **to United States (US) 54** (east of downtown El Paso), a total length of approximately 9 miles, of which approximately 7 miles would be tolled.

A public hearing will be held beginning with an open house at 4:00 p.m. and a presentation scheduled to begin at 6:30 p.m. on November 15, 2012 at the University of Texas at El Paso (UTEP), El Paso Natural Gas Conference Center, Wiggins Road, El Paso, Texas. The public hearing notice will be published in the *El Paso Times* and *El Diario de El Paso* prior to the hearing. Written comments may be submitted to: **Loop 375 BHW Comments c/o HNTB Corporation, 7500 Viscount Boulevard, Suite 100, El Paso, Texas, 79925.** Comments will also be accepted by e-mail to info@borderhighwaywest.com. The comment period closes on November 26, 2012.

The proposed improvements would close the Loop 375 gap that currently exists along the border in the downtown El Paso area and would create an alternate route to Interstate Highway 10 (I-10) to increase system capacity and reliability and regional system linkage improving the mobility for the El Paso region. Other than I-10, there is no continuous high speed east-west highway through El Paso. The only other major highways that serve east-west traffic are US 85 (Paisano Drive) and Loop 375. However, US 85 (Paisano Drive) has numerous signalized intersections and heavy pedestrian activity, and Loop 375 terminates at Santa Fe Street.

The study included the consideration of a full range of alternatives, including: the No-Build Alternative; various Build Alternatives, including alternative corridors and other new planned roadway construction; Transportation System/Travel Demand Management (TSM/TDM); Smart Street improvements; and modal transportation improvements such as bus transit, high-occupancy vehicle lanes, and rail feasibility. Alternatives determined not to meet the purpose and need for the project were eliminated from further consideration, while other reasonable alternatives were identified and carried forward for detailed study. The study approach first emphasized avoidance, and then minimization to ensure that the identified Reasonable Alternatives, and ultimately the Preferred Alternative, minimizes adverse impacts to the greatest extent possible. The Preferred Alternative was

identified after careful consideration of comments received from the public and resource agencies.

The Preferred Alternative consists of a controlled-access toll road on a new location. The proposed facility would include four lanes within a typical right-of-way width of 120 feet. All existing non-toll lanes in the project area would remain non-tolled. A total of four Build Alternatives, in addition to the No-Build Alternative, are presented in the DEIS. All reasonable build alternatives are described as follows.

Alternative 1 closely follows the international border for its entire length and portions are within the floodplain of the Rio Grande. The northern section would be elevated over existing US 85 (Paisano Drive) and the southern section would follow a new location elevated within the Rio Grande floodplain and along the existing Customs and Border Protection (CBP) road, then crosses over the Burlington Northern and Santa Fe (BNSF) Railroad (RR) and beneath the Santa Fe International Bridge.

Alternative 2 (the Preferred Alternative) would be elevated along a new location through the northern section of the project through the CEMEX and the American Smelting and Refining Company (ASARCO) industrial areas just west of I-10 and the southern portion would follow a new location elevated within the Rio Grande floodplain and along the existing CBP road, then crosses over the BNSF RR and beneath the Santa Fe International Bridge.

Alternative 3 would be elevated along a new location through the northern section of the project through the CEMEX and ASARCO industrial areas just west of I-10 and the southern section would follow along a new location, elevated or depressed, north of the Chihuahuita neighborhood and the BNSF rail yard and then would cross over the BNSF RR and beneath the Santa Fe International Bridge.

Alternative 4 would be elevated over existing US 85 (Paisano Drive) in the northern section and would follow closely along the border. The southern section would be on a new location and would be elevated or depressed just north of the Chihuahuita neighborhood and the BNSF rail yard and then would cross over the BNSF RR and beneath the Santa Fe International Bridge.

Under the No-Build Alternative, the proposed project would not be constructed. The No-Build Alternative would not address the needed improvements to system capacity and reliability and regional system linkage; therefore, traffic congestion and capacity needs would continue to increase.

The Preferred Alternative that has emerged from the study is Alternative 2. The Preferred Alternative allows for impact avoidance and minimization for a number of resources, fulfills the purpose and need for the project, and provides feasible engineering alternatives. The Preferred Alternative best balances the expected project benefits with the overall effects.

The Preferred Alternative, Alternative 2, would require the acquisition of new right-of-way, including 0.2 acre of parkland from the Chihuahuita Park, two residential and 42 commercial displacements, potential community impacts, access changes, and other environmental impacts including impacts to land use, floodplains, water quality, vegetation, hazardous materials, and traffic noise. Although a Preferred Alternative is presented, final selection of the Preferred Alternative would not be made until after the public comment period is completed, comments on the DEIS are received and considered, and the environmental effects are fully evaluated.

The Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (Uniform Act) requires that comparable, decent, safe, and sanitary replacement housing within a person's financial means be made available to all displaced residents. The State's Relocation Assistance Program will be available to all individuals, families, businesses, farmers, ranchers, and nonprofit organizations displaced as a result of the proposed project. Acquisitions of businesses and residences will be conducted in accordance with the Uniform Act, as amended in 1987. Relocation assistance would be made available to all businesses and residences without discrimination, consistent with the requirements of the Civil Rights Act of 1964 and the Housing and Urban Development Amendment of 1974. Representatives from the State of Texas will be available at the public hearing to answer questions and provide information concerning the property acquisition process and benefits offered by relocation assistance. Construction would not begin until after issuance of a Record of Decision on the Final Environmental Impact Statement.

The DEIS is on file, available for review and copying at the following locations:

(1) **Texas Department of Transportation, Environmental Affairs Division,** 118 E. Riverside Drive, Austin, Texas 78701;

(2) **Texas Department of Transportation, El Paso District Office,** 13301 Gateway Boulevard West, El Paso, Texas 79928;

(3) **Lardy Fox Branch Library,** 5515 Robert Alva Road, El Paso, Texas 79905;

(4) **Memorial Park Branch Library,** 3200 Copper Drive, El Paso, Texas 79930;

(5) **Armijo Branch Library,** 620 East 7th Avenue, El Paso, Texas 79901; and

(6) **Main Library,** 501 N. Oregon Street, El Paso, Texas 79901.

A copy of the DEIS may also be downloaded from the department's El Paso District project website: http://www.txdot.gov/project_information/projects/el_paso/border_highway_west.htm. To request that a copy of the DEIS be made at the requestor's expense, please contact **Eduardo Calvo, Advance Planning Director, 13301 Gateway Boulevard West, El Paso, Texas 79928 or call (915) 790-4200.**

TRD-201205117
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 26, 2012

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Sul Ross State University

Request for Proposals #13-001

Pursuant to Texas Government Code, Chapter 2254, Sul Ross State University, a member of the Texas State University System, announces the solicitation for consultant services to advise and assist with the development of Strategic Planning and Facilitation.

Project Summary: The President, in consultation with his senior staff and counsel, will appoint a planning committee comprised of selected members from the ranks of board leadership, faculty, alumni, administration, donors, and friends of the University. The committee will guide and shepherd the planning. The entire program of planning meetings and deliberations through completion will be managed by Consultant. At the conclusion of the planning process, a final report and strategic plan will be presented to the University with recommendations on the next steps for Dr. Maestas.

In accordance with the provisions of Government Code §2254.028(c), the president of Sul Ross State University has approved the use of a private consultant and has determined that the required fact exists.

Proposals are to be received no later than 4:00 p.m., Monday, October 22, 2012. A copy of the request for proposal packet is available upon request from Noe Hernandez, Director of Purchasing, Sul Ross State University, P.O. Box C-116, Alpine, Texas 79832, phone (432) 837-8045, fax (432) 837-8046.

Vendors will be evaluated on credentials for the work to be done, previous successful experience on similar projects and interpersonal and written communication skills. Proposals will be evaluated on the fulfillment of the requirements as outlined in the specifications, a fee schedule which is appropriate to the proposed activities, and the quality of performance on previous contracts or experience on similar projects.

The University reserves the right to reject any and all proposals received if it is determined to be in the best interest of the University. All material submitted in response to this request becomes the property of the University and may be reviewed by other vendors after the official review of the proposals.

TRD-201204964
Ricardo Maestas
Executive Director
Sul Ross State University
Filed: September 20, 2012

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Texas Veterans Commission

Accepting Membership Applications for Advisory Committees

The Texas Veterans Commission ("commission") is accepting applications to fill membership vacancies on the following committees: Veterans Employment and Training Advisory Committee, Fund for Veterans' Assistance Advisory Committee, and Veterans Communication Advisory Committee.

Each committee is composed of nine (9) members who are appointed by the commission. The term of office for each member is two (2) years (staggered terms). Committees are required to meet at least four (4) times a year. The Veterans Communication Advisory Committee currently meets on a monthly basis. The Fund for Veterans' Assistance Advisory Committee may meet as needed to make grant recommendations to the commission. Committees generally meet at commission headquarters in Austin or via telephone conference. Committee membership is voluntary, and the commission is not currently authorized to reimburse members for their travel expenses.

Committees. Each advisory committee will review issues and provide advice to the commission, as charged by the commission.

Veterans Employment and Training Advisory Committee - Seeks the input of employers to better assist veterans in gaining successful employment and/or training.

Fund for Veterans' Assistance Advisory Committee - Evaluates grant applications and makes recommendations to the commission.

Veterans Communication Advisory Committee - Develops recommendations to improve communications with veterans, their families, and the general public regarding the services provided by the Texas Veterans Commission and information on benefits and assistance available to veterans from federal, state, and private entities.

Qualifications for Membership. Veterans are strongly preferred. In addition, applicants should identify how they meet these qualifications for each committee:

Veterans Employment and Training Advisory Committee - Individuals who are recognized authorities in the fields of business, employment, training, rehabilitation, or labor or are nominated by veterans' organizations that have a national employment program.

Fund for Veterans' Assistance Advisory Committee - Representatives from veterans' organizations, non-profit or philanthropic organizations, veterans or family members of veterans, and other individuals with the experience and knowledge to assist the committee with achievement of its purpose.

Veterans Communication Advisory Committee - Representatives from the communications industry, state agencies, the Texas National Guard, U.S. Armed Forces reserve components, and other individuals with the experience and knowledge to assist the committee with achievement of its purpose.

Application for Membership. To apply for membership on a committee, please submit an online application through the commission's website at *http://www.tvc.texas.gov.*

Deadline for Application. Applications must be received by the commission no later than 5:00 p.m. (Central Time), Wednesday, October 10, 2012, to be considered for membership on a committee.

TRD-201205121
Kyle V. Mitchell
Deputy Executive Director
Texas Veterans Commission
Filed: September 26, 2012

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Texas Water Development Board

Request for Applications for Flood Protection Planning

The Texas Water Development Board (Board) requests, pursuant to Texas Administrative Code (TAC), Title 31, §355.3, the submission of applications leading to the possible award of contracts to develop flood protection plans for areas in Texas from political subdivisions with the legal authority to plan for and abate flooding and which participate in the National Flood Insurance Program. Flood Protection Planning Grant applications may be submitted by eligible political subdivisions from any area of the State and will be considered and evaluated. In addition, applicants must supply a map of the geographical planning area to be studied.

Description of Planning Purpose and Objectives. The purpose of the Flood Protection Planning Grant Program is for the State to assist local governments to develop flood protection plans for entire major or minor watersheds (as opposed to local drainage areas) that provide protection from flooding through structural and non-structural measures as described in 31 TAC §355.2. Planning for flood protection will include studies and analyses to determine and describe problems resulting from or relating to flooding and the views and needs of the affected public relating to flooding problems. Potential solutions to flooding problems will be identified, and the benefits and costs of these solutions will be estimated. From the planning analysis, feasible solutions to flooding problems will be recommended. The flood protection planning study should also include an assessment of the environmental and cultural resources of the planning area as necessary to evaluate the flood control alternatives being considered. Solutions for localized drainage problems are not eligible for grant funding.

Description of Funding Consideration. Up to $900,000 has been initially authorized for Fiscal Year 2013 assistance for flood protection planning from the Board's Research and Planning Fund. Up to 50 percent funding may be provided to individual applicants, with up to 75 percent funding available to areas identified in 31 TAC §355.10(a) as economically disadvantaged. In the event that acceptable applica-

tions are not submitted, the Board retains the right to not award contract funds.

Deadline, Review Criteria, and Contact Person for Additional Information. Six double-sided copies on recycled paper and one digital copy (CD) of a complete Flood Protection Planning Grant application including the required attachments must be filed with the Board prior to noon, 12:00 p.m., January 23, 2013. Applications can be directed either in person to Mr. David Carter, Texas Water Development Board, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas or by mail to Mr. David Carter, Texas Water Development Board, P.O. Box 13231 - Capitol Station, Austin, Texas 78711-3231. Applications will be evaluated according to 31 TAC §355.5. All potential applicants can contact the Board to obtain these rules and an application instruction sheet. Requests for information, the Board's rules, and the instruction sheet covering the research and planning fund may be directed to Mr. Gilbert Ward at the preceding mailing address, or by email at gilbert.ward@twdb.texas.gov, or by calling (512) 463-6418. This information can also be found on the Internet at the following address: http://www.twdb.texas.gov.

TRD-201205036
Kenneth Petersen
General Counsel
Texas Water Development Board
Filed: September 24, 2012

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Request for Applications for Regional Facility Planning

The Texas Water Development Board (Board) requests, pursuant to Texas Administrative Code (TAC), Title 31, Chapter 355, Subchapter A, as amended, the submission of planning grant applications leading to the possible award of contracts for regional facility planning. This planning will evaluate and determine the most feasible alternatives to meet water supply and/or wastewater facility needs, estimate the costs associated with implementing feasible water supply and/or wastewater facility alternatives, and identify institutional arrangements to provide water supply and/or wastewater services for areas in Texas. In order to receive a grant, the applicant must have the authority to plan, implement, and operate regional water supply and/or wastewater facilities.

Planning grant applications may be submitted by eligible political subdivisions from any area of the state. To be eligible for funding, at least two political subdivisions must participate in the proposed study and more than one service area must be evaluated for feasibility of regional facilities. In addition, applicants must supply a map of the geographical planning area to be studied.

Description of Planning Purpose and Objectives. Note: studies related to the development of regional water supply plans, the evaluation of water supply alternatives, and drought response plans, as described in Texas Water Code, §16.053, are not eligible for funding under this Request for Applications. The purpose of this program is for the state to assist local governments to prepare plans that document water supply and/or wastewater service facility needs, identify feasible regional alternatives to meet water supply and/or wastewater facility needs, and present estimates of costs associated with providing regional water supply facilities and distribution lines and/or regional wastewater treatment plants and collection systems. The study should, at a minimum, include the following steps:

1. Develop Problem Statement;

2. Inventory Existing Conditions and Forecast Future Conditions and Needs;

3. Formulate Planning Alternatives;

4. Evaluate and Compare Each Planning Alternative; and

5. Select Best Planning Alternative.

A water conservation plan and a drought management plan must be developed to ensure that existing and future sources are used efficiently and as a basis for confirming demand projections of future need. The Board's population and water demand projections will be considered in preparing projections. Discrete phases to implement regional water supply and/or wastewater facilities to meet projected needs will be identified. Environmental, social, and cultural factors for possible solutions identified in the plan should be evaluated. Cost estimates will be made for each respective implementation phase to determine the capital, operation, and maintenance requirements for a 30-year planning period. Separate cost estimates will be made for each regional water supply and/or wastewater system component, including the water conservation program.

Description of Funding Consideration. An amount not to exceed $400,000 has been initially authorized for Fiscal Year 2013 assistance for regional facility planning from the Board's Research and Planning Fund. Up to 50 percent funding may be provided to individual applicants, with up to 75 percent funding available to areas identified in 31 TAC §355.10(a) as economically disadvantaged. In the event that acceptable applications are not submitted, the Board retains the right not to award contract funds.

Deadline, Review Criteria, and Contact Person for Additional Information. Six double-sided copies on recycled paper and one digital copy (CD) of a complete regional facility planning grant application including the required attachments must be filed with the Board prior to 12:00 p.m., Thursday, December 20, 2012. Applications can be directed either in person to Mr. David Carter, Texas Water Development Board, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas or by mail to Mr. David Carter, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231.

Applications will be evaluated according to 31 TAC §355.5. All potential applicants can contact the Board to obtain these rules and an application instruction sheet. Requests for information may be directed to David Meesey at the preceding mailing address, by e-mail at david.meesey@twdb.texas.gov or by calling (512) 936-0852. More information can be found on the Internet at the following address: http://www.twdb.texas.gov.

TRD-201205035
Kenneth Petersen
General Counsel
Texas Water Development Board
Filed: September 24, 2012

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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.

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)*