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Sergio Ledesma

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FAX (512) 463-5569

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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.texas.gov.

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.

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 1. ADMINISTRATION

PART 7. STATE OFFICE OF ADMINISTRATIVE HEARINGS

CHAPTER 156. ARBITRATION PROCEDURES FOR CERTAIN ENFORCEMENT ACTIONS OF THE DEPARTMENT OF AGING AND DISABILITY SERVICES (DADS) REGARDING ASSISTED LIVING FACILITIES

The State Office of Administrative Hearings (SOAH) proposes new 1 TAC Chapter 156, Arbitration Procedures for Certain Enforcement Actions of the Department of Aging and Disability Services (DADS) Regarding Assisted Living Facilities, consisting of Subchapter A, §§156.1, 156.3, and 156.5, concerning general information; Subchapter B, §§156.51, 156.53, 156.55, 156.57, and 156.59, concerning election and initiation of arbitration; Subchapter C, §156.101, concerning filing and service of documents; Subchapter D, §§156.151, 156.153, 156.155, 156.157, 156.159, and 156.161, concerning selection of arbitrator and costs; Subchapter E, §§156.201, 156.203, 156.205, 156.207, 156.209, 156.211, 156.213, 156.215, 156.217, 156.219, 156.221, 156.223, 156.225, 156.227, 156.229, 156.231, 156.233, and 156.235, concerning arbitration proceedings; and Subchapter F, §§156.251, 156.253, and 156.255, concerning arbitration order.

Background and Justification

The new chapter is being proposed pursuant to the 83rd Legislative Session, H.B. 33, which added Health and Safety Code Chapter 247, Subchapter E, which authorizes arbitrations in certain disputes involving the Department of Aging and Disability Services and assisted living facilities.

Section-by-Section Summary

New Subchapter A is entitled General Information and contains §§156.1, 156.3, and 156.5. These sections set out SOAH's rules concerning definitions; construction of this chapter; and other SOAH rules of procedure.

New Subchapter B is entitled Election and Initiation of Arbitration and contains §§156.51, 156.53, 156.55, 156.57, and 156.59. These sections set out SOAH's rules concerning opportunity to elect arbitration; notice of election of arbitration; initiation of arbitration; jurisdictional challenges; and changes of claim.

New Subchapter C is entitled Filing and Service of Documents and contains §156.101. This section sets out SOAH's rule concerning filing and service of documents.

New Subchapter D is entitled Selection of Arbitrator and Costs and contains §§156.151, 156.153, 156.155, 156.157, 156.159, and 156.161. These sections set out SOAH's rules concerning selection of arbitrator; notice to and acceptance of appointment by arbitrator who is not a SOAH judge; vacancies; qualifications of arbitrators; duties of the arbitrator; and cost of arbitration.

New Subchapter E is entitled Arbitration Proceedings and contains §§156.201, 156.203, 156.205, 156.207, 156.209, 156.211, 156.213, 156.215, 156.217, 156.219, 156.221, 156.223, 156.225, 156.227, 156.229, 156.231, 156.233, and 156.235. These sections set out SOAH's rules concerning exchange and filing of information; preliminary conference; discovery; stenographic record; electronic record; interpreters; communication of parties with arbitrator; date, time, and place of hearing; representation; attendance required; public hearings and confidential material; order of proceedings; control of proceedings; evidence; witnesses; exclusion of witnesses; evidence by affidavit; and evidence filed after the hearing.

New Subchapter F is entitled Arbitration Order and contains §§156.251, 156.253, and 156.255. These sections set out SOAH's rules concerning the order; effect of the order; and clerical error.

Fiscal Note

Thomas H. Walston, General Counsel, has determined that, for the first five years the new chapter is in effect, enforcing or administering the new chapter does not have foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

Mr. Walston has determined that the new chapter will not have an adverse economic effect on either small businesses or micro-businesses because the proposed new chapter will not require providers to alter their business practices.

Cost to Persons and Effect on Local Economies

Mr. Walston anticipates that there will be an economic cost to persons who elect arbitration under the proposed new chapter during the first five years the rules will be effect. Health and Safety Code §247.083(c) requires the party electing arbitration to pay the cost of arbitration. Cost to the party electing arbitration shall not exceed $1,000 per day for the arbitrator's services, which does not include incidental expenses connected with an arbitration proceeding, such as rent for a hearing room, and/or the arbitrator's travel expenses. However, because these are new requirements, there is insufficient data available to estimate the potential fiscal impact.

There is no anticipated negative impact on local employment or local economies.

Public Benefit

Mr. Walston also has determined that for the first five-year period the new chapter is in effect the public benefit anticipated as a result of the new chapter will be in providing rules for arbitration proceedings that are consistent with Health and Safety Code Chapter 247, Subchapter E.

Regulatory Analysis

Mr. Walston has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Taking Impact Assessment

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

Public Comment

Written comments must be submitted within 30 days after publication of the proposed new chapter in the *Texas Register* to Debra Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, or by email at debra.anderson@soah.state.tx.us, or by facsimile to Debra Anderson at (512) 475-4994. Comments must be received within 30 days after publication of this proposal in order to be considered.

SUBCHAPTER A. GENERAL INFORMATION

1 TAC §§156.1, 156.3, 156.5

Statutory Authority

The new sections are proposed under Health and Safety Code, §247.083, which requires SOAH to adopt rules for arbitration procedures after consulting with DADS; Government Code, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures; and Government Code, §2003.050, which authorizes SOAH to establish procedural rules for its hearings.

The new sections affect Health and Safety Code, Chapter 247, and Government Code, Chapters 2001 and 2003. No other statutes, articles, or codes are affected by this proposal.

§156.1. Definitions.

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

(1) Administrative law judge or judge--An individual appointed by the chief administrative law judge of the State Office of Administrative Hearings (SOAH) under Government Code, §2003.041. The term shall also include any temporary administrative law judge appointed by the chief administrative law judge pursuant to Government Code, §2003.043.

(2) APA--Government Code, Chapter 2001.

(3) Authorized representative--An attorney authorized to practice law in the State of Texas or, where permitted by applicable law, a person designated by a party to represent the party.

(4) Chief judge--The chief administrative law judge or his or her designee for action under this chapter. Any designee shall be a person qualified to serve as an arbitrator.

(5) Code--Health and Safety Code, Chapter 247 as it may be amended from time to time.

(6) DADS--The Department of Aging and Disability Services.

(7) Facility--An assisted living facility as defined by the Code §247.002(1).

(8) Order--The award or final order issued by the arbitrator.

§156.3. Construction of this Chapter.

Unless otherwise expressly provided, the past, present, or future tense shall each include the other; the masculine, feminine, or neuter genders shall each include the other; and the singular and plural number shall each include the other.

§156.5. Other SOAH Rules of Procedure.

Unless specific applicable procedures are set out in this chapter, other SOAH rules of procedure found at Chapter 155 of this title (relating to Rules of Procedure), Chapter 157 of this title (relating to Temporary Administrative Law Judges), and Chapter 161 of this title (relating to Requests for Records) may apply in arbitration proceedings under this chapter. The rules that specifically apply include:

(1) 1 TAC 155, Subchapter C, §155.101 (relating to Filing Documents);

(2) 1 TAC 155, Subchapter C, §155.103 (relating to Service of Documents on Parties);

(3) 1 TAC 155, Subchapter D, §155.151 (relating to Assignment of Judges to Cases);

(4) 1 TAC 155, Subchapter D, §155.153 (relating to Powers and Duties);

(5) 1 TAC 155, Subchapter E, §155.201 (relating to Representation of Parties);

(6) 1 TAC 155, Subchapter I, §155.405 (relating to Participation by Telephone or Videoconference);

(7) 1 TAC 155, Subchapter I, §155.417 (relating to Stipulations);

(8) 1 TAC 155, Subchapter I, §155.425 (relating to Procedure at Hearing);

(9) 1 TAC 155, Subchapter I, §155.431 (relating to Conduct and Decorum);

(10) 1 TAC 155, Subchapter J, §155.503 (relating to Dismissal Proceedings);

(11) 1 TAC 157, §157.1 (relating to Temporary Administrative Law Judges); and

(12) 1 TAC 161, §161.1 (relating to Charges for Copies of Public Records).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2014.

TRD-201405552

Thomas H. Walston
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: January 4, 2015
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER B. ELECTION AND INITIATION OF ARBITRATION

1 TAC §§156.51, 156.53, 156.55, 156.57, 156.59

Statutory Authority

The new sections are proposed under Health and Safety Code, §247.083, which requires SOAH to adopt rules for arbitration procedures after consulting with DADS; Government Code, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures; and Government Code, §2003.050, which authorizes SOAH to establish procedural rules for its hearings.

The new sections affect Health and Safety Code, Chapter 247, and Government Code, Chapters 2001 and 2003. No other statutes, articles, or codes are affected by this proposal.

§156.51. Opportunity to Elect Arbitration.

(a) DADS or any affected facility may elect arbitration as an alternative to a contested case proceeding or to a judicial proceeding relating to any of the following disputes arising under the Code, Subchapter E:

(1) renewal of a license under §247.023;

(2) suspension, revocation, or denial of a license under §247.041;

(3) assessment of a civil penalty under §247.045; or

(4) assessment of an administrative penalty under §247.0451.

(b) Arbitration may not be elected if the facility has had an arbitration order levied against it in the previous five years.

(c) The election of arbitration is a representation that the party choosing arbitration is solvent and able to bear the costs of the proceeding. In cases where the facility is responsible for paying SOAH's costs and expenses, SOAH will require that an authorized representative of the facility provide:

(1) a deposit for the costs of the proceeding, based on SOAH's reasonable determination of the amounts expected to be incurred; and

(2) an affidavit acknowledging the facility's responsibility and duty to pay SOAH's costs and expenses.

(d) An election to engage in arbitration under this chapter is irrevocable and binding on the facility and DADS. However, an election does not preclude the parties from reaching an agreed resolution of a dispute that has been submitted for arbitration at any time during the arbitration process before the final order has been issued by the arbitrator.

§§156.53. Notice of Election of Arbitration.

(a) Pursuant to Code §247.082(b), in an enforcement lawsuit filed in court:

(1) An affected facility may elect arbitration by filing a notice of election to arbitrate with the court in which the lawsuit is pending and sending copies to the office of the attorney general and to the Health and Human Services Appeals Division.

(A) The notice of election must be filed no later than the tenth day after the date on which the answer is due or the date on which the answer is filed with the court, whichever is earlier.

(B) If a civil penalty is requested by an amended or supplemental pleading in a lawsuit, the affected facility must file its notice of election of arbitration not later than the tenth day after the date on which the amended or supplemental pleading is served on the affected facility or the facility's counsel.

(C) If the election of arbitration is challenged, the parties shall seek a prompt ruling from the court on the challenge. If a court finds SOAH has jurisdiction to conduct arbitration, the Health and Human Services Appeal Division shall immediately file the court's order and the notice of election of arbitration at SOAH and request the arbitration be processed in the usual manner.

(2) DADS may elect arbitration by filing the election with the court in which the lawsuit is pending and by notifying the facility of the election not later than the date on which the facility may elect arbitration under paragraph (1) of this subsection.

(b) In an administrative enforcement proceeding originally docketed at SOAH:

(1) An affected facility may elect arbitration by filing a notice of election to arbitrate with the docket clerk at SOAH no later than the tenth day after receiving notice of hearing that complies with the requirements of the Administrative Procedure Act. A copy of this election shall be sent to DADS's representative of record in the relevant action and to the Health and Human Services Appeals Division.

(2) DADS may elect arbitration under this chapter by filing a notice of election with the docket clerk at SOAH no later than the date that the facility may elect arbitration under paragraph (1) of this subsection and sending a copy of the notice of election to the facility's representative of record in the relevant action.

(c) The date of filing shall be the date affixed upon a notice of election by a date-stamp utilized by the docket clerk at the court for judicial proceedings, or by the docket clerk of SOAH for administrative proceedings.

(d) The notice of election shall include a written statement that contains:

(1) the nature of the action that is being submitted to arbitration, as listed in this subchapter, §156.51(a) (relating to Opportunity to Elect Arbitration);

(2) a brief description of the factual and/or legal controversy, including an estimate of the amount of any penalties sought;

(3) an estimate of the length of the arbitration hearing on the merits and the extensiveness of the record necessary to determine the matter;

(4) the remedy sought;

(5) a statement that the facility has not been the subject of an arbitration order within the previous five years;

(6) any special information that should be considered in selecting an arbitrator;

(7) if a hearing location other than Austin is requested, an explanation for requesting that location; and

(8) the name, title, address, and telephone number of a designated contact person for the party who will be paying the costs of the arbitration.

§156.55. Initiation of Arbitration.

(a) When a notice of election of arbitration is filed at SOAH, the notice shall be date stamped and the file given a SOAH docket number that identifies it as a case submitted for arbitration. Parties shall include this docket number on all subsequent correspondence and documents filed with SOAH relating to the arbitration.

(b) The party that did not initiate the arbitration may file an answering statement with SOAH within ten days after receipt of the notice of election from the electing party. That answering statement should include a response to the claim and any challenge to the election of arbitration. If the party that did not initiate the arbitration does not file an answering statement, SOAH will presume that party denies the claim and does not challenge the election of arbitration. Failure to file an answering statement shall not operate to delay the arbitration.

§156.57. Jurisdictional Challenges.

(a) Parties who raise jurisdictional challenges to an election for arbitration in a judicial enforcement action are required to seek an expeditious ruling from the court in which the election was filed.

(b) Jurisdictional challenges brought to an election for arbitration in an administrative enforcement proceeding shall be decided by the presiding administrative law judge in the contested case.

§156.59. Changes of Claim.

If either party desires to make any new or different claim, it shall be made in writing and filed with SOAH. The other party may, within ten days from the date of such filing, file an answer with SOAH. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2014.

TRD-201405554
Thomas H. Walston
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: January 4, 2015
For further information, please call: (512) 475-4931

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SUBCHAPTER C. FILING AND SERVICE OF DOCUMENTS

1 TAC §156.101

Statutory Authority

The new section is proposed under Health and Safety Code, §247.083, which requires SOAH to adopt rules for arbitration procedures after consulting with DADS; Government Code, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures; and Government Code, §2003.050, which authorizes SOAH to establish procedural rules for its hearings.

The new section affects Health and Safety Code, Chapter 247, and Government Code, Chapters 2001 and 2003. No other statutes, articles, or codes are affected by this proposal.

§156.101. Filing and Service of Documents.

(a) All documents a party files with SOAH shall be governed by the provisions of 1 TAC §155.101 (relating to Filing Documents).

(b) All documents a party files with SOAH shall be simultaneously served on the other parties. Service of documents on parties shall be governed by the provisions of 1 TAC §155.103 (relating to Service of Documents on Parties).

(c) Except as provided herein, any oral or written communication, other than a communication authorized under subsection (a) of this section, from the parties to an arbitrator shall be directed to the association that is conducting the arbitration or, if there is no association conducting the arbitration, to SOAH, for transmittal to the arbitrator. After the arbitrator has been appointed in a case, materials may be filed directly with the arbitrator, if:

(1) the parties agree;

(2) the arbitrator agrees; and

(3) the service requirements of this section are met.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Thomas H. Walston
General Counsel
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For further information, please call: (512) 475-4931

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SUBCHAPTER D. SELECTION OF ARBITRATOR AND COSTS

1 TAC §§156.151, 156.153, 156.155, 156.157, 156.159, 156.161

Statutory Authority

The new sections are proposed under Health and Safety Code, §247.083, which requires SOAH to adopt rules for arbitration procedures after consulting with DADS; Government Code, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures; and Government Code, §2003.050, which authorizes SOAH to establish procedural rules for its hearings.

The new sections affect Health and Safety Code, Chapter 247, and Government Code, Chapters 2001 and 2003. No other statutes, articles, or codes are affected by this proposal.

§156.151. Selection of Arbitrator.

(a) The parties may agree upon an arbitrator qualified under this Chapter and submit that individual's name with their initial statements.

(b) Arbitrators designated by the parties.

(1) Parties who agree to retain a qualified non-SOAH arbitrator shall notify the chief judge within ten days of the arbitrator's retention.

(2) The notice must include the name, address, and telephone number of the arbitrator selected; a statement that the parties have entered into an agreement with the arbitrator regarding the arbitrator's rate and method of compensation; and an affirmation that the arbitrator is qualified to serve according to the provisions of this chapter.

(3) The chief judge shall issue an order specifying the date by which the arbitration must be completed.

(c) If the parties do not agree on a non-SOAH arbitrator who is willing and available to serve, SOAH will provide a list of potential SOAH arbitrators.

(d) Any objections for cause pertaining to any name on the list shall be made in writing directed to the chief judge at SOAH within three days of receiving the list of potential SOAH arbitrators, with a copy served on all other parties. Such objections will be reviewed by the chief judge.

(e) SOAH will notify the parties of the arbitrator appointed.

(f) Until an arbitrator has been appointed, the chief judge may rule on pending matters, including dispositive motions.

§156.153. Notice to and Acceptance of Appointment by Arbitrator who is not a SOAH Judge.

(a) Notice of the appointment of the arbitrator shall be sent to the arbitrator by SOAH, together with a copy of this chapter and an acceptance form for the arbitrator to sign and return. The signed acceptance of the arbitrator shall be filed with SOAH prior to the first pre-hearing conference or other meeting of the parties to the arbitration.

(b) The acceptance of the arbitrator shall state that the arbitrator is qualified and willing to serve as arbitrator in accordance with this chapter, and with the Code of Ethics for Arbitrators in Commercial Disputes issued by the American Bar Association and the American Arbitration Association in 2004. It shall also state that the arbitrator foresees no difficulty in completing the arbitration according to the schedule set out in this chapter.

(c) A potential arbitrator must not accept appointment in or continue handling any matter in which the arbitrator believes or perceives that participation as an arbitrator would be a conflict of interest or create the impression of a conflict. The duty to disclose is a continuing obligation throughout the arbitration process.

(d) Upon objection of a party to the continued service of an arbitrator, the chief judge shall provide the arbitrator and all parties an opportunity to respond. After consideration of these responses, the chief judge shall determine whether the arbitrator should be disqualified and shall inform the parties of his/her decision, which shall be conclusive.

§156.155. Vacancies.

If for any reason an appointed arbitrator is unable to perform the duties of the office, the chief judge may, on proof satisfactory to the chief judge, declare the office vacant. The chief judge may fill a vacancy by appointing a SOAH arbitrator. Objections for cause to the appointed arbitrator shall be filed in accordance with this subchapter, §156.151(d) (relating to Selection of Arbitrator). During the period of a vacancy, the chief judge may rule on pending matters, including dispositive motions.

§156.157. Qualifications of Arbitrators.

(a) The chief judge may appoint as an arbitrator any SOAH administrative law judge.

(b) A potential arbitrator who is not a SOAH administrative law judge shall be on an approved list of a nationally recognized association that performs arbitration services or meet the following minimum standards:

(1) Have at least five years of experience in health care and/or the legal profession and/or alternative dispute resolution with recognized expertise in his/her profession(s).

(2) Have the attributes necessary to be a successful arbitrator, including expertise, honesty, integrity, impartiality, and the ability to manage the arbitration process.

(3) May not represent any plaintiff in a proceeding seeking monetary damages from the State of Texas or any of its agencies, and he/she must affirm that he/she will not undertake any such representation during the pendency of the arbitration proceeding.

(c) The chief judge may remove an arbitrator if she/he determines that the arbitrator no longer meets the qualifications listed in this section. The determination of the chief judge in this matter is conclusive.

§156.159. Duties of the Arbitrator.

The arbitrator shall:

(1) secure appropriate facilities for the hearing, giving preference to using state facilities;

(2) protect the interests of DADS and the facility;

(3) ensure that all relevant evidence has been disclosed to the arbitrator, DADS, and facility; and

(4) render an order consistent with applicable state and federal law, including the Code and this chapter.

§156.161. Cost of Arbitration.

(a) An arbitrator's fees and expenses shall not exceed $1,000 per day for case preparation, pre-hearing conferences, hearings, preparation of the order, and any other required post-hearing work. Rates charged for less than one day must bear a reasonable relationship to the daily maximum.

(b) There may also be incidental expenses connected with an arbitration proceeding which may be charged in addition to the arbitrator's fees and expenses. If a party requests that an arbitration hearing be held outside of Austin, and the arbitrator agrees to hold the arbitration in that location, incidental expenses would include the cost of renting a room for the hearing and the arbitrator's travel expenses.

(c) SOAH charges fees for the services provided by SOAH arbitrators at the hourly rate approved in the General Appropriations Act, but the total amount charged for a SOAH arbitrator's services in an arbitration proceeding conducted under these rules shall not exceed $1,000 per day.

(d) The party electing arbitration must pay the cost of the arbitration.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER E. ARBITRATION PROCEEDINGS

1 TAC §§156.201, 156.203, 156.205, 156.207, 156.209, 156.211, 156.213, 156.215, 156.217, 156.219, 156.221, 156.223, 156.225, 156.227, 156.229, 156.231, 156.233, 156.235

Statutory Authority

The new sections are proposed under Health and Safety Code, §247.083, which requires SOAH to adopt rules for arbitration procedures after consulting with DADS; Government Code, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures; and Government Code, §2003.050, which authorizes SOAH to establish procedural rules for its hearings.

The new sections affect Health and Safety Code, Chapter 247, and Government Code, Chapters 2001 and 2003. No other statutes, articles, or codes are affected by this proposal.

§156.201. Exchange and Filing of Information.

(a) Unless the arbitrator orders otherwise, by the 30th day after the date SOAH mailed notice to the parties of the name of the appointed arbitrator, the parties shall have exchanged the following information:

(1) List of witnesses that a party expects to call with a short summary of their expected testimony;

(2) Any and all documents or other tangible things that contain information relevant to the subject matter, including any documents that will be testified about at the hearing or that witnesses have reviewed in preparing for their testimony.

(b) Not later than the seventh day before the first day of the arbitration hearing, sooner if so directed by the arbitrator, DADS and the facility shall exchange and file with the arbitrator:

(1) all documentary evidence not previously exchanged and filed that is relevant to the dispute, with the relevant portions clearly indicated; and

(2) information relating to a proposed resolution of the dispute.

(c) The parties are responsible for identifying any material that is confidential by law and for taking appropriate measures, for example, redacting resident identities, to ensure that all such material remains confidential.

(d) Each producing party's documents shall be labeled by name or initials of the party and Bates-stamped or otherwise consecutively numbered in the lower right hand corner of each page.

§156.203. Preliminary Conference.

The arbitrator may set a preliminary conference and may require parties to file a statement of position prior to that conference. The statement of position shall include:

(1) stipulations of the parties to uncontested facts and applicable law;

(2) citation to the statutory and regulatory law, both state and federal, that controls the controversy;

(3) a list of the issues of fact and law that are in dispute between the parties, including a citation to legal authorities that each party relies on for its legal positions;

(4) proposals designed to expedite the arbitration proceedings, including minimizing preparation and decision time required of the arbitrator;

(5) a list of documents that the parties have exchanged and a schedule for the delivery of any additional relevant documents, indicating the approximate length of each document;

(6) the identification of witnesses expected to be called during the arbitration proceeding, with a short summary of their expected testimony; and

(7) other matters as specified by the arbitrator.

§156.205. Discovery.

Discovery is typically not allowed in a proceeding under this chapter. A party may obtain disclosure of documents or information by agreement with the other party or by order of the arbitrator upon a showing of good cause. Any discovery will be completed no later than 14 days before the opening of the arbitration hearing on the merits. Responses to discovery should not be filed with SOAH or the arbitrator unless there is a related dispute which must be resolved by the arbitrator.

§156.207. Stenographic Record.

An official stenographic record of the proceeding is not required, but DADS or the facility may make a stenographic record. The party that makes the stenographic record shall pay the expense of having the record made.

§156.209. Electronic Record.

DADS shall make an electronic recording of the proceeding. If there is no stenographic record of the proceeding, the original recording or a copy will be provided to the arbitrator at the close of the proceeding if the arbitrator so requests. At the arbitrator's request, DADS shall also record prehearing conferences.

§156.211. Interpreters.

When an interpreter will be needed for all or part of a proceeding, a party shall file a written request at least seven days before the setting. SOAH shall provide and pay for:

(1) an interpreter for deaf or hearing impaired parties and subpoenaed witnesses in accordance with the APA, §2001.055;

(2) reader services or other communication services for blind and sight impaired parties and witnesses; and

(3) a certified language interpreter for parties and witnesses who need that service.

§156.213. Communication of Parties with Arbitrator.

(a) DADS and the facility shall not communicate with the arbitrator other than at an oral hearing, or through properly filed documents, unless the parties and the arbitrator agree otherwise.

(b) Any oral or written communication from the parties, other than a communication authorized under subsection (a) of this section, shall be directed to SOAH for transmittal to the arbitrator.

§156.215. Date, Time, and Place of Hearing.

(a) The arbitration hearing shall be scheduled to begin no later than the 90th day after the date that the arbitrator is selected.

(b) The arbitrator shall set the date, time, and place for each hearing. She/he shall send a notice of hearing to the parties at least 30 days in advance of the hearing date, unless otherwise agreed to by the parties. A copy of such notice shall be simultaneously filed with SOAH by the arbitrator.

(c) The arbitrator may grant a continuance of the arbitration at the request of DADS or the facility. The arbitrator may not unreasonably deny a request for a continuance.

(d) Arbitration hearings normally will be held at SOAH's hearings facility in Austin, Texas. If a party seeks to have the arbitration hearing held elsewhere, the party shall submit a written request to the arbitrator and make a showing of good cause. The arbitrator shall have sole discretion to determine whether to grant such a request. If the arbitrator grants the request, the arbitrator shall determine how the incidental expenses of holding the arbitration hearing outside of Austin will be apportioned between the parties. Incidental expenses include the cost of renting a room for the hearing and the arbitrator's travel expenses. Preference will be given to using state facilities. The arbitrator may require that the incidental expenses be paid in advance of the arbitration hearing.

§156.217. Representation.

Any party may be represented by counsel or other authorized representative.

§156.219. Attendance Required.

(a) The arbitrator may proceed in the absence of any party or representative of a party who, after notice of the proceeding, fails to be present or to obtain a continuance.

(b) An arbitrator may not make an order solely on the default of a party and shall require the party who is present to submit evidence, as required by the arbitrator, before issuing an order.

§156.221. Public Hearings and Confidential Material.

Hearings held under this chapter shall be open to the public. The parties are responsible for identifying any material that is confidential by law and for taking appropriate measures to ensure that such material remains confidential during the hearing. All exhibits shall be returned to DADS following the issuance of the order by the arbitrator, where they shall be maintained in accordance with DADS' rules.

§156.223. Order of Proceedings.

(a) Opening statements. The arbitrator may ask each party to make an opening statement to clarify the issues involved.

(b) The complaining party shall then present evidence to support its claim. The defending party shall then present evidence to support its claim. Witnesses for each party shall answer questions propounded by the other parties and the arbitrator.

(c) The arbitrator has the discretion to vary this procedure but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence within the time frames set by the arbitrator.

(d) Exhibits offered by either party may be received in evidence by the arbitrator.

(e) The parties may make closing statements as they desire, but the record may not remain open for written briefs unless ordered by the arbitrator. If the arbitrator requests briefs the arbitration hearing shall be deemed "closed" on the date that the last requested brief is filed.

§156.225. Control of Proceedings.

The arbitrator shall exercise reasonable control over the proceedings, including but not limited to the manner and order of interrogating witnesses and presenting evidence so as to:

(1) make the interrogation and presentation effective for the determination of the truth;

(2) avoid needless consumption of time; and

(3) protect witnesses from harassment or undue embarrassment.

§156.227. Evidence.

(a) The parties may offer evidence as they desire and shall produce additional evidence that the arbitrator considers necessary to understand and resolve the dispute. However, any documentary evidence not properly exchanged between the parties before the hearing will be excluded from consideration unless good cause is shown.

(b) The arbitrator is the judge of the relevance and materiality of the evidence offered. Strict conformity to the rules of judicial proceedings is not required. The Texas Rules of Evidence are not binding on the arbitrator but may be used as a guideline.

(c) Each party shall produce any witnesses under its control without the necessity of a subpoena. Individuals may be compelled by the arbitrator, as provided under the Texas General Arbitration Act, Texas Civil Practice and Remedies Code, §171.007, to attend and give testimony or to produce documents at the arbitration proceeding or at a deposition allowed under this subchapter, §156.205 (relating to Discovery).

§156.229. Witnesses.

Witnesses shall testify under oath. Testimony may be presented in a narrative, without strict adherence to a "question and answer" format.

§156.231. Exclusion of Witnesses.

Any party may request that the arbitrator exclude witnesses from the hearing except when they are testifying. If such a request is made, the arbitrator shall instruct the witnesses not to discuss the case outside the official hearing other than with the designated representatives or attorneys in the case. However, an individual who is a party or any other single party representative shall not be excluded under this rule. A witness or other person violating these instructions may be punished by the exclusion of evidence as the arbitrator deems appropriate.

§156.233. Evidence by Affidavit.

The arbitrator may receive and consider evidence of witnesses by affidavit. Affidavit testimony must be filed with the arbitrator and served on the other party no later than 30 days before the hearing. The other party will have 15 days to file any objection to the admissibility of the affidavit or to file controverting affidavits. The arbitrator shall give such evidence only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

§156.235. Evidence Filed After the Hearing.

If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, all parties shall be afforded an opportunity to examine such documents or other evidence. Such materials shall be served as provided in Subchapter C of this chapter, §156.101 (relating to Filing and Service of Documents).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER F. ARBITRATION ORDER

1 TAC §§156.251, 156.253, 156.255

Statutory Authority

The new sections are proposed under Health and Safety Code, §247.083, which requires SOAH to adopt rules for arbitration procedures after consulting with DADS; Government Code, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures; and Government Code, §2003.050, which authorizes SOAH to establish procedural rules for its hearings.

The new sections affect Health and Safety Code, Chapter 247, and Government Code, Chapters 2001 and 2003. No other statutes, articles, or codes are affected by this proposal.

§156.251. Order.

(a) The arbitrator may enter any order consistent with state and federal law applicable to a dispute described in Subchapter B of this chapter, §156.51 (relating to Opportunity to Elect Arbitration).

(b) The order shall be entered no later than the 60th day after the close of the arbitration hearing.

(c) The arbitrator shall base the order on the facts established in the arbitration proceeding, including stipulations of the parties; and on the state and federal statutes and formal rules and regulations, as properly applied to those facts.

(d) The order must:

(1) be in writing;

(2) be signed and dated by the arbitrator; and

(3) include a list of stipulations on uncontested issues and a statement of the arbitrator's decisions on all contested issues. If requested by either of the parties, the decision shall contain findings of fact and conclusions of law on controverted issues.

(e) The arbitrator shall file a copy of the order with SOAH and the Health and Human Services Appeals Division and send a copy to the parties.

§156.253. Effect of Order.

An order of an arbitrator under this chapter is final and binding on all parties. A party's right to appeal is limited to the provisions of the Code.

§156.255. Clerical Error.

For the purpose of correcting clerical errors, an arbitrator retains jurisdiction of the order for 20 days after the date of the order.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 27. COMMUNITY FIRST CHOICE

1 TAC §§354.1360 - 354.1366

The Texas Health and Human Services Commission (HHSC) proposes new Division 27, Community First Choice, to implement a new state plan option to provide certain home and community based supports. Specifically, HHSC proposes new §§354.1360 - 354.1366.

Background and Justification

Texas Government Code §533.0025(i) requires HHSC to "implement the most cost-effective option for the delivery of basic attendant and habilitation services for individuals with disabilities under the STAR+PLUS Medicaid managed care program that maximizes federal funding for the delivery of services for that program and other similar programs." The Government Code also requires HHSC to provide voluntary training to individuals receiving services under the STAR+PLUS Medicaid managed care program or their legally authorized representatives regarding how to select, manage, and dismiss personal attendants providing basic attendant and habilitation services under the program.

Community First Choice (CFC) is a new state plan option that allows states to provide home and community-based attendant services to Medicaid enrollees with disabilities under the state plan (federal regulations describing the program can be found at 42 CFR §441.500-590). HHSC has elected to implement CFC to meet the requirements of Texas Government Code §533.0025(i). This option provides HHSC with enhanced federal matching funds for this service.

The proposed new rules describe eligibility, benefits, and provider criteria for the CFC program. HHSC continues to discuss the implementation of this program with the Centers for Medicare & Medicaid Services (CMS), as well as in-state stakeholders. As a result, HHSC expects the proposed rule to evolve.

Section-by-Section Summary

HHSC proposes a new division title of "Community First Choice" to reflect the new rules proposed within this division.

Proposed §354.1360, Purpose, describes the purpose of this new division. Specifically, the division describes CFC and explains that this program is based on a state plan option to provide certain home and community based supports.

Proposed §354.1361, Definitions, describes the terms used throughout the CFC division.

Proposed §354.1362, Eligibility, describes the requirements for an individual to be eligible to receive CFC services.

Proposed §354.1363, Assessment, describes the processes for assessing level of care and functional needs for individuals interested in receiving CFC services.

Proposed §354.1364, Benefits and Limitations, describes the services offered through CFC and the limits on those services.

Proposed §354.1365, Provider Criteria, describes the types of providers who can provide CFC services.

Proposed §354.1366, Consumer Directed Services, explains that individuals choosing the CFC benefit may also elect to accept the Consumer Directed Services (CDS) option.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the new rules are in effect there will be a fiscal impact to state government. The expected costs are $24,945,720 in General Revenue (GR) ($140,663,096 All Funds (AF)) for State Fiscal Year (SFY) 2015, $62,572,359 GR ($294,948,030 AF) for SFY 2016, $68,965,461 in GR ($318,071,432 AF) for SFY 2017, $75,693,800 in GR ($344,011,460 AF) for SFY 2018 and $82,985,764 GR ($372,110,577 AF) for SFY 2019. The new rule is not anticipated to result in any fiscal implications to revenues or costs of local governments.

The expected increase for general revenue is $0 for SFY 2015; $6,270,007 for SFY 2016; $4,621,688 for SFY 2017; $5,015,992 for SFY 2018; and $5,443,854 for SFY 2019

Ms. Rymal does not anticipate that there will be any economic cost to persons who are required to comply with the proposed new rules during the first five years the rules will be in effect. The rules will not affect local employment.

Small and Micro-Business Impact Analysis

HHSC has determined that there will not be an effect on small businesses or micro-businesses to comply with the new rules, as they will not be required to alter their business practices as a result of the rules.

Public Benefit

Chris Traylor, Chief Deputy Commissioner for the Health and Human Services Commission, has determined that for each year of the first five years the proposed new rules are in effect, the public will benefit from the adoption of the rules. The anticipated public benefit of Community First Choice will be an expanded opportunity for individuals with Medicaid coverage to access home and community based supports that prevent them from needing institutional care.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "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

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

Public Comment

Written comments on the proposal may be submitted to Jennie Costilow, Senior Policy Advisor, Medicaid & CHIP Division, Texas Health and Human Services Commission, 4900 North Lamar Blvd. MC H600, Austin, Texas, 78751; by fax to (512) 424-6918; or by e-mail MCD_CFC@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for January 5, 2015, from 9:00 a.m. - 10:00 a.m. Persons requiring further information, special assistance, or accommodations should contact Kristine Dahlmann at (512) 462-6299.

Statutory Authority

The new rules are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and 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.

No other statutes, articles or codes are affected by the proposal.

§354.1360. Purpose.

(a) This division governs the Community First Choice (CFC) benefit.

(b) CFC is a state plan option through which a state may provide certain home and community based supports.

§354.1361. Definitions.

The following terms, when used in this division, have the following meanings unless the context clearly indicates otherwise.

(1) Activities of daily living (ADLs)--Basic personal everyday activities including, but not limited to, tasks such as eating, toileting, grooming, dressing, bathing, and transferring.

(2) CFC emergency response services--Electronic devices or a backup support plan to ensure continuity of services and supports available for functionally-impaired individuals who live alone, who are alone for significant parts of the day, or have no regular caregiver for extended periods of time, and who would otherwise require extensive routine supervision.

(3) CFC habilitation--Acquisition, maintenance, and enhancement of skills necessary for the individual to accomplish ADLs, IADLs, and health-related tasks.

(4) CFC personal assistance services--Services provided to assist an individual in performing the ADLs and IADLs based on the person-centered service plan.

(5) CFC support consultation services--An optional service offered to individuals using the CDS option. Support consultation is a voluntary service that offers practical skills training and assistance related to recruiting, screening, hiring, managing, and dismissing attendants.

(6) CFR--Code of Federal Regulations.

(7) Consumer directed services (CDS) option--A service delivery option (also known as self-directed model with service budget) in which an individual or legally authorized representative employs and retains service providers and directs the delivery of program services.

(8) DADS--The Texas Department of Aging and Disability Services.

(9) Financial management services agency (FMSA)--An entity that contracts to provide financial management services (FMS).

(10) Financial management services (FMS)--Services including, but not limited to, the following activities: collect and process timesheets of the individual's attendant care providers; process payroll, withholding, filing, and payment of applicable Federal, State, and local employment related taxes and insurance; separately track budget funds and expenditures for each individual; track and report disbursements and balances of each individual's funds; process and pay invoices for services in the person-centered service plan; and provide individual periodic reports of expenditures and the status of the approved service budget to the individual and to HHSC.

(11) HHSC--The Texas Health and Human Services Commission or its designee.

(12) Health-related tasks--Specific tasks related to the needs of an individual if the individual is receiving Medicaid services from a licensed professional who may delegate or assign the health-related task to an attendant, or the health-related task is exempt from delegation under §501.053(e) Texas Government Code or 22 TAC, §225.4 (relating to Definitions). Health-related tasks include tasks delegated by a registered nurse, health maintenance activities, and extension of therapy.

(13) Home and Community Support Services Agency (HCSSA)--Home and community support services agency licensed by the Texas Department of Aging and Disability Services (DADS) in accordance with Texas Health and Safety Code, Chapter 142.

(14) Instrumental activities of daily living (IADLs)--Activities related to living independently in the community including, but not limited to, meal planning and preparation; managing finances; shopping for food, clothing, and other essential items; performing essential household chores; communicating by phone or other media; and traveling around and participating in the community.

(15) Legally authorized representative (LAR)--A person authorized by law to act on behalf of an individual with regard to a matter described in this division, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(16) Local authority (LA)--An entity designated by DADS in accordance with the Texas Health and Safety Code, §533.035(a).

(17) Managed care organization (MCO)--An organization contracted with HHSC in accordance with §353.1 of this title (relating to Purpose).

(18) Person-centered planning--Service planning process that includes people chosen by the individual, is directed by the individual to the maximum extent possible, enables the individual to make informed choices and decisions, is timely and occurs at times and locations convenient to the individual, reflects cultural considerations of the individual, includes strategies for solving conflict or disagreement within the process, offers choices to the individual regarding the services and supports they receive and from whom, includes a method for the individual to request updates to the plan, and records alternative settings that were considered by the individual.

§354.1362. Eligibility.

(a) To be eligible for the Community First Choice (CFC) benefit, an individual must:

(1) be eligible for medical assistance under the state plan;

(2) as determined annually, be in an eligibility group under the state plan that includes an institutional level of care; and

(3) receive a determination, at least annually, that in the absence of the home and community-based personal assistance services and supports, the individual would otherwise require the level of care furnished in a hospital, a nursing facility, an intermediate care facility for individuals with an intellectual disability or related conditions, an institution providing psychiatric services for individuals under age 21, or an institution for mental diseases for individuals age 65 or over, if the cost could be reimbursed under the state plan. The Texas Health and Human Services Commission (HHSC) may permanently waive the annual recertification requirement for an individual if:

(A) it is determined there is no reasonable expectation of improvement or significant change in the individual's condition; and

(B) HHSC retains documentation of the reason for waiving the annual recertification requirement.

(b) Individuals who qualify for medical assistance under the special home and community-based waiver eligibility group defined at §1902(a)(10)(A)(ii)(VI) of the Social Security Act must meet all section 1915(c) waiver requirements and receive at least one home and community-based service per month.

§354.1363. Assessment.

(a) Level of care (LOC) assessment. Individuals receive an assessment of institutional level of care prior to receiving Community First Choice (CFC) services. LOC assessments are conducted by HHSC designated entities. Texas utilizes existing LOC assessment tools for all institutional LOC eligibility determinations for implementation of CFC benefits as outlined in §354.1364 of this division (relating to Benefits and Limitations).

(b) Functional needs assessment. Face-to-face assessments of an individual's functional needs, strengths, preferences, and goals for CFC services and supports are provided annually through person-centered planning. Functional needs assessments are performed by HHSC designated entities.

(c) Requirements on entities conducting the assessments. Individuals or entities conducting the assessment of functional need and person-centered service plan development process are not:

(1) related by blood or marriage to the individual, or to any paid caregiver of the individual;

(2) financially responsible for the individual;

(3) empowered to make financial or health-related decisions on behalf of the individual;

(4) individuals who would benefit financially from the provision of assessed needs and services; or

(5) providers of state plan home and community-based services (HCBS) for the individual, or those who have an interest in or are employed by a provider of state plan HCBS for the individual, except when HHSC determines that the provider is the only willing and qualified entity able to perform assessments of functional need and develop person-centered service plans in a geographic area.

§354.1364. Benefits and Limitations.

(a) Subject to the specifications, conditions, requirements, and limitations established by HHSC or its designee, Community First

Choice (CFC) services are provided subject to provisions in 42 CFR §§441.500 - 441.590. Services include:

(1) CFC Personal Assistance Services. CFC personal assistance services include:

(A) non skilled assistance with the performance of the ADLs and IADLs;

(B) household chores necessary to maintain the home in a clean, sanitary, and safe environment;

(C) escort services, which consist of accompanying, but not transporting, and assisting an individual to access personal assistance services or activities in the community; and

(D) assistance with health-related tasks.

(2) CFC Habilitation. CFC habilitation is provided to allow an individual to reside successfully in a community setting by assisting the individual to acquire, retain, and improve self-help, socialization, and daily living skills or assisting with and training the individual on ADLs and IADLs. Personal assistance may be a component of CFC habilitation for some individuals' ADLs. CFC habilitation services include habilitation training, which is interacting face-to-face with an individual who is awake, to train the individual in activities such as:

(A) self-care;

(B) personal hygiene;

(C) household tasks;

(D) mobility;

(E) money management;

(F) community integration;

(G) use of adaptive equipment;

(H) management of caregivers;

(I) personal decision making;

(J) interpersonal communication;

(K) reduction of challenging behaviors;

(L) socialization and the development of relationships;

(M) participating in leisure and recreational activities;

(N) use of natural supports and typical community services available to the public;

(O) self-administration of medication; and

(P) strategies to restore or compensate for reduced cognitive skills.

(3) CFC Emergency Response Services. Services are available for individuals who live alone, who are alone for significant parts of the day, or have no regular caregiver for extended periods of time, and who would otherwise require extensive routine supervision.

(4) CFC Support Consultation Services. Support consultation is a voluntary service that offers practical skills training and assistance related to recruiting, screening, hiring, managing, and dismissing attendants.

(b) CFC benefits can only be delivered in a home and community-based setting. These settings do not include:

(1) hospitals providing long-term services;

(2) nursing homes;

(3) institutions for mental disease;

(4) intermediate care facilities for individuals with an intellectual disability or related conditions; or

(5) settings with the characteristics of an institution.

(c) Individuals receiving services through CFC are not precluded from receiving other home and community-based long-term services and supports through other Medicaid state plan, waiver, grant, or demonstration authorities.

§354.1365. Provider Criteria.

(a) Community First Choice (CFC) services are provided by long-term services and supports (LTSS) providers that are determined to be qualified by the Texas Health and Human Services Commission (HHSC) in an existing LTSS program.

(b) HHSC ensures that all current qualification standards are maintained.

(c) Providers delivering CFC services include licensed home and community support services agencies (HCSSAs), certified Home and Community-based Services (HCS) and Texas Home Living (TxHmL) providers, licensed personal emergency response services agencies, qualified financial management services agencies, and qualified support advisors.

§354.1366. Consumer Directed Services.

Individuals utilizing the Community First Choice benefit may choose the Consumer Directed Services (CDS) option. Choosing the CDS option does not affect the applicability of other rules in this division. Rules governing the operation of CDS are in accordance with 40 TAC Chapter 41 (relating to Consumer Directed Services Option).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Jack Stick
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER M. MISCELLANEOUS PROGRAMS
DIVISION 7. COMMUNITY FIRST CHOICE

1 TAC §355.9090

The Texas Health and Human Services Commission (HHSC) proposes new §355.9090, concerning Reimbursement Methodology for Community First Choice.

Background and Justification

HHSC, under its authority and responsibility to administer and implement rates, proposes new §355.9090 to establish a reimbursement methodology for services provided under Community First Choice (CFC).

Texas Government Code §533.0025(i) requires HHSC to "implement the most cost-effective option for the delivery of basic attendant and habilitation services for individuals with disabilities under the STAR+PLUS Medicaid managed care program that maximizes federal funding for the delivery of services for that program and other similar programs." CFC is available under federal law and lets states provide home and community-based attendant and habilitation services to Medicaid enrollees with disabilities under their State Plan *(see 42 United States Code §1396n(k))*.

CFC services will be provided at an enhanced federal match rate to individuals with disabilities, who meet categorical coverage requirements for Medicaid or meet financial eligibility for home and community-based services, and who meet an institutional level of care. This option became available on October 1, 2011, and provides a six percent increase in the Federal Medical Assistance Percentage (FMAP) for expenditures related to this option. The Centers for Medicare & Medicaid Services (CMS) issued a Final Rule on May 7, 2012, and regulations are in effect as of July 6, 2012 (*see 42 Code of Federal Regulations part 441, subpart K*).

This proposed new rule describes the reimbursement methodology for CFC services. CFC rates are established using pre-existing attendant and habilitation, consumer directed services, support consultation, financial management services agency, and emergency response services rates.

Section-by-Section Summary

Proposed §355.9090(a) indicates that HHSC applies the general principles of cost determination as specified in §355.101, relating to Introduction, in its determination of CFC rates.

Proposed §355.9090(b) indicates that CFC rates are established using pre-existing rates.

Proposed §355.9090(b)(1) indicates that the CFC State Plan Rate - Habilitation will be equal to rates established for Community Living Assistance and Support Services (CLASS) Attendant and Habilitation.

Proposed §355.9090(b)(2) indicates that the CFC State Plan Rate - Attendant will be equal to rates established for Primary Home Care Priority Attendant.

Proposed §355.9090(b)(3) indicates that the CLASS - Attendant and Habilitation CFC rate will be equal to rates established for CLASS Attendant and Habilitation.

Proposed §355.9090(b)(4) indicates that the Deaf-Blind with Multiple Disabilities (DBMD) - Attendant and Habilitation CFC rate will be equal to rates established for DBMD Residential Habilitation.

Proposed §355.9090(b)(5) indicates that the Home and Community-based Services (HCS) - Supported Home Living (SHL) CFC rate will be equal to rates established for HCS SHL.

Proposed §355.9090(b)(6) indicates that the Texas Home Living (TxHmL) - Community Support Services (CSS) CFC rate will be equal to rates established for TxHmL CSS.

Proposed §355.9090(b)(7) indicates that the Personal Care Services (PCS) - Habilitation CFC rate will be equal to rates established for CLASS Attendant and Habilitation.

Proposed §355.9090(b)(8) indicates that the Personal Care Services (PCS) - Attendant CFC rate will be equal to the base rates established for PCS.

Proposed §355.9090(b)(9) indicates that the Consumer Directed Services (CDS) CFC rates will be equal to rates established for CDS for the equivalent non-CFC service.

Proposed §355.9090(b)(10) indicates that the Support Consultation Services CFC rate will be equal to the rates established for Support Consultation Services.

Proposed §355.9090(b)(11) indicates that the CFC State Plan rate for Financial Management Services Agencies (FMSA) will be equal to rates established for FMSAs. This paragraph also indicates that this service is only authorized for individuals receiving all of their CDS services under CFC.

Proposed §355.9090(b)(12) indicates that the CFC Emergency Response Services (ERS) CFC rate will be equal to rates established for ERS.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the proposed rule is in effect, there will be no fiscal impact to state government. The proposed rule will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering the section.

Ms. Rymal does not anticipate that there will be any economic cost to persons who are required to comply with the proposed new rule during the first five years the rule will be in effect. The rule will not affect local employment.

Small and Micro-business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the new rule. The implementation of the proposed rule does not require any change in practice or any additional cost to the contracted provider.

Public Benefit

Pam McDonald, Director of Rate Analysis for HHSC, has determined that for each year of the first five years the proposed rule is in effect, the anticipated public benefit is that the rule will describe the reimbursement methodology used to develop rates for this program.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "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

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

Public Comment

Questions about the content of this proposal may be directed to Pam McDonald in the HHSC Rate Analysis Department by telephone at (512) 707-6079. Written comments on the proposal may be submitted to Ms. McDonald by fax to (512) 730-7475; by e-mail to pam.mcdonald@hhsc.state.tx.us; or by mail to HHSC Rate Analysis, Mail Code H400, P.O. Box 149030, Austin, Texas, 78714-9030, within 30 days of publication of this proposal in the *Texas Register.*

Public Hearing

HHSC will conduct a public hearing on Monday, January 5, 2015 from 10:00 - 11:00 a.m., to receive comments on proposed new §355.9090. The public hearing will be held in the Health and Human Services Commission Public Hearing Room of the Brown-Heatly Building, located at 4900 North Lamar Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Lamar Boulevard. Persons requiring Americans with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact the External Relations Division by calling (512) 487-3300 at least 72 hours prior to the hearing so appropriate arrangements can be made.

Statutory Authority

The new rule is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas 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).

The proposed new rule affects Texas Human Resources Code Chapter 32, and Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.9090. Reimbursement Methodology for Community First Choice.

(a) General information. The Texas Health and Human Services Commission (HHSC) applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction).

(b) Reimbursement Methodology. Community First Choice (CFC) rates are established using pre-existing rates as follows.

(1) CFC State Plan Rate--Habilitation: Rates will be equal to rates established for Community Living Assistance and Support Services (CLASS) Attendant and Habilitation under §355.505 of this title (relating to Reimbursement Methodology for the Community Living Assistance and Support Services Waiver Program).

(2) CFC State Plan Rate--Attendant: Rates will be equal to rates established for Primary Home Care (PHC) Priority under §355.5902 of this title (relating to Reimbursement Methodology for Primary Home Care).

(3) CLASS--Attendant and Habilitation CFC: Rates will be equal to rates established for CLASS Attendant and Habilitation under §355.505 of this title.

(4) Deaf-Blind with Multiple Disabilities (DBMD)--Attendant and Habilitation CFC: Rates will be equal to rates established for DBMD Residential Habilitation under §355.513 of this title (relating to Reimbursement Methodology for the Deaf-Blind with Multiple Disabilities Waiver Program).

(5) Home and Community-Based Services (HCS)--Supported Home Living (SHL) CFC: Rates will be equal to rates established for HCS SHL under §355.723 of this title (relating to Reimbursement Methodology for Home and Community-Based Services and Texas Home Living Programs).

(6) Texas Home Living (TxHmL)--Community Support Services (CSS) CFC: Rates will be equal to rates established for TxHmL CSS under §355.723 of this title.

(7) Personal Care Services (PCS)--Habilitation CFC: Rates will be equal to rates established for CLASS Attendant and Habilitation under §355.505 of this title.

(8) Personal Care Services (PCS)--Attendant CFC: Rates will be equal to the base rates established for PCS under §355.8441 of this title (relating to Methodologies for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services).

(9) Consumer Directed Services (CDS)--CFC: Rates will be equal to rates established for CDS for the equivalent non-CFC service under §355.114 of this title (relating to Consumer Directed Services Payment Option).

(10) Support Consultation Services--CFC: Rates will be equal to rates established for Support Consultation Services under §355.114 of this title.

(11) CFC State Plan rate for Financial Management Services Agencies (FMSA) (only authorized for individuals receiving all of their CDS services under CFC): Rates will be equal to rates established for FMSAs under §355.114 of this title.

(12) Emergency Response Services (ERS)--CFC: Rates will be equal to rates established for ERS under §355.510 of this title (relating to Reimbursement Methodology for Emergency Response Services (ERS)).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 21, 2014.

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Jack Stick
Chief Counsel
Texas Health and Human Services Commission
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 101. ASSESSMENT

SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING IMPLEMENTATION OF THE ACADEMIC CONTENT AREAS TESTING PROGRAM

DIVISION 3. SECURITY OF ASSESSMENTS, REQUIRED TEST ADMINISTRATION PROCEDURES AND TRAINING ACTIVITIES

19 TAC §101.3031

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §101.3031(b)(2) is not included in the print version of the Texas Register. The figure is available in the on-line version of the December 5, 2014, issue of the Texas Register.)

The Texas Education Agency (TEA) proposes an amendment to §101.3031, concerning student assessment. The section addresses required test administration procedures and training activities to ensure validity, reliability, and security of assessments. The proposed amendment would adopt the *2015 Test Security Supplement* as part of the Texas Administrative Code. The earlier versions of the security supplement will remain in effect with respect to the year for which they were developed.

Through the adoption of 19 TAC §101.3031, effective March 26, 2012, the commissioner exercised rulemaking authority relating to the administration of assessment instruments adopted or developed under the Texas Education Code, §39.023, including procedures designed to ensure the security of the assessment instruments. The rule addresses purpose, administrative procedures, training activities, and records retention. As part of the administrative procedures, school districts and charter schools are required to comply with test security and confidentiality requirements delineated annually in test administration materials.

The proposed amendment to 19 TAC §101.3031, Required Test Administration Procedures and Training Activities to Ensure Validity, Reliability, and Security of Assessments, would update the rule by adopting the *2015 Test Security Supplement* as Figure: 19 TAC §101.3031(b)(2). The *2015 Test Security Supplement* describes the security procedures and guidelines that school districts and charter schools will be required to follow during the 2015 testing year.

The security supplements adopted prior to the 2015 year will remain in effect with respect to a given year.

The proposed amendment would establish in rule the test security procedures outlined in the *2015 Test Security Supplement.* Applicable procedures will be adopted each year as annual versions of the test security supplement are published.

The proposed amendment would have no additional effect on the paperwork required and maintained by school districts and charter schools.

Criss Cloudt, associate commissioner for assessment and accountability, 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.

Dr. Cloudt 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 inform the public of the security procedures for the 2015 test administrations. 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 December 5, 2014, and ends January 5, 2015. 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 December 5, 2014.

The amendment is proposed under Texas Education Code (TEC), §39.0301, which authorizes the commissioner to establish procedures for the administration of assessment instruments adopted or developed under TEC, §39.023, including procedures designed to ensure the security of the assessment instruments; and TEC, §39.0304, which authorizes the commissioner to adopt rules necessary to implement training in assessment instrument administration.

The amendment implements the TEC, §39.0301 and §39.0304.

§101.3031. Required Test Administration Procedures and Training Activities to Ensure Validity, Reliability, and Security of Assessments.

(a) Purpose. To ensure that each assessment instrument is reliable and valid and meets applicable federal requirements for measurement of student progress, the commissioner of education shall establish test administration procedures and required training activities that support the standardization and security of the test administration process.

(b) Test administration procedures. These test administration procedures shall be delineated in the test administration materials provided to school districts and charter schools annually. Districts and charter schools must comply with all of the applicable requirements specified in the test administration materials. Test administration materials shall include, but are not limited to, the following:

(1) general testing program information;

(2) requirements for ensuring test security and confidentiality described in the *2015* [~~*2014*~~] *Test Security Supplement* provided in this subsection;
Figure: 19 TAC §101.3031(b)(2)
[~~Figure: 19 TAC §101.3031(b)(2)~~]

(3) procedures for test administration;

(4) responsibilities of personnel involved in test administration; and

(5) procedures for materials control.

(c) Training activities. As part of the test administration procedures, the commissioner shall require training activities to ensure that testing personnel have the necessary skills and knowledge required to administer assessment instruments in a valid, standardized, and secure manner. The commissioner may require evidence of successful completion of training activities. Test coordinators and administrators must receive all applicable training as required in the test administration materials.

(d) Records retention. As part of test administration procedures, the commissioner shall require school districts and charter schools to maintain records related to the security of assessment instruments for a minimum of five years.

(e) Applicability. The test administration procedures and required training activities established in the annual test security supplements for prior years remain in effect for all purposes with respect to the prior year to which it applies.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 224. DELEGATION OF NURSING TASKS BY REGISTERED PROFESSIONAL NURSES TO UNLICENSED PERSONNEL FOR CLIENTS WITH ACUTE CONDITIONS OR IN ACUTE CARE ENVIRONMENTS

22 TAC §§224.1 - 224.3, 224.5 - 224.11

Introduction. The Texas Board of Nursing (Board) proposes amendments to Chapter 224, §§224.1 - 224.3 and §§224.5 - 224.11, concerning Application of Chapter; Exclusion from Chapter; Purpose; RN Accountability for Delegated Tasks; General Criteria for Delegation and Supervision of Delegation of Tasks; nurse delegation relative to the Medication Aide Permit Holder; Supervising Unlicensed Personnel Performing Tasks Delegated by Non RN Practitioners; and delegation in relation to Application of Other Laws and Regulations. The amendments include correction of outdated references to the "Board of Nurse Examiners" and legal citations; clarification of the phrase "continuously provided" in order to include correctional health settings; guidance to APRNs so they know they too can use delegation rules; clarification of responsibilities of Chief Nursing Officer (CNO) and other RN responsibilities when supervising tasks delegated to unlicensed personnel or when delegated by another practitioner; and a revision to allow the RN to delegate the collection of capillary blood and urine tests to unlicensed personnel for more than just "sugar and hematests." The amendments are proposed under the authority of the Occupations Code §301.151 and §301.152.

Background. In September 2014, the Texas Board of Nursing (BON) Task Force on Delegation recommended approval of amendments to Chapter 224 reflected in these proposed rule changes. The Task Force consists of the following members: Texas School Nurses Association; AARP Consumer; Hospice Austin; Department of Aging and Disability Services; Developmental Disabilities Nurses Association; Texas Association for Home Care & Hospice; Texas Council for Developmental Disabilities; ADAPT of Texas; and Disability Texas (formerly Advocacy, Inc.). During the October 2014 Board Meeting, the Board approved publication of this amendment.

Section by Section Overview.

Proposed amended §224.1(2) clarifies the phrase "continuously provided" by adding additional settings considered to be in an acute care environment where nursing services are continuously provided.

Proposed amended §224.2(1) reflects the new Government Code reference.

Proposed amended §224.3 designates the existing paragraph as subsections (a) and (b). Proposed amended §224.3(a) correctly references the "Texas Board of Nursing". Proposed amended §224.3(b) provides guidance to Advance Practice Registered Nurses (APRN) regarding the rules APRNs are required to use when delegating nursing tasks to unlicensed personnel.

Proposed amended §224.5(a) correctly references the "Texas Board of Nursing". Proposed §224.5(c) is added to reflect recent amendments to §225.3(e) and existing requirements in §217.19(l)(2) and §217.20(j)(1) regarding a CNO's responsibility related to RN delegation.

Proposed amended §224.6(8) adds new language to clarify an RN's responsibility to reassess and reevaluate periodically and when changes in condition occur.

Proposed amended §224.7 further clarifies an RN's responsibilities when supervising tasks delegated to unlicensed personnel or when delegated by another practitioner. Proposed amended §224.7(1) and (2) add clarifying language regarding the supervising RN. Proposed §224.7(2)(C) is added to provide guidance consistent with §211.11(1)(M) concerning the supervising RN's responsibility to intervene and §211.11(1)(P) regarding the RN's responsibility to promote the patient's safety and collaborate with the delegating RN to foster communication.

Proposed amended §224.8(a)(2)(A) provides for the RN to delegate the collection of capillary blood and urine tests to unlicensed personnel for more than just "sugar and hematests," which is consistent with changes in nursing practice since this rule was adopted in 2003. Proposed amended §224.8(b)(1)(B) provides further clarification regarding the employer's use of unlicensed personnel. Proposed §224.8(b)(1)(B)(v) is added to address communication requirements between unlicensed personnel and the delegating RN. Proposed §224.8(b)(1)(B)(vi) is added to address the need for periodic competency verification of unlicensed personnel.

Proposed amended §224.9(a) reflects recent changes to Human Resource Code Chapter 161 and 40 Texas Administrative Code Chapter 95 that allow correctional health settings to utilize certified medication aides and will allow in the future for other areas that may adopt similar rules. Proposed amended §224.9(b)(3) reflects amendments to §225.12 adopted in February 2014. Proposed amended §224.9(b)(4) reflects amendments to §225.10(10)(F) adopted in February 2014. Proposed amended §224.9(b)(5) reflects amendments to §225.10(10)(A) adopted in February 2014.

Proposed amended §224.10(a) correctly references the "Texas Board of Nursing". Proposed §224.10(c) is added to provide guidance consistent with §211.11(1)(M) concerning the supervising RN's responsibility to intervene and §211.11(1)(P) regarding the RN's responsibility to promote the patient's safety and collaborate with the delegating RN to foster communication.

Proposed amended §224.11(a) correctly references the "Texas Board of Nursing". Proposed amended §224.11(b) adds the language "facility licensing" to explain that these laws and regula-

tions may apply and therefore the RN must take these into account.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments are effect, there will be no additional fiscal implications for state or local government as a result of implementing the proposal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be the adoption of updated requirements that are consistent with the provisions of the NPA.

Potential Costs of Compliance. The Board does not anticipate any associated costs of compliance with the proposed amendments, as the proposal does not include any substantive changes that would impose new costs of compliance on any person subject to the proposal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code §2006.002(c) and (f), the Board has determined that the proposal will not have an adverse economic effect on any small or micro business because there are no anticipated economic costs to any person who is required to comply with the proposal.

Takings Impact Assessment. The Board 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.

Request for Public Comment. To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on January 5, 2015, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing may be simultaneously submitted to Bonnie Cone, Nursing Practice Consultant, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to bonnie.cone@bon.texas.gov or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the Occupations Code §301.151 and §301.152.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (1) perform its duties and conduct proceedings before the Board; (2) regulate the practice of professional nursing and vocational nursing; (3) establish standards of professional conduct for license holders under Chapter 301; and (4) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Section 301.152 defines "advanced practice registered nurse" as a registered nurse licensed by the board to practice as an advanced practice registered nurse on the basis of completion of an advanced educational program. The term includes a nurse practitioner, nurse midwife, nurse anesthetist, and clinical nurse specialist. The term is synonymous with "advanced nurse practitioner" and "advanced practice nurse."

Cross Reference to Statute. The following statutes are affected by this proposal: the Occupations Code §301.151 and §301.152.

§224.1. Application of Chapter.

This chapter applies to situations where:

(1) (No change.)

(2) the client is in an acute care environment where nursing services are continuously provided. Settings include [~~including~~], but are not limited to, hospitals, rehabilitation centers, skilled nursing facilities, clinics, correctional health, [~~and~~] private practice physician offices and settings that do not otherwise meet the definition of independent living environment {§225.4(9)}.

§224.2. Exclusions from Chapter.

This chapter does not apply to:

(1) tasks provided in compliance with Government Code §531.051(e) relating to Consumer Direction of Certain Services for Persons With Disability and Elderly Persons; [~~§531.051(f) (relating to Voucher Program for Payment of Certain Services for Persons With Disabilities);~~] or

(2) (No change.)

§224.3. Purpose.

(a) The Texas Board of Nursing [~~Nurse Examiners~~] (BON [~~BNE~~] or Board) recognizes that changes in health care delivery have and will continue to influence the way nursing care is delivered. The Board believes that the registered nurse (RN) is in a unique position to develop and implement a nursing plan of care that incorporates a professional relationship between the RN and the client. The Board recognizes that the RN's responsibility may vary from that of the nurse providing care at the bedside of an acutely ill client to that of the nurse managing health care delivery in institutional and community settings. Assessment of the nursing needs of the client, the plan of nursing actions, implementation of the plan, and evaluation are essential components of professional nursing practice and are the responsibilities of the RN.

(b) The full utilization of the services of a RN, to include advanced practice registered nurses (APRN), may require delegation of selected nursing tasks to unlicensed personnel. The scope of delegation and the level of supervision by the RN may vary depending on the setting, the complexity of the task, the skills and experience of the unlicensed person, and the client's physical and mental status. The following sections govern the RN in delegating nursing tasks to unlicensed personnel across a variety of settings where nursing care services are delivered.

§224.5. RN Accountability for Delegated Tasks.

(a) The RN's accountability to the BON [~~BNE~~] with respect to its taking disciplinary action against the RN's license is met when the delegating RN has complied with and can verify compliance with this chapter and specifically with §224.6 and §224.8(b)(1) of this title (relating to General Criteria for Delegation and Discretionary Delegation Tasks) as appropriate.

(b) (No change.)

(c) The RN nurse administrator or the RN who is responsible for nursing services in settings that utilize RN delegation in clients with acute care conditions or acute care environments shall be responsible for knowing the requirements of this rule and for taking reasonable steps to assure that registered nurse delegation is implemented and conducted in compliance with the Texas Nursing Practice Act and this chapter.

§224.6. General Criteria for Delegation.

The following standards must be met before the RN delegates nursing tasks to unlicensed persons. These criteria apply to all instances of RN delegation. Additional criteria, if appropriate to the particular task being delegated, may also be found in §224.8(b)(1) of this title (relating to Discretionary Delegation Tasks).

(1) - (7) (No change.)

(8) If the delegation continues over time, the RN shall periodically evaluate, review, and when a change in condition occurs reevaluate the delegation of tasks. For example, the evaluation would be appropriate when the client's Nursing Care Plan is reviewed and revised. The RN's evaluation of a delegated task(s) will be incorporated into the client's Nursing Care Plan.

§224.7. Supervision.

The registered professional nurse shall provide supervision of all nursing tasks delegated to unlicensed persons in accordance with the following conditions. These [~~supervision~~] criteria apply to all instances of RN delegation and supervision of delegation for clients with acute conditions or in acute care environments.

(1) The degree of supervision required shall be determined by the delegating RN or the RN who assumes supervisory responsibilities after an evaluation of appropriate factors involved including, but not limited to, the following:

(A) - (D) (No change.)

(2) The RN or an RN who assumes supervisory responsibilities under this section [~~another equally qualified RN~~] shall be available in person or by telecommunications, and shall make decisions about appropriate levels of supervision using the following examples as guidelines:

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

(C) In situations where the RN assumes supervision of UAPs performing tasks that have been delegated by another RN, if performance of the tasks by the UAP poses a risk of patient harm, the supervising RN must intervene as required to stabilize a patient's condition and prevent complications and then communicate with the delegating RN.

§224.8. Delegation of Tasks.

(a) Tasks Which are Most Commonly Delegated. By way of example, and not in limitation, the following nursing tasks are ones that are most commonly the type of tasks within the scope of sound professional nursing practice to be considered for delegation, regardless of the setting, provided the delegation is in compliance with §224.6 of this title (relating to General Criteria for Delegation) and the level of supervision required is determined by the RN in accordance with §224.7 of this title (relating to Supervision):

(1) (No change.)

(2) the collecting, reporting, and documentation of data including, but not limited to:

(A) vital signs, height, weight, intake and output, capillary blood and urine test; [~~for sugar and hematest results,~~]

(B) - (D) (No change.)

(3) - (9) (No change.)

(b) Discretionary Delegation Tasks.

(1) In addition to General Criteria for Delegation outlined in §224.6 of this title, the nursing tasks which follow in paragraph (2) of this subsection may be delegated to an unlicensed person only:

(A) (No change.)

(B) if the agency, facility, or institution employing or utilizing unlicensed personnel follows a current protocol for the delegation of the task and for the instruction and training of unlicensed personnel performing nursing tasks under this subsection and that the protocol is developed with input by registered nurses currently employed in the facility and includes:

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

(iv) an established mechanism for identifying those individuals to whom nursing tasks under this subsection may be delegated; [~~and~~]

(v) how the unlicensed person will report back to the delegating RN or supervising RN; and

(vi) periodic re-demonstration of competency.

(C) (No change.)

(2) (No change.)

(c) (No change.)

§224.9. The Medication Aide Permit Holder.

(a) An RN may delegate to medication aides the administration of medication to clients in correctional health, long term care facilities, [~~and~~] home health agencies, and other facilities as authorized by law if:

(1) (No change.)

(2) the RN assures that the medication aide functions in compliance with the laws and [~~an~~] regulations of the agency issuing the permit; and

(3) (No change.)

(b) The following tasks may not be delegated to the Medication Aide Permit Holder unless allowed and in compliance with Chapter 225 of this title (relating to RN Delegation to Unlicensed Personnel and Tasks not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions):

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

(3) administration of medications by an injectable route except as permitted in independent living environments for administration of insulin as outlined in §225.12 (relating to Delegation of Insulin or Other Injectable Medications Prescribed in the Treatment of Diabetes Mellitus); [~~under §225.11 of this title (relating to Delegation of Administration of Medications From Pill Reminder Container and Administration of Insulin);~~]

(4) administration of medications used for intermittent positive pressure breathing or other methods involving medication inhalation treatments in independent living environments except as permitted in §225.10(10)(F) [~~§225.10(10)(E) of this title~~] (relating to Tasks That May Be Delegated);[~~.~~]

(5) administration of medications by way of a tube inserted in a cavity of the body in independent living environments except as permitted [~~stated~~] in §225.10(10)(A) (relating to Tasks That May be Delegated); [~~§225.11 of this title.~~]

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

§224.10. Supervising Unlicensed Personnel Performing Tasks Delegated by Non RN [~~Other~~] Practitioners.

(a) The following applies to the registered professional nurse who practices in a collegial relationship with another licensed practitioner, who has delegated tasks to an unlicensed person over whom the

RN has supervisory responsibilities. The RN's accountability to the BON [~~BNE~~], with respect to its taking disciplinary action against the RN's license, is met if the RN:

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

(b) (No change.)

(c) If performance of the task(s) by UAP poses risk of harm to the patient, the RN must intervene as required to stabilize a patient's condition and prevent complications; and then communicate with the delegating practitioner.

§224.11. Application of Other Laws and Regulations.

(a) BON [~~BNE~~] §217.11(1)(A) of this title (relating to Standards of [~~Professional~~] Nursing Practice) requires RNs to know and conform to all laws and regulations affecting their area of practice.

(b) The RN delegating tasks to an unlicensed person should be aware that, in addition to this chapter, various laws and regulations may apply to, including but not limited to, laws and regulations governing facility licensing, home and community support services agencies, Medicare and Medicaid regulations, and Medication Aide regulations.

(c) In situations where an RN's practice is governed by multiple laws and regulations that impose different requirements, the RN must comply with them all and if inconsistent, the most restrictive requirement(s) governs. For example, if one regulation requires an RN to make a supervisory visit every 14 days and another leaves it to the RN's professional judgment, the RN would have to visit at least every 14 days or more frequently, if that is what the RN's professional judgment indicated.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 21, 2014.

TRD-201405617
James W. Johnston
General Counsel
Texas Board of Nursing
Earliest possible date of adoption: January 4, 2015
For further information, please call: (512) 305-6821

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PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 322. PRACTICE

22 TAC §322.1

The Texas Board of Physical Therapy Examiners proposes amendments to §322.1, regarding Provision of Services. The amendment changes the timeframe for re-evaluation of a patient before provision of physical therapy treatment by a physical therapist assistant or a physical therapy aide can continue.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public will not be adversely affected as the physical therapist will continue to hold the primary responsibility for the care rendered under his supervision. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Karen Gordon, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: karen@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§322.1. Provision of Services.

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

(d) Reevaluation.

(1) Provision of physical therapy treatment by a PTA or an aide may not continue if the PT has not performed a reevaluation: [~~A patient receiving treatment must be reevaluated by a PT:~~]

(A) at a minimum of once every 60 [~~30~~] days after treatment is initiated, or at a higher frequency as established by the PT; and

(B) In response to a change in the patient's medical status that affects physical therapy treatment, when a change in the physical therapy plan of care is needed, or prior to any planned discharge.

(2) A reevaluation must include:

(A) An onsite reexamination of the patient; and

(B) A review of the plan of care with appropriate continuation, revision, or termination of treatment.

[~~(3) Provision of physical therapy treatment by a PTA or an aide may not continue if the PT has not performed the required reevaluation.~~]

(e) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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TRD-201405559
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: January 4, 2015
For further information, please call: (512) 305-6900

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CHAPTER 329. LICENSING PROCEDURE

22 TAC §329.3

The Texas Board of Physical Therapy Examiners proposes amendments to §329.3, regarding Temporary Licensure for Examination Candidates. The amendment establishes a new category for issuing a temporary license to restoration applicants completing supervised clinical practice and allows a temporary licensee to begin work on the basis of website verification of licensure.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public benefit will be to assure the Texas consumers of physical therapy services that physical therapists and physical therapist assistants who restore their licenses through supervised clinical practice are accountable to the Texas Board of Physical Therapy Examiners. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There is the cost of the temporary licensure fee for individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Karen Gordon, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: karen@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§329.3. Temporary Licensure [for ~~Examination Candidates~~].

(a) For examination candidates. [~~Requirements. To be eligible for a temporary license, the applicant must:~~]

(1) Requirements.

(A) [~~(1)~~] meet all requirements as stated in §329.1 of this title (relating to General Licensure Requirements and Procedures);

(B) [~~(2)~~] register for the national physical therapy examination;

(C) [~~(3)~~] submit temporary licensee and supervisor [~~supervision~~] affidavits as provided by the board; and

(D) [~~(4)~~] submit fees for temporary licensure as set by the executive council.

(2) [~~(b)~~] Eligibility.

(A) The board will issue a temporary license to work in Texas to an applicant who is taking the exam for the first time.

(B) An applicant who has received a license from another state is not eligible for temporary licensure.

(C) A candidate who has taken and failed the physical therapist examination is not eligible for temporary licensure as a physical therapist assistant.

(3) [~~(c)~~] Duration.

(A) The [~~A~~] temporary license is valid until the applicant receives the score report from the board, or until the last day of the third month after the month the license is issued, whichever occurs first.

(B) The coordinator may extend the temporary license for no more than 30 days to offset an unreasonable delay in reporting the examination results to the applicant.

(4) [~~(d)~~] Failure of examination. If the applicant fails the exam, the temporary license is void and must be returned to the board when the notification of the failure is received.

(b) For restoration of license by means of Supervised Clinical Practice (SCP).

(1) Requirements.

(A) meet all requirements as stated in §341.6(d)(1)(A) - (D) (relating to License Restoration);

(B) submit temporary license and supervisor affidavits as provided by the board; and

(C) submit fees for temporary licensure as set by the executive council.

(2) Duration.

(A) The temporary license is valid for the duration of the SCP as designated by the board;

(B) If the applicant fails to complete the SCP in the designated timeframe, the temporary license is void and must be returned to the board.

(c) [~~(c)~~] Supervision requirements. An applicant with a temporary PT license must have on-site supervision by a physical therapist with a permanent license to practice in Texas when providing physical therapy services. An applicant with a temporary PTA license must have on-site supervision by [~~either~~] a physical therapist [~~or a physical therapist assistant~~] with a permanent license to practice in Texas when providing physical therapy services.

(d) A new temporary licensee may provide physical therapy services upon online verification of licensure. The Board will maintain a secure resource for verification of license status and expiration date on its website.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2014.

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John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
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For further information, please call: (512) 305-6900

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22 TAC §329.6

The Texas Board of Physical Therapy Examiners proposes amendments to §329.6, regarding Licensure Endorsement. The amendment eliminates reference to a two-year work history for provisional licensure in order to comply with legislative changes during the 83rd Legislature.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public will not be adversely affected by the change. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Karen Gordon, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: karen@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§329.6. Licensure by Endorsement.

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

(d) Provisional licensure. The board may grant a provisional license to an applicant who is applying for licensure by endorsement if there is a delay in the submission of required documents outside the applicant's control [~~under the conditions listed in paragraphs (1) and (2) of this subsection~~]. The applicant must submit the provisional license fee as set by the executive council[~~, and meet all other requirements of licensure by examination or endorsement as set by the board~~]. The board may not grant a provisional license to an applicant with disciplinary action in their licensure history. The provisional license is valid for 180 days, or until a permanent license is issued or denied, whichever is first. [~~The conditions under which the board may grant a provisional license are:~~]

[~~(1) The applicant is applying for licensure by endorsement, and there is a delay in the submission of required documents outside the applicant's control; or~~]

[~~(2) The applicant has previously held a Texas license and is currently licensed in another state that has licensing requirements substantially equivalent to those of Texas, but has not worked as a PT or PTA for the two years prior to application for a license in Texas, and must submit to reexamination to restore the Texas license as stated in §341.1 of this title (relating to Requirements for Renewal).~~]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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John P. Maline
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Texas Board of Physical Therapy Examiners
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CHAPTER 341. LICENSE RENEWAL

22 TAC §341.1

The Texas Board of Physical Therapy Examiners proposes amendments to §341.1, regarding Requirements for Renewal. The amendment establishes a conversion of license renewal dates from the current method to birth month renewal.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public will not be adversely affected by the conversion of renewal month. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Karen Gordon, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: karen@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§341.1. Requirements for Renewal.

(a) Biennial renewal. Licensees are required to renew their licenses every two years by the end of their birth month. [~~the month in which they were originally licensed.~~] The Board will maintain a secure resource for verification of license status and expiration date on its website.

(b) - (f) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
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22 TAC §341.3

The Texas Board of Physical Therapy Examiners proposes amendments to §341.3, regarding Qualifying Continuing Competence Activities. The amendment aligns the criteria for claiming continuing competence credit for mentoring a fellow or resident with the criteria set by the accrediting entity, the American Board of Physical Therapy Residency and Fellowship Education.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public benefit will be to assure the Texas consumers of physical therapy services that physical therapists who serve as a mentor of a fellow or resident meet the requirements of the accrediting body. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Karen Gordon, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: karen@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§341.3. Qualifying Continuing Competence Activities.

Licensees may select from a variety of activities to fulfill the requirements for continuing competence. These activities include the following:

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

(5) Advanced Training, Certification, and Recognition.

(A) - (C) (No change.)

(D) Supervision or mentorship of a resident or fellow in an American Board of Physical Therapy Residency and Fellowship Education (ABPTRFE) [~~APTA~~] credentialed residency or fellowship program. This activity type is automatically approved and is assigned a standard approval number by the board-approved organization.

(i) Clinical supervision of a resident for a minimum of 1500 hours [~~residents~~] or a fellow [~~fellows~~] for a minimum of 1000 hours [~~1 year~~] is valued at 10 CCUs.

(ii) - (iii) (No change.)

(E) (No change.)

(6) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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TRD-201405568
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
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22 TAC §341.6

The Texas Board of Physical Therapy Examiners proposes amendments to §341.6, regarding License Restoration. The amendments establish a timeframe for completion of supervised clinical practice for restoring a Texas license that has been expired for one to five years, and clarifies the application requirements for a new license if an applicant is not eligible for restoration.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public benefit will be to assure the Texas consumers of physical therapy services that physical therapists and physical therapist assistants who restore their licenses are competent to return to the workforce. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Karen Gordon, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: karen@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§341.6. License Restoration.

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

(d) Persons who are not currently licensed in another state or territory of the U.S.

(1) A licensee whose Texas license is expired for one to five years. The requirements for restoration are:

(A) a completed restoration application form;

(B) a passing score on the jurisprudence examination;

(C) the restoration fee;

(D) verification of Licensure from all states in which the applicant has held a license; and

(E) demonstration of competency. Competency may be demonstrated in one of the following ways:

(i) reexamination with a passing score on the national physical therapy exam;

(ii) completion of an advanced degree in physical therapy within the last five years;

(iii) For PTs only: successful completion of a board-approved practice review tool and 30 CCUs of board-approved continuing competence activities within the previous 24 months;

(iv) For PTs only: 480 hours on-site supervised clinical practice completed over a continuous 12 month period and 30 CCUs of board-approved continuing competence activities within the previous 24 months;

(v) For PTAs only: 320 hours on-site supervised clinical practice completed over a continuous 12 month period and 20 CCUs of board-approved continuing competence activities within the previous 24 months.

(2) A licensee whose Texas license is expired for five years or more may not restore the license but may obtain a new license by taking the national examination again and getting a new license by relicensure. The requirements for relicensure are:

(A) a completed [~~restoration~~] application form;

(B) a passing score on the jurisprudence examination;

(C) the application [~~restoration~~] fee; and

(D) a passing score on the national exam, reported directly to the board by the Federation of State Boards of Physical Therapy.

(e) - (f) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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TRD-201405569
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
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For further information, please call: (512) 305-6900

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PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES
SUBCHAPTER D. APPLICATIONS, EXAMINATIONS, AND LICENSING

22 TAC §661.41

The Texas Board of Professional Land Surveying (Board) proposes an amendment to §661.41, concerning Applications.

The amended section is proposed to have survey reports submitted with exam applications be of a more manageable size for the Board office staff.

Marcelino Estrada, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no additional cost to state or local governments as a result of enforcing or administering the amended sections.

Mr. Estrada also has determined that for each year of the first five year-period the rules are in effect there will be no local employment impact as a result of adoption of the proposed rule.

Mr. Estrada has also determined that for each of the first five years the rule is in effect, the anticipated public benefit will be that the Board's Rules will be more consistent and precise. Mr. Estrada has determined that there will be no economic cost to individuals required to be subject to this rule. Mr. Estrada has determined that there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in cost of compliance between small and large businesses.

Mr. Estrada has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas Board of Professional Land Surveying invites comments on the proposed amendment to the rules from any member of the public. A written statement should be mailed or delivered to Natalie Jackson, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite156, MC 230, Austin, Texas 78753, by facsimile (FAX) to (512) 239-5253, or by email Natalie.jackson@txls.texas.gov. Comments will be accepted for 30 days following publication in the *Texas Register.*

The rule amendments are proposed under Texas Occupations Code §1071.151, §1071.252, and Government Code §2001.004.

§661.41. Applications.

(a) An applicant qualified by law who wishes to take an examination for certification or for registration to practice professional land surveying and/or state land surveying in Texas shall be furnished duplicate application forms, one to be returned to the office of the Board, the other to be retained by the applicant. Applications received by the Board shall be examined by the Executive Director for conformity with the rules and regulations governing applications as established by the Board. Applications accompanied by proper fees and in the form prescribed by the Board shall be entered in the records of the Board. Applications not accompanied by proper fees or not conforming to the rules and regulations shall be returned to the applicant. Each applicant shall be required to furnish all information requested on the application

form. The application form shall contain general information regarding the applicant, a recent passport type photograph, other registration and memberships, references and qualifications, formal education information with certified transcripts of college work, personal surveying experience, and instructions for filing the form.

(b) The application shall be neatly typed or lettered and all questions must be answered. If the answer is negative, the applicant shall use the word "no" or "none." It is the applicant's responsibility to see that certified transcripts of college work and any other information required or requested by the Board are received in the office of the Board on or before July 15 or January 15 in order for the applicant's file to be considered for the ensuing examination. Experience time will be counted only up to the date of the filing of the application with fee. Applications will not be considered if essential information is lacking.

(1) It is important that the experience record of the applicant be completed in detail giving character of work performed, particularly with respect to percentage of time engaged in boundary land surveying as opposed to engineering surveying, title of position, employer, amount of time, and responsibility in each engagement listed. Experience in responsible charge will be counted only if under the direct supervision of a registered professional land surveyor. Give total time in actual land boundary surveying in each engagement. If the space provided in the forms is not sufficient, the applicant may attach as many sheets as necessary. If the experience is of the character that it cannot be described properly in the tabulated form, the applicant may submit a complete narrative account of his/her education, professional, or business career. All documents filed with the application shall be maintained by the Board pursuant to the state's record retention schedule.

(2) Accompanying this application shall be two sample survey reports (sketch, map or plat) completed under the direction of a Registered Professional Land Surveyor. Submissions should be paper copies and also digital copies on a CD, DVD, or USB accessible medium. Each survey report should be on a single piece of paper not to exceed 11" x 17" [~~24" x 36"~~]. The digital copy should be in pdf or similar format. Each survey report should include a certification and a list of all documents reviewed in preparation of the survey. However, a signature and seal are not necessary. One survey should be an urban type survey (residential or commercial platted property) with the other being a rural type survey (metes and bounds). Each report will be evaluated for compliance with the existing Act and Rules. All documents filed with the application shall remain in the permanent files of the Board.

(c) Application files are considered initiated the date the application is received with fee. If an application is not received within 90 days after date of receipt of reference forms and required information, that file will be closed and the applicant so notified at his/her last known address. If the applicant does not take the examination within one year from the date the application is approved, the file will be closed, and for further consideration by the Board, the applicant will be required to file a complete new application with fee and references.

(d) No credit will be considered for experience obtained in violation of the Professional Land Surveying Practices Act or any applicable prior Act governing the surveying profession. Only that experience obtained in regular full-time employment, or as otherwise specifically allowed in the act and rules, will be considered in evaluating an applicant's record.

(e) Certificate Requirements for Surveyors-In-Training in Other States, Territories or Possessions of the United States. An individual is eligible to be certified as a surveyor-in-training in Texas upon:

(1) Successfully passing the National Council of Examiners for Engineering and Surveying (NCEES) fundamentals of land surveying exam; and

(2) Obtaining certification as a surveyor-in-training by a state, territory or possession of the United States other than Texas.

(f) The Texas certification as a surveyor-in-training is valid for eight years from the date the surveyor-in-training certificate was issued by the original issuing state, territory or possession of the United States.

(g) The Board will recognize degrees conferred by the Accreditation Board for Engineering and Technology (ABET), the Southern Association of Colleges (SAC) and the Applied Science Accreditation Commission (ASAC) or their equivalent.

(h) Degrees not accredited by ABET/SAC/ASAC must be evaluated by an organization approved by the Board and shall be done at the expense of the applicant. The Board will consider recognizing degrees on a case-by-case basis upon submission of the evaluation.

(i) All foreign language documentation submitted must be accompanied by certified translations.

(j) Applicants must speak and write the English language. Proficiency in English may be evidenced by possession of an accredited bachelor degree taught exclusively in English, or passage of the Test of English as a Foreign Language (TOEFL) with a score of at least 550 and passage of the Test of Spoken English (TSE) with a score of at least 45, or other evidence such as significant academic or work experience in English acceptable to the Board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Tony Estrada
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22 TAC §661.46

The Texas Board of Professional Land Surveying (Board) proposes an amendment to §661.46, concerning the Seal and Oath.

The amended section is proposed to insert language that was omitted from the August 2013 rule revision at the end of section (b), making it clear that the Board office is to receive a copy of a new licensee's seal and signature.

Marcelino Estrada, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no additional cost to state or local governments as a result of enforcing or administering the amended sections.

Mr. Estrada also has determined that for each year of the first five year-period the rules are in effect there will be no local employment impact as a result of adoption of the proposed rule.

Mr. Estrada has also determined that for each of the first five years the rule is in effect, the anticipated public benefit will be that the Board's Rules will be more consistent and precise. Mr. Estrada has determined that there will be no economic cost to

individuals required to be subject to this rule. Mr. Estrada has determined that there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in cost of compliance between small and large businesses.

Mr. Estrada has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas Board of Professional Land Surveying invites comments on the proposed amendment to the rules from any member of the public. A written statement should be mailed or delivered to Natalie Jackson, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite156, MC 230, Austin, Texas 78753, by facsimile (FAX) to (512) 239-5253, or by email Natalie.jackson@txls.texas.gov. Comments will be accepted for 30 days following publication in the *Texas Register.*

The rule amendments are proposed under Texas Occupations Code §§1071.151, 1071.351, 1071.255 and Government Code §2001.004.

§661.46. Seal and Oath.

(a) At the time the applicant receives a certificate of registration/licensure, the applicant will secure a seal of the type specified by the Board.

(b) At the time an applicant receives a certificate of registration/licensure, before he/she can offer land surveying services, they shall sign and affix their seal to the following oath and forward same to the Board office: I, _____, Registered Professional Land Surveyor, Certificate Number_____, hereby affirm that I will place the interest of the public above all others in my practice of Professional Land Surveying and I will adhere to the Texas Professional Land Surveying Practices Act and General Rules of Procedures and Practices adopted by the Board.

(c) At the time a registrant renews their certificate of registration/licensure, he/she shall affirm the oath in subsection (b) of this section.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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22 TAC §661.53

The Texas Board of Professional Land Surveying (Board) proposes an amendment to §661.53, concerning active duty military.

The amended section is proposed to comply with SB 162 (83rd Legislature, Regular Session) requiring regulatory agencies to accommodate military personnel seeking licensing by expediting their application for licensure. The amendment to Rule 661.53 allows military personnel seeking licensure with the Board to receive credit for relevant service, training or education.

Marcelino Estrada, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no additional cost to state or local governments as a result of enforcing or administering the amended sections.

Mr. Estrada also has determined that for each year of the first five year-period the rules are in effect there will be no local employment impact as a result of adoption of the proposed rule.

Mr. Estrada has also determined that for each of the first five years the rule is in effect, the anticipated public benefit will be that the Board's Rules will be more consistent and precise. Mr. Estrada has determined that there will be no economic cost to individuals required to be subject to this rule. Mr. Estrada has determined that there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in cost of compliance between small and large businesses.

Mr. Estrada has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas Board of Professional Land Surveying invites comments on the proposed amendment to the rules from any member of the public. A written statement should be mailed or delivered to Natalie Jackson, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, MC 230, Austin, Texas 78753, by facsimile (FAX) to (512) 239-5253, or by email Natalie.jackson@txls.texas.gov. Comments will be accepted for 30 days following publication in the *Texas Register.*

The rule amendments are proposed under Texas Occupations Code §§1071.151, 1071.253, 1071.254, 1071.259 and Government Code §2001.004.

§661.53. Active Duty Military.

Registrants are exempt from any increased fee or other penalty for failing to renew the license in a timely manner if the individual establishes to the satisfaction of the Board (copies of orders) that the individual failed to renew the license in a timely manner because the individual was on active duty in the United States armed forces serving outside Texas. An applicant who is a military service member or military veteran with relevant military service, training or education in land surveying or a land surveying career field, may receive credit for service, training or education upon Board verification and evaluation.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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22 TAC §661.57

The Texas Board of Professional Land Surveying (Board) proposes an amendment to §661.57, concerning land surveying firms compliance.

The amended section is proposed to address the requirement that a firm have full-time registered professional land surveyor supervising contract crews.

Marcelino Estrada, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no additional cost to state or local governments as a result of enforcing or administering the amended sections.

Mr. Estrada also has determined that for each year of the first five year-period the rules are in effect there will be no local employment impact as a result of adoption of the proposed rule.

Mr. Estrada has also determined that for each of the first five years the rule is in effect, the anticipated public benefit will be that the Board's Rules will be more consistent and precise. Mr. Estrada has determined that there will be no economic cost to individuals required to be subject to this rule. Mr. Estrada has determined that there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in cost of compliance between small and large businesses.

Mr. Estrada has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas Board of Professional Land Surveying invites comments on the proposed amendment to the rules from any member of the public. A written statement should be mailed or delivered to Natalie Jackson, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite156, MC 230, Austin, Texas 78753, by facsimile (FAX) to (512) 239-5253, or by email Natalie.jackson@txls.texas.gov. Comments will be accepted for 30 days following publication in the *Texas Register.*

The rule amendments are proposed under Texas Occupations Code §1071.151, §1071.352 and Government Code §2001.004.

§661.57. Land Surveying Firms Compliance.

A Firm shall not offer to perform or perform land surveying services for the public unless registered with the Board pursuant to the requirements of §661.55 of this title (relating to Registration of Land Surveying Firms).

(1) A Firm shall not offer land surveying services to the public unless the offer of services contains the Certificate of Registration firm number.

(2) A Firm shall designate a surveyor of record for the primary and for each branch office. The surveyor of record must be an active license holder who is employed full-time by the Firm and shall perform or directly supervise all survey work and activities that require a license. The surveyor of record shall not be designated as the surveyor of record for more than one primary or branch office.

(3) An active license holder who is a sole practitioner shall satisfy the requirement of the regular, full-time employee.

(4) No surveying services are to be offered to or performed for the public in Texas by a Firm while that Firm does not have a current Certificate of Registration.

(5) A Firm that offers or is engaged in the practice of surveying in Texas and is not registered with the Board or has previously been registered with the Board and whose registration has expired shall be considered to be in violation of the Act and Board rules and will be subject to administrative penalties as set forth in §1071.451 and §1071.452 of the Act and §661.99 of this title (relating to Sanctions and Penalty Schedule).

(6) The Board may revoke a certificate of registration that was obtained in violation of the Act and/or Board rules including, but not limited to, fraudulent or misleading information submitted in the application or lack of employee relationship with the designated professional surveyor for the Firm.

(7) If a Firm has notified the Board that it is no longer offering service to the public or performing surveying services for the public, including the absence of a regular, full-time employee who is an active professional surveyor licensed in Texas, the Certificate of Registration will expire.

(8) In addition to any other penalty provided in this section, the Board shall have the power to fine, refuse to issue or renew and/or revoke the registration of a firm where one or more of its officers, directors, partners, members, or managers have been found guilty of any conduct which would constitute a violation of the Board's Act or Rules.

(9) A Firm shall cooperate in Board investigations concerning complaints against a current or former Registered Professional Land Surveyor or Licensed State Land Surveyor employed by the Firm, by making all files and other pertinent records available to the surveyor so that he or she may respond to the complaint.

(10) Any firm furnishing contract land surveying crews must have a RPLS as a full-time employee in that firm and as reflected in its registration form filed with the Board. A full-time employee is an individual employed by a company in an on-going position with a minimum of 35 scheduled work hours per week, 52 weeks per year.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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CHAPTER 663. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND RULES OF CONDUCT

SUBCHAPTER B. PROFESSIONAL AND TECHNICAL STANDARDS

22 TAC §663.18

The Texas Board of Professional Land Surveying (Board) proposes an amendment to §663.18, concerning certification.

The amended section is proposed to delete the word "only" from section (a), removing the restriction that only final documents receive the land surveyor's seal and signature.

Marcelino Estrada, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no additional cost to state or local governments as a result of enforcing or administering the amended sections.

Mr. Estrada also has determined that for each year of the first five year-period the rules are in effect there will be no local employment impact as a result of adoption of the proposed rule.

Mr. Estrada has also determined that for each of the first five years the rule is in effect, the anticipated public benefit will be that the Board's Rules will be more consistent and precise. Mr. Estrada has determined that there will be no economic cost to individuals required to be subject to this rule. Mr. Estrada has determined that there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in cost of compliance between small and large businesses.

Mr. Estrada has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas Board of Professional Land Surveying invites comments on the proposed amendment to the rules from any member of the public. A written statement should be mailed or delivered to Natalie Jackson, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite156, MC 230, Austin, Texas 78753, by facsimile (FAX) to (512) 239-5253, or by email Natalie.jackson@txls.texas.gov. Comments will be accepted for 30 days following publication in the *Texas Register.*

The rule amendments are proposed under Texas Occupations Code §1071.151, §1071.351 and Government Code §2001.004.

§663.18. Certification.

(a) The Registered Professional Land Surveyor shall personally apply his/her seal and signature [~~only~~] to final documents released to the public representing professional land surveying as defined in the Act. The professional land surveyor shall maintain control and possession over his/her seal at all times.

(b) If the land surveyor certifies, or otherwise indicates, that his/her product or service meets a standard of practice in addition to that promulgated by the Texas Board of Professional Land Surveying, then the failure to so meet both standards may be considered by the Board, for disciplinary purposes, to be misleading the public.

(c) Preliminary documents released from a land surveyor's control shall identify the purpose of the document, the land surveyor of record and the land surveyor's registration number, and the release date. Such preliminary documents shall not be signed or sealed and shall bear the following statement in the signature space or upon the face of the document: "Preliminary, this document shall not be recorded for any purpose and shall not be used or viewed or relied upon as a final survey document". Preliminary documents released from the land surveyor's control which include this text in place of the land surveyor's signature need not comply with the other minimum standards promulgated in this chapter.

(d) A land surveyor shall certify only to factual information that the land surveyor has knowledge of or to information within his professional expertise as a land surveyor unless otherwise qualified.

(e) Registered professional land surveyors may certify, using the registrant's signature and official seal, services which are not within the definition of professional land surveying as defined in the Act, provided that such certification does not violate any Texas or federal law.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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22 TAC §663.19

The Texas Board of Professional Land Surveying (Board) proposes an amendment to §663.19, concerning survey drawings/written/description/reports.

The amended section is proposed to remove vagueness created by the phrase "if appropriate" in section (f). It was believed that land surveyors interpreted the phrase to mean they did not have to show adjoiners on the survey report. The Board feels that showing adjoiners on the survey report is an indication that the land surveyor has done his research on the property being surveyed.

Marcelino Estrada, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no additional cost to state or local governments as a result of enforcing or administering the amended sections.

Mr. Estrada also has determined that for each year of the first five year-period the rules are in effect there will be no local employment impact as a result of adoption of the proposed rule.

Mr. Estrada has also determined that for each of the first five years the rule is in effect, the anticipated public benefit will be that the Board's Rules will be more consistent and precise. Mr. Estrada has determined that there will be no economic cost to individuals required to be subject to this rule. Mr. Estrada has determined that there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in cost of compliance between small and large businesses.

Mr. Estrada has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas Board of Professional Land Surveying invites comments on the proposed amendment to the rules from any member of the public. A written statement should be mailed or delivered to Natalie Jackson, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite156, MC 230, Austin, Texas 78753, by facsimile (FAX) to (512) 239-5253, or by email Natalie.jackson@txls.texas.gov. Comments will be accepted for 30 days following publication in the *Texas Register.*

The rule amendments are proposed under Texas Occupations Code §1071.151 and Government Code §2001.004.

§663.19. Survey Drawing/Written /Description/Report.

(a) All reports shall delineate the relationship between record monuments and the location of the boundaries surveyed; such relationship shall be shown on the survey drawing, if a drawing is prepared, and/or separate report and recited in the description with the appropriate record references recited thereon and therein.

(b) Every description prepared for the purpose of defining boundaries shall provide a definite and unambiguous identification of the location of such boundaries and shall describe all monuments found or placed.

(c) Courses shall be referenced by notation upon the survey drawing to an identifiable and monumented line or an established geodetic system for directional control.

(d) The survey drawing shall bear the Firm name and Firm Registration Number, the land surveyor's name, address, and phone number who is responsible for the land survey, his/her official seal, his/her original signature (see §661.46 of this title (relating to Seal and Oath), and date surveyed.

(e) Boundary monuments found or placed by the land surveyor shall be described upon the survey drawing. The land surveyor shall note upon the survey drawing, which monuments were found, which monuments were placed as a result of his/her survey, and other monuments of record dignity relied upon to establish the corners of the property surveyed.

(f) A reference shall be cited on the drawing and prepared description[~~, if appropriate,~~] to the record instrument that defines the location of adjoining boundaries.

(g) If any report consists of more than one part, each part shall note the existence of the other part or parts.

(h) If a land surveyor provides a written narrative in lieu of a drawing/sketch to report the results of a survey, the written narrative shall contain sufficient information to demonstrate the survey was conducted in compliance with the Act and rules of the Board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 37. FINANCIAL ASSURANCE SUBCHAPTER T. FINANCIAL ASSURANCE FOR RADIOACTIVE SUBSTANCES AND AQUIFER RESTORATION

30 TAC §37.9045, §37.9050

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §37.9045 and §37.9050.

Background and Summary of the Factual Basis for the Proposed Rules

The purpose of this rulemaking is to implement Senate Bill (SB) 347, 83rd Texas Legislature, 2013, and its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)). The proposed amendments to Chapter 37 establish a new account, subject to appropriations, to fund an Environmental Radiation and Perpetual Care Account to replace the perpetual care account currently in rule.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapter 336, Radioactive Substance Rules. Section by Section Discussion

§37.9045, Financial Assurance Requirements for Closure, Post Closure, and Corrective Action

The commission proposes to amend §37.9045(a)(5) and (6) to reflect that upon such time that the Environmental Radiation and Perpetual Care Account is certified by legislation that all financial assurance proceeds that may be drawn upon shall be deposited to the Environmental Radiation and Perpetual Care Account rather than the perpetual care account.

§37.9050, Financial Assurance Mechanisms

The commission proposes to amend the insurance requirements under §37.9050(f)(4) and (11) by striking reference to the perpetual care account as the recipient of funds directly and instead add a cross reference to §37.9045(a)(6) that acknowledges the Environmental Radiation and Perpetual Care Account upon certification by legislation.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of the administration or the enforcement of the proposed rules.

The proposed rulemaking would implement portions of SB 347. SB 347 created a new account within the General Revenue Fund to be called the Environmental Radiation and Perpetual Care Account, for the use of the TCEQ to prevent or mitigate the adverse effects of radioactive substances and ensure protection of public health. Funds in the account could be used for the decontamination, decommissioning, stabilization, reclamation, maintenance, surveillance, control, storage, and disposal of radioactive substances for the protection of the public health and safety and the environment. The account would consist of fees on licenses and registrations as well as revenues from the 20% surcharge on nonparty compact waste previously deposited into the Low Level Radioactive Waste Account 088. This surcharge would now be deposited into the newly-created Environmental Radiation and Perpetual Care Account, instead of Account 088. However, as part of the legislature's funds consolidation efforts, through the passage of House Bill 6, 83rd Texas Legislature, 2013, the account was abolished just after it was established. Fee revenue that was required by SB 347 to be deposited into the new Environmental Radiation and Perpetual Care Account is now going into the General Revenue Fund.

In anticipation of the re-creation of the Environmental Radiation and Perpetual Care Account by the 84th Texas Legislature, 2015, and the re-dedication of funds in the account for low-level radioactive site closure, post closure and corrective action activities, and to implement provisions of SB 347, the commission is proposing this rulemaking.

The proposed amendments to Chapter 37 would amend financial assurance requirements to allow financial assurance that is converted to cash and payable to the State of Texas to be deposited into the Environmental Radiation and Perpetual Care Account (or the perpetual care account). The proposed rulemaking would also insert the name of the Environmental Radiation and Perpetual Care Account into other appropriate provisions of Chapter 37. No fiscal implications are anticipated from the proposed rules. Even if the account was legislatively re-created, the proposed changes merely identify an account that may be used for financial assurance for corrective action and post closure activities.

In concurrent rulemaking, the commission is proposing amendments to Chapter 336 which would implement other provisions of SB 347. The fiscal implications for these amendments are discussed in the fiscal note for the Chapter 336 rulemaking. Public Benefits and Costs Mr. Horvath has 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 the potential for a dedicated account and funding for post closure and corrective action activities associated with the low-level radioactive waste disposal site, assuming the legislature re-creates the account.

No fiscal implications are anticipated for businesses or individuals as a result of the proposed rulemaking. The changes in the proposed rules merely identify an account that may be used for financial assurance for corrective action and post closure activities. This account was created and then abolished by the 83rd Texas Legislature, 2013, but it is assumed that the account will be re-created as TCEQ and the Texas Department of State Health Services (DSHS) each require their respective perpetual care accounts for the entities they regulate.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect small or micro-businesses and are required to implement state law and therefore are consistent with the health, safety, or environmental and economic welfare of the state.

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 proposes the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking action implements legislative requirements in SB 347 regarding funding and subject to appropriation by the legislature of the Environmental Radiation and Perpetual Care Account. The proposed amendments to Chapter 37 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because financial assurance and this fund was already required for these licensing programs. The amendments only change the name for the fund as administered by the commission and the commission will only be implementing an appropriation of the state budget from the legislature and following an order from the Texas Comptroller of Public Accounts. While there could be new costs associated with obtaining a financial assurance mechanism that meets the requirements of the proposed rules, the commission does not expect that the costs to adversely affect the economy, productivity, or competition in a material way.

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

tion agreement, nor does it adopt a rule solely under the general powers of the agency.

THSC, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, Texas is an "Agreement State" authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The proposed rules are compatible with federal law. The proposed rules do not exceed an express requirement of state law. THSC, Chapter 401, establishes general requirements, including requirements for public notices, for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. The purpose of the rulemaking is to implement statutory requirements consistent with recent amendments to THSC, Chapter 401, as provided in SB 347.

The proposed rules are compatible with a requirement of a delegation agreement or contract between the state and an agency of the federal government. Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as amended, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rules are compatible with the NRC requirements and the requirements for retaining status as an "Agreement State." These rules are proposed under specific authority of THSC, Chapter 401. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances.

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

Takings Impact Assessment

The commission evaluated these proposed rules and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that the Private Real Property Rights Preservation Act does not apply to these proposed rules because these proposed rules implement SB 1604, 80th Texas Legislature, 2007, transferring certain regulatory responsibilities from the DSHS to the commission and is an action reasonably taken to fulfill an obligation mandated by federal law. Financial assurance is required for these licensing programs under the NRC's requirements.

Nevertheless, the commission further evaluated these proposed rules and performed a preliminary assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these proposed rules is to implement changes to the TRCA required by SB 347 for the deposit of funds into the Environmental Radiation and Perpetual Care Account. The proposed amendments to Chapter 37 would fund, subject to pending appropriation, by renaming the former perpetual care account, the Environmental Radiation and Perpetual Care Account. Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

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.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on January 13, 2015, at 10:00 a.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

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

Submittal of Comments

Written comments may be submitted to Kris Hogan, 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 2013-056-037-WS. The comment period closes on January 20, 2015. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Bobby Janecka, Radioactive Material Licensing Section, (512) 239-6415.

Statutory Authority

The amendments are proposed under specific authority of Texas Health and Safety Code (THSC), Chapter 401. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition to the specific provisions of the Texas Radiation Control

Act (TRCA), the amendments are proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under TWC and other laws of the state.

The proposed amendments implement Senate Bill 347, 83rd Texas Legislature, 2013, and its amendments to THSC, Chapter 401 (also known as the TRCA).

§37.9045. Financial Assurance Requirements for Closure, Post Closure, and Corrective Action.

(a) An owner or operator subject to this subchapter shall establish financial assurance for the closure, post closure, and corrective action of the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action).

(1) An owner or operator subject to this subchapter may use any of the mechanisms as specified in §37.9050 of this title (relating to Financial Assurance Mechanisms) to demonstrate financial assurance for closure, post closure, and corrective action. On a case-by-case basis, the executive director may approve other alternative financial assurance mechanisms.

(2) The executive director will respond within 60 days after receiving a written request for a financial assurance reduction in accordance with §37.151 of this title (relating to Decrease in Current Cost Estimate).

(3) An owner or operator may use multiple financial assurance mechanisms provided in §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), but must use only those financial assurance mechanisms as specified in §37.9050 of this title.

(4) The executive director may accept financial assurance established to meet requirements of other federal, state agencies, or local governing bodies for closure or post closure, provided such mechanism complies with the requirements of this chapter and the full amount of financial assurance required for the specific license is clearly identified and committed for use for the purposes of Chapter 336, Subchapters G, H, L, and M of this title (relating to Decommissioning Standards; Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste; Licensing of Source Material Recovery and By-Product Material Disposal Facilities; and Licensing of Radioactive Substances Processing and Storage Facilities).

(5) Proof of forfeiture must not be necessary to collect the financial assurance, so that in the event that the owner or operator does not provide acceptable replacement financial assurance within the required time prior to the expiration, cancellation, or termination of the financial assurance mechanism, the financial assurance provider shall pay the face amount of the financial assurance to the State of Texas for deposit as specified in paragraph (6) of this subsection [~~to the credit of the perpetual care account~~].

(6) All financial assurance required under §§336.619, 336.736 - 336.738, 336.1125, and 336.1235 of this title (relating to Financial Assurance for Decommissioning; Liability Coverage and Funding for Disposal Site Closure and Stabilization; Funding for Institutional Control; Funding for Corrective Action; Financial Assurance Requirements; and Financial Assurance for Storage and Processing) to be converted to cash by direction of the executive director pursuant to §37.101 of this title (relating to Drawing on the Financial Assurance Mechanisms) [~~under §§336.619, 336.736 - 336.738, 336.1125, 336.1235, and 37.101 of this title (relating to Financial Assurance for Decommissioning; Funding for Disposal Site Closure and Stabilization; Funding for Institutional Control; Funding for Corrective Action; Financial Security Requirements; Financial Assurance for Storage and Processing; and Drawing on the Financial Assurance Mechanisms)~~] and paragraph (5) of this subsection shall be payable to the State of Texas for deposit to the credit of the perpetual care account or upon the Environmental Radiation and Perpetual Care Account being recreated and rededicated by legislation, then such financial assurance proceeds as described in this subsection shall be paid to the State of Texas for deposit to the credit of the Environmental Radiation and Perpetual Care Account.

(b) Financial assurance for aquifer restoration shall be provided in an amount no less than the cost estimate for aquifer restoration approved for each production area authorization. The executive director shall have discretion to apply financial assurance approved for one production area to the restoration of any other production area.

(c) The owner or operator shall comply with §37.71 of this title (relating to Incapacity of Owners or Operators, Guarantors, or Financial Institutions), except financial assurance must be established within 30 days after such an event.

§37.9050. Financial Assurance Mechanisms.

(a) An owner or operator may satisfy the requirements of a fully funded trust or standby trust fund as provided in §37.201 of this title (relating to Trust Fund), except within 60 days following the executive director's final review and approval of closure or post closure expenditures for reimbursement, release of funds shall occur.

(b) An owner or operator may satisfy the requirements of a surety bond guaranteeing payment as provided in §37.211 of this title (relating to Surety Bond Guaranteeing Payment) except:

(1) the surety must also be licensed in the State of Texas;

(2) cancellation may not occur during the 90 days beginning on the date of receipt of the notice of cancellation; and

(3) the bond must guarantee that the owner or operator will provide alternate financial assurance within 30 days after receipt of a notice of cancellation of the bond.

(c) An owner or operator may satisfy the requirements of an irrevocable standby letter of credit as provided in §37.231 of this title (relating to Irrevocable Standby Letter of Credit), except:

(1) the letter of credit shall be automatically extended unless the issuer provides notice of cancellation at least 90 days before the current expiration date. Under the terms of the letter of credit, the 90 days shall begin on the date when both the owner or operator and the executive director have received the notice, as evidenced by the return receipts; and

(2) in accordance with §37.231(h) of this title, the executive director shall draw on the letter of credit within 30 days after receipt of notice from the issuing institution that the letter of credit will not be extended, or within 60 days of an extension, if the owner or operator fails to establish and obtain approval of such alternate financial assurance from the executive director.

(d) A statement of intent may be used by a governmental entity subject to this subchapter. The statement of intent shall be subject to the executive director's approval and shall include the following:

(1) a statement that funds will be made immediately available upon demand by the executive director;

(2) the signature of an authorized official who has the authority to bind the governmental entity into a financial obligation, and has the authority to sign the statement of intent;

(3) name of facility(ies), license number, and physical and mailing addresses; and

(4) corresponding current cost estimates.

(e) An owner or operator may satisfy the requirements of financial assurance by establishing an external sinking fund as specified in this subsection. An external sinking fund has two components: a sinking fund account and a financial assurance mechanism such that the total of both equals, at all times, the current cost estimate. A sinking fund account is an account segregated from the owner's or operator's assets and is outside the owner's or operator's administrative control. As the value of the sinking fund account increases, the value of the second financial assurance mechanism decreases. When the external sinking fund account is equal to the current cost estimate, the second financial assurance mechanism will no longer be required to be maintained.

(1) An external sinking fund account shall be approved by the executive director and administered by a third party that is regulated and examined by a federal or state agency.

(2) The external sinking fund is established and maintained by setting aside funds periodically, at least annually.

(f) An owner or operator may satisfy the requirements of financial assurance by obtaining insurance that conforms to the requirements of this subsection, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements; and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action[~~, respectively~~]), and submitting an originally-signed endorsement to the insurance policy to the executive director.

(1) At a minimum, the insurer on the policy must be authorized to transact or be a surplus lines insurer eligible to engage in the business of insurance in Texas and have a minimum financial strength rating of "A" and a financial size category of "XV" as assigned by the A.M. Best Company.

(2) The insurance policy must designate the commission as an additional insured.

(3) The owner or operator must maintain the policy in full force and effect until the executive director consents to termination of the policy. Failure to pay the premium, without substitution of alternate financial assurance as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary. Such violation shall be deemed to begin upon receipt by the executive director of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration of the policy.

(4) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with the date of receipt of the notice by both the executive director and the owner or operator, as evidenced by the return receipts. The policy must also provide that the insurer shall pay the face amount of the insurance policy to the State of Texas for deposit as specified under §37.9045(a)(6) of this title (relating to Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), [~~to the credit of the perpetual care account~~] if the executive director does not approve acceptable replacement financial assurance within 90 days of receiving notice by certified mail from the insurer of its election to cancel, terminate, or not renew the policy.

(5) The insurance policy may not contain an exclusion for intentional, willful, knowing, or deliberate noncompliance with a statute, regulation, order, notice, or government instruction.

(6) The wording of the endorsement to the insurance policy must be identical to the wording specified in §37.9052 of this title (relating to Endorsement).

(7) The insurance policy must be issued for a face amount at least equal to the current cost estimate for closure, post closure, or corrective action, except when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms). Actual payments by the insurer shall not change the face amount, although the insurer's future liability shall be lowered by the amount of the payments.

(8) The insurance policy must guarantee that funds shall be available to provide for closure, post closure, or corrective action of the facility. The policy shall also guarantee that once closure, post closure, or corrective action begins, the issuer shall be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the executive director, to such party or parties as the executive director specifies.

(9) An owner or operator or any other person authorized to perform closure, post closure, or corrective action may request reimbursement for closure, post closure, or corrective action expenditures by submitting itemized bills to the executive director. The request shall include an explanation of the expenses and all applicable itemized bills. The owner or operator may request reimbursement for partial closure only if the remaining value of the policy is sufficient to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for closure, post closure, or corrective action activities, the executive director shall determine whether the closure, post closure, or corrective action expenditures are in accordance with the approved closure, post closure, or corrective action activities or are otherwise justified and, if so, shall instruct the insurer to make reimbursement in such amounts as the executive director specifies in writing. If the executive director has reason to believe that the maximum cost of closure, post closure, or corrective action over the remaining life of the facility will be greater than the face amount of the policy, the executive director may withhold reimbursement of such amounts as deemed prudent until the executive director determines, in accordance with Subchapters A and B of this chapter, that the owner or operator is no longer required to maintain financial assurance requirements for closure, post closure, or corrective action of the facility. If the executive director does not instruct the insurer to make such reimbursements, the executive director shall provide the owner or operator with a detailed written statement of reasons.

(10) Commencing on the date that liability to make payments pursuant to the policy accrues, the insurer will thereafter annually increase the face amount of the policy. Such increase must be equivalent to the face amount of the policy, less any payments made, multiplied by an amount equivalent to 85% of the most recent investment rate or of the equivalent coupon issue yield announced by the United States Treasury for 26-week Treasury securities.

(11) Upon notification by the executive director that the institutional control period has begun, the insurer will pay the remaining face amount of the policy to the State of Texas for deposit as specified

under §37.9045(a)(6) of this title [~~to the credit of the perpetual care account~~].

(g) This subsection applies only to owner or operators required to provide financial assurance under Chapter 336, Subchapter M of this title (relating to Licensing of Radioactive Substances Processing and Storage Facilities). Owners or operators required to provide financial assurance under Chapter 336, Subchapter M of this title may satisfy the requirements of financial assurance by demonstrating that it passes a financial test as provided in §37.251 of this title (relating to Financial Test), except the owner or operator which has issued rated bonds must also meet the criteria of [~~or~~] paragraphs (1) and (3) of this subsection, or the owner or operator which has not issued rated bonds must also meet the criteria of paragraphs (2) and (3) of this subsection.

(1) The owner or operator must have:

(A) tangible net worth of at least ten times the total current cost estimate (or the current amount required if a certification is used) for all closure activities;

(B) assets located in the United States amounting to at least 90% of total assets or at least ten times the total current cost estimate (or the current amount required if a certification is used) for all closure activities;

(C) a current rating for its most recent bond issuance of AAA, AA, or A as issued by Standard and Poor's, or AAA, AA, A as issued by Moody's; and

(D) at least one class of equity securities registered under the Securities Exchange Act of 1934.

(2) The owner or operator must have:

(A) tangible net worth greater than $10 million, or of at least ten times the total current cost estimate (or the current amount required if a certification is used) for all closure activities, whichever is greater;

(B) assets located in the United States amounting to at least 90% of total assets or at least ten times the total current cost estimate (or the current amount required if a certification is used) for all closure activities;

(C) a ratio of cash flow divided by total liabilities greater than 0.15; and

(D) a ratio of total liabilities divided by net worth less than 1.5.

(3) To demonstrate that the owner or operator meets the test, it must submit the following items to the executive director:

(A) a letter signed by the owner's or operator's chief financial officer and worded identically to the wording specified in §37.9025(a) of this title (relating to Wording of Financial Assurance Mechanisms); and

(B) a written guarantee, hereafter referred to as "self-guarantee," signed by an authorized representative which meets the requirements specified in §37.261 of this title (relating to Corporate Guarantee). The wording of the self-guarantee shall be acceptable to the executive director and must include the following:

(i) the owner or operator will fund and carry out the required closure or post closure activities, or upon issuance of an order by the executive director, the owner or operator will set up and fund a trust, as specified in §37.201 of this title [~~(relating to Trust Fund)~~] in the name of the owner or operator, in the amount of the current cost estimates; and

(ii) if, at any time, the owner's or operator's most recent bond issuance ceases to be rated in any category of "A" or above by either Standard and Poor's or Moody's, the owner or operator will provide notice in writing of such fact to the executive director within 20 days after publication of the change by the rating service. If the owner's or operator's most recent bond issuance ceases to be rated in any category of "A" or above by both Standard and Poor's and Moody's, the owner or operator no longer meets the requirements of paragraph (1) of this subsection.

(h) This subsection only applies to owners or operators required to provide financial assurance under Chapter 336, Subchapter M of this title. A parent company controlling a majority of the voting stock of the owner or operator may satisfy the requirements of financial assurance by demonstrating that it passes a financial test as specified in §37.251 of this title, and by meeting the requirements of a corporate guarantee as specified in §37.261 of this title. The guarantor shall also comply with the requirements identified in this subsection.

(1) The wording of the corporate guarantee as specified in §37.361 of this title (relating to Corporate Guarantee) shall also include:

(A) the signatures of two officers of the owner or operator and two officers of the guarantor who are authorized to bind the respective entities; and

(B) the corporate seals.

(2) The guarantor shall also certify and submit to the executive director that the guarantor has:

(A) majority control of the owner or operator;

(B) full authority under the laws of the state under which it is incorporated and its articles of incorporation and bylaws to enter into this corporate guarantee;

(C) full approval from its board of directors to enter into this corporate guarantee; and

(D) authorization of each signatory.

(i) A parent company guarantee may not be used in combination with other financial assurance mechanisms to satisfy the requirements of this subchapter. A financial test by the owner or operator may not be used in combination with any other financial assurance mechanisms to satisfy the requirements of this subchapter or in any situation where the owner or operator has a parent company holding majority control of the voting stock of the company.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 21, 2014.

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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) 239-6812

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CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes amendments to §§114.2, 114.7, 114.53, 114.60, 114.62, 114.64, 114.70, and 114.87.

If adopted, §§114.2, 114.53, and 114.87 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

The commission proposes revisions to incorporate a procedure for counties to opt out of the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) and to be released from program obligations, including remittance of the fee to fund the LIRAP. The commission also proposes to add language that differentiates between a LIRAP participating county and non-participating county.

The LIRAP was established to enhance the objectives of the Vehicle Inspection and Maintenance (I/M) Program. The 77th Texas Legislature, 2001, enacted House Bill (HB) 2134 to assist low income individuals with repairs, retrofits, or retirement of vehicles that fail emissions inspections. HB 2134 required the commission and the Texas Department of Public Safety (DPS), by rule, to provide the minimum guidelines by which eligible counties may implement the LIRAP. The commission, in coordination with DPS, adopted rules implementing HB 2134.

The LIRAP is a voluntary program, and only those counties that have implemented vehicle emissions I/M programs are eligible to participate in the LIRAP. I/M program counties include Brazoria, Fort Bend, Galveston, Harris, and Montgomery Counties in the Houston-Galveston-Brazoria (HGB) area; Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties in the Dallas-Fort Worth (DFW) area; Travis and Williamson Counties in the Austin-Round Rock (ARR) area; and El Paso County. To participate, an eligible county must submit a written request to the TCEQ from the county's commissioners court to implement the LIRAP. The TCEQ executive director and the participating county then enter into a grant contract for implementation of the LIRAP. Under the program, monetary or other compensatory assistance is provided for emission-related repairs directly related to bringing the vehicle into compliance or for replacement assistance for a vehicle that has failed the required emissions test and for which emission-related repairs would not be economical. In addition, appropriated funds are granted to participating counties for use in approved local initiative projects (LIP).

The LIRAP is funded through a fee (LIRAP fee) that is charged to vehicle owners in participating counties. The LIRAP fee is $6.00 in participating DFW and HGB-area counties, and it is charged to vehicle owners who receive on-board diagnostics (OBD) emissions inspection tests. The LIRAP fee is $2.00 in participating ARR-area counties, and it is charged to vehicle owners for any emissions inspection test performed. The LIRAP fee is remitted at authorized inspection stations during annual vehicle safety and emissions inspections, but as of March 1, 2015 the LIRAP fee will be paid at the Texas Department of Motor Vehicles (DMV) or county tax assessor-collector during vehicle registration. This change is a result of a 2014 revision to Chapter 114, Subchapters A, B, and C (Rule Project Number 2013-035-114-AI), transitioning the state to a single sticker system for vehicle inspection and registration and implementing HB 2305, 83rd Texas Legislature, 2013.

The 2002 rules adopted to implement the LIRAP established minimum and maximum assistance amounts for emission-related repairs and retrofits, minimum and maximum assistance amounts toward purchase of replacement vehicles, and criteria for determining eligibility. The 2002 rulemaking required that emission-related repairs covered by the program be carried out at recognized emissions repair facilities and allowed participating counties to administer the program themselves or contract with private entities or other participating counties to administer the program.

The 2002 rulemaking allowed the commissioners court of a participating county to appoint one or more local advisory panels consisting of individuals representing automobile dealerships, the automotive repair industry, safety inspection stations, local affected governments, and local nonprofit organizations to advise the commissioners court on the operation of the LIRAP. Additionally, the rulemaking required the commission to authorize the assignment of emissions reduction credits to private, commercial, or business entities that purchase qualified vehicles for accelerated retirement under the LIRAP. Retired vehicles had to be destroyed, recycled, dismantled with remaining parts sold, or placed in storage and subsequently retired, repaired, or used as replacement vehicles. The rulemaking to implement the LIRAP was adopted on March 27, 2002, as published in the April 12, 2002, issue of the *Texas Register* (27 TexReg 3194).

The 79th Texas Legislature, 2005, enacted HB 1611, which revised elements of the LIRAP. HB 1611 allowed for the LIRAP to be administered by participating counties in accordance with Texas Government Code, Chapter 783 (relating to Uniform Grant and Contract Management). It also allowed LIRAP funds to cover programmatic costs such as call-center management, application oversight, invoice analysis, education, outreach, and advertising. In 2005, legislation revised vehicle registration eligibility requirements. The commission adopted rule revisions (Rule Project Number 2005-073-114-EN) implementing HB 1611 on April 12, 2006, as published in the April 28, 2006, issue of the *Texas Register* (31 TexReg 3575).

On April 28, 2014, the commission received Court Order No. 2014-221-04-21 from the Collin County Commissioners Court withdrawing the county from participation in the LIRAP. The court order was sent with a letter requesting that the commission release Collin County from program requirements, including collection of the LIRAP fee.

At the time the LIRAP was established, the rules did not specify a procedure to allow participating counties to opt out of the program or to be released from the LIRAP fee requirement. This proposed rulemaking would provide Collin County or any participating county with a procedure for opting out of the LIRAP, which includes being released from collection of the LIRAP fee and ending of the contract between the county and the TCEQ executive director. The proposed rulemaking would amend Subchapter A to revise the definitions for the LIRAP to account for counties opting out of the program and to add four new definitions to further clarify program elements and differentiate between counties participating in the LIRAP and non-participating counties. This proposed rulemaking would also amend Subchapter C, Divisions 1, 2, and 3. Division 1 would be amended to revise the I/M fees in a participating nonattainment county that elects to opt out of the LIRAP. Division 2 would be amended to provide a mechanism for participating nonattainment counties to opt out of the LIRAP, and Division 3 would be amended to provide a mechanism for early action compact (EAC) counties to

opt out of the LIRAP and accordingly, revise the I/M fee requirements in §114.87.

Section by Section Discussion

In addition to the proposed amendments associated with providing a mechanism for counties to opt out of the LIRAP, various stylistic, non-substantive changes are included to update rule language to current Texas Register style and format requirements. Such changes include appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally are not specifically discussed in this preamble.

§114.2, Inspection and Maintenance Definitions

The commission proposes to replace the acronym for the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program with the full program title to be consistent with the title of the referenced subchapter and *Texas Register* requirements.

§114.7, Low Income Vehicle Repair Assistance, Retrofits, and Accelerated Vehicle Retirement Program Definitions

The commission proposes to correct the title of §114.7 by amending the term "retrofit" to be singular. In addition, the commission proposes to add four new definitions to §114.7 to clarify program requirements and differentiate between participating counties and non-participating counties. "LIRAP fee" is proposed to be added as paragraph (13) to define the fee that vehicle owners in participating LIRAP counties pay when their vehicles receive certain emissions tests, OBD tests in DFW and HGB-area counties, and any emissions test in El Paso, Travis, and Williamson Counties. El Paso is currently a non-participating county. Assessment of the LIRAP fee is authorized by Texas Health and Safety Code (THSC), §382.202.

"LIRAP fee termination date" is proposed to be added as paragraph (14) to define the effective date upon which a county opting out of the LIRAP would no longer pay the LIRAP fee. "LIRAP opt-out effective date" is proposed to be added as paragraph (15) to define the date upon which a county that was participating in the LIRAP becomes a non-participating county. Withdrawal from the program is effective on the date that both of the following requirements have been met: 1) the county is no longer subject to the LIRAP fee; and 2) the grant contract between the county and the TCEQ executive director that established participation in the program is ended. The grant contract cannot be ended before the LIRAP fee termination effective date.

"Non-participating county" is proposed to be added as paragraph (18) to differentiate between counties that are eligible to participate in the LIRAP but choose not to and eligible counties that participate in the LIRAP. The definition for "Participating county" is proposed to be amended to clarify that a county that is in the process of opting out of the LIRAP would be considered a participating county until the LIRAP opt-out effective date. The definition for "Recognized emissions repair facility" would be amended to replace the reference to 37 Texas Administrative Code (TAC) §23.93 with 37 TAC §23.51 as it replaced the former as of March 13, 2013. The remaining definitions in §114.7 would be renumbered to accommodate the added definitions.

§114.53, Inspection and Maintenance Fees

The commission proposes to amend §114.53(d)(1), (2), and (3) to more fully describe the LIRAP fee as it relates to the vehicle I/M programs in El Paso County and the DFW and HGB-area counties. Subparagraphs would be added to §114.53(d)(1), (2), and (3) to explain remittance of I/M fees, including the LIRAP fee, in a county participating in the LIRAP, a participating county that is in the process of opting out of the LIRAP, and a county that is not participating in the LIRAP and not subject to the LIRAP fee. The commission proposes to reorganize §114.53(d)(1) to allow the proposed subparagraphs to be consistent among the paragraphs of §114.53(d). The proposed description of the state fees vehicle owners would pay during vehicle registration in participating counties, subparagraph (A) for each paragraph in §114.53(d), would include the LIRAP fee. The proposed description of the state fees vehicle owners would pay during vehicle registration in participating counties that are in the process of opting out of the LIRAP, subparagraph (B) for each paragraph in §114.53(d), would include the LIRAP fee until the effective LIRAP fee termination date, after which state fees would not include the LIRAP fee. The proposed description of the state fees vehicle owners would pay during vehicle registration in non-participating counties, subparagraph (C) for each paragraph in §114.53(d), would not include the LIRAP fee.

§114.60, Applicability for LIRAP

The commission proposes to add §114.60(c)(7) specifying that LIRAP requirements are not applicable to vehicles registered in counties that do not participate in the program. This addition would clarify that vehicles in non-participating counties are not subject to LIRAP requirements.

§114.62, LIRAP Funding

The commission proposes to amend §114.62(a) to clarify that the LIRAP is funded through money collected only in participating counties, and the term, "participating" would replace "affected" in §114.62(c) for consistency in describing counties that participate in the program.

§114.64, LIRAP Requirements

The counties that are eligible to participate in the LIRAP are limited to those that are included in I/M program areas, but no county is required to participate in the LIRAP. The original rule to implement the program included a procedure to allow counties to opt into the LIRAP, but it did not include a procedure to allow counties to opt out. The proposed amendment to §114.64 would establish a procedure for opting out of the LIRAP.

The commission proposes to amend §114.64(a), concerning implementation of the LIRAP, to indicate that participation in the program is voluntary. The commission proposes to amend §114.64(b)(3) to clarify that vehicle repair and retrofit assistance through the AirCheckTexas Drive a Clean Machine (DACM) Program is only available for vehicles registered in participating LIRAP counties.

The commission proposes to add §114.64(g) to establish the procedure for opting out of the LIRAP. Proposed §114.64(g)(1) would require a county wishing to opt out of the program to submit a written request from the county commissioners court to the TCEQ executive director, which is consistent with the process for opting into the LIRAP. The written request would include one of two possible LIRAP opt-out effective dates, either the LIRAP fee termination effective date or the last day of the legislative biennium in which the LIRAP fee termination effective date occurred. The first option would completely withdraw the opt-out county from the program on the same date that the county was no longer subject to the LIRAP fee. The second option would extend the opt-out county's program participation past the LIRAP

fee termination effective date to allow the county time to spend any remaining funds that had been allocated by the commission. The commission requests comment on the two program opt-out options proposed.

Participation in the LIRAP makes grant funds available to counties for program-related projects and to qualified vehicle owners, and the LIRAP is funded through fees collected from county vehicle owners. Due to the program's reliance on public support, the commission is requesting public comment on the method and process by which counties wishing to opt into or out of the LIRAP would do so, including any associated public notice requirements.

Proposed §114.64(g)(2) describes the procedure the commission would follow to release a county from LIRAP requirements upon receiving a written request from the county to opt out. Release from LIRAP requirements includes removing the LIRAP fee from the state fees charged to vehicle owners during vehicle registration, which requires the commission to coordinate with the DMV and DPS and to contact the Legislative Budget Board of Texas (LBB). This proposal includes a period of time for the LIRAP fee to be removed in counties that have requested to opt out of the program. The extended time frame is proposed because it allows the DMV to cycle through vehicle registrations for which notices that include the LIRAP fee have already been issued. The DMV prints and distributes vehicle registration notices more than 90 days prior to registration expiration dates. For example, if the TCEQ executive director received a written request to withdraw from the program on August 1st, then the effective LIRAP fee termination date would be on or after December 1st because December would be the first month for which registration notices that did not include the LIRAP fee would be printed. The DMV prints registration notices mid-month, so a written request to withdraw that was received by the TCEQ executive director in mid-August would likely not result in the LIRAP fee being effectively terminated for the submitting county until, at the earliest, January 1st. The commission requests comment concerning this element of proposed §114.64(g)(2).

The proposed effective LIRAP fee termination date would be the first day of the month for the month that the DMV issues registration notices that do not include the LIRAP fee in the opt-out county. Until the LIRAP fee termination effective date, a county in the process of opting out of the LIRAP is still considered a participating county because the LIRAP fee cannot be assessed in a non-participating county. Depending upon the LIRAP opt-out effective date included in a county's written request to opt out of the program, the county could be completely withdrawn from the LIRAP on the LIRAP fee termination effective date, ending the contract between the county and the TCEQ executive director simultaneous with removal of the LIRAP fee, or the county could continue to participate in LIRAP activities without being subject to the LIRAP fee until the end of the legislative biennium in which the fee termination date occurs. The first option could end the county's participation in the LIRAP before all grant funds allocated to the county have been spent. The second option would allow a county the opportunity to continue LIRAP activities and spend previously allocated LIRAP grant funds until the end of the biennium in which the LIRAP fee termination date occurred for that county.

Proposed §114.64(g)(3) describes the LIRAP opt-out effective date, which is upon which a participating county is no longer subject to the LIRAP fee and the grant contract between the county and the TCEQ executive director is ended. On this date, the county becomes a non-participating county. Because the commission proposes to allow a county wishing to opt out of the LIRAP two options in determining when the program is ended for that county, there are two possible effective dates upon which a participating county would become a non-participating county, either simultaneous with the LIRAP fee termination effective date or the last day of the legislative biennium in which the LIRAP fee termination effective date occurred. Upon a county's LIRAP opt-out effective date, any remaining grant balances would be returned to the commission.

§114.70, Records, Audits, and Enforcement

The commission proposes to amend §114.70(c) and (d) to incorporate recordkeeping and inspection requirements for counties that opt out of the LIRAP. Proposed §114.70(c) would require program participants in counties opting out of the LIRAP to maintain program records concerning the opt-out county for three years after the effective LIRAP opt-outdate for the county. Program participants include the county, its designated entity, participating recognized emissions repair facilities, and participating vehicle retirement facilities. Proposed §114.70(d) would require that in the three-year period during which records must be kept after a county's LIRAP opt-out effective date, the TCEQ executive director must be allowed to conduct audits and inspections of the records kept concerning the opted out county by program participants.

§114.87, Inspection and Maintenance Fees

The commission proposes to amend §114.87 to apply the changes proposed in §114.53 to counties with early action compact programs that participate in the vehicle emissions I/M program. Proposed §114.87(d)(1) - (3) would explain remittance of I/M fees, including the LIRAP fee, in a county participating in the LIRAP, a participating county that is in the process of opting out of the LIRAP, and a county that is not participating in the LIRAP and not subject to the LIRAP fee. The proposed description of the state fees vehicle owners would pay during vehicle registration in participating EAC counties, paragraph (1), would include the LIRAP fee. The proposed description of the state fees vehicle owners would pay during vehicle registration in participating EAC counties that are in the process of opting out of the LIRAP, paragraph (2), would include the LIRAP fee until the effective LIRAP fee termination date, after which state fees would not include the LIRAP fee. The proposed description of the state fees vehicle owners would pay during vehicle registration in non-participating EAC counties, paragraph (3), would not include the LIRAP fee.

Fiscal Note: Costs to State and Local Government

Jeff Horvath, Analyst in the Chief Financial Officer's Division, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules. The proposed rules provide a mechanism for a county to withdraw from the LIRAP, which is a voluntary program.

The proposed rulemaking would establish a procedure to allow a participating county to opt out of the LIRAP. In March 2002, the agency adopted rules to implement the LIRAP, which was authorized in THSC, §382.209. The rules established a fee under the vehicle emissions I/M program to be paid by vehicle owners in participating counties, to fund the LIRAP. Pursuant to the passage of HB 2305, 83rd Texas Legislature, under the new single sticker system for vehicle inspection and registration, the vehi-

cle emissions I/M fees will now be collected when vehicle owners register their vehicles.

Only counties that participate in the vehicle emissions I/M program are eligible to participate in the LIRAP. Those counties include the nonattainment and planning counties of Brazoria, Fort Bend, Galveston, Harris, and Montgomery Counties in the HGB area; Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties in the DFW area; Travis and Williamson Counties in the ARR area, and El Paso County. When the rules were first adopted, a procedure was established to allow counties to opt into the LIRAP as part of an effort to reduce vehicle emissions. All eligible counties but El Paso County opted in. However, no mechanism was established to allow a participating county to opt out of the LIRAP and have the LIRAP-funding fee removed from vehicle emissions inspection fees in that county.

The Auto Emissions Inspection OBD, or LIRAP, fee revenue funds the LIRAP for those counties that have opted into the program. Vehicle owners in Travis and Williamson Counties pay $2.00 in annual LIRAP fees, and vehicle owners in DFW- and HGB-area counties pay $6.00 in annual LIRAP fees. These fees are added to the base emissions inspection fee. The LIRAP fees from each participating county are deposited into the agency's Clean Air Account 151, and a portion of that account's balance is used to fund both the DACM and LIP grant programs in participating counties.

If a county opted out of the LIRAP program, the OBD fees that fund the program would no longer be collected from vehicle owners in that county. Because this fee is used to fund the DACM and LIP programs, opting out would mean the county would not receive additional LIRAP funding to support clean air efforts and to fund repairs and replacements for low income vehicle owners who fail the motor vehicle emissions inspection.

There is no direct fiscal impact to the agency or to other units of state or local government from the proposed rulemaking as the proposed rules only provide a mechanism for a county to withdraw from the LIRAP, which is a voluntary program. Of the 17 eligible counties, 16 are currently participating in the program. If a county chose to withdraw from the LIRAP, there may be fiscal impacts, but they would be a result of voluntarily opting out, not a result of the proposed rulemaking.

The amount of LIRAP funding available to counties depends upon how much the legislature decides to appropriate for that purpose. The 83rd Texas Legislature, 2013, appropriated $7,664,640 annually to fund the LIRAP for Fiscal Years 2014 and 2015. The estimated amount of Fiscal Year 2014 LIRAP-related revenue was $42,847,650. The portion of the LIRAP fee that is not legislatively appropriated to fund the program in participating counties remains in the Clean Air Account 151 as part of the available fund balance. Collin County submitted a resolution from the county commissioners court to opt out of the program. Actual fiscal impacts for a county that opts out would be unique to that county due to varying funding amounts and program-related spending. LIRAP grants are split between funding for local projects through the LIP and funding through the DACM program, which provides financial assistance for vehicle owners to repair, retrofit, or replace vehicles that fail annual emissions inspections. Eligible LIP include expansion and enhancement of the AirCheckTexas Repair and Replacement Assistance Program, development and implementation of remote emissions-sensing systems, enhancement of transportation system improvements, and coordination with local law enforcement to reduce counterfeit inspection stickers.

Upon Collin County's LIRAP opt-out effective date, future funding for both DACM and LIP would stop for Collin County. Collin County DACM and LIP allocations for 2008 through 2015 are listed in Table 1: *DACM and LIP Allocations for Collin County.* No allocations have been made beyond Fiscal Year 2015.

Figure 1: 30 TAC Chapter 114--Preamble

If a participating county elects to opt out of the LIRAP, then staff would be required to coordinate between the county, the DMV, and the DPS to release the county from its LIRAP fee obligation. For example, TCEQ staff would inform DPS and DMV of Collin County's intention to withdraw from the LIRAP upon adoption of this proposed rulemaking. The proposed rulemaking would allow the DMV time to cycle through its pre-printed vehicle registration forms that include the LIRAP fee. This would prevent the DMV from having to reissue vehicle registration notices, which are printed and distributed to vehicle owners more than 90 days in advance of when they are due. Vehicle owners in Collin County with the LIRAP fee included on their registration notices would pay the LIRAP fee, but those notices would cycle out as the DMV issued notices that did not include the fee. Any DACM or LIP funds that were not spent by Collin County before its LIRAP opt-out effective date (either upon the effective LIRAP fee termination date or upon the last day of the legislative biennium in which the LIRAP fee termination becomes effective, as decided by the county) would be returned to the commission.

The proposed rules establish a procedure for opting out of the LIRAP, but the procedure would not impose a fiscal burden on a county wishing to withdraw from the program. The proposed rules require records to be kept for three years following a county's withdrawal from the LIRAP. This requirement would not have a fiscal impact beyond the records retention requirement imposed while the county was participating in the program.

There are participating counties that have used LIRAP grant funds for LIP-related salaries. If a county opted out of the LIRAP, those funds would no longer be available for that purpose upon the LIRAP opt-out effective date.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, there is no direct public benefit anticipated from the changes seen in the proposed rules. However, counties in nonattainment and planning areas that participate in the LIRAP program will have the ability to opt out of the program if they so choose.

The proposed rules are not expected to have fiscal implications for individuals or businesses as the proposed rules only provide a mechanism for a county to withdraw from the LIRAP, which is a voluntary program.

The residents in a county that voluntarily opted out of the LIRAP program would be affected. The DACM program provides assistance to vehicle owners, and by doing so, may help generate business for participating emissions repair facilities, dealers, and vehicle salvage facilities. For example, upon Collin County's LIRAP opt-out effective date, eligible, low-income individuals in that county with vehicles that fail emissions inspection tests would not have access to repair or replacement grant funds to assist with bringing their vehicles into compliance or replacing old vehicles. However, there may be little impact on affected businesses as drivers with vehicles that fail emissions

inspections would still be obligated to remediate the failure, and vouchers from vehicle owners in other participating counties can still be used in Collin County.

Vehicle owners in Collin County, or any county opting out, would no longer be assessed the annual LIRAP fee upon the effective LIRAP fee termination date. Table 2: *Estimated Annual Revenue from LIRAP Fee in Collin County* lists the estimated LIRAP fees by year collected from inspection stickers issued in Collin County. There are 21 participating recognized emissions repair facilities that perform repair work through the program in Collin County, and there are 27 participating dealerships that sell vehicles to eligible participants through the program in Collin County. Since the beginning of DACM in 2007, Collin County residents have repaired 1,308 vehicles and retired and replaced 2,710 vehicles at an overall cost of $8,896,641.

Figure 2: 30 TAC Chapter 114--Preamble

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules as the proposed rules only provide a mechanism for a county to withdraw from the LIRAP, which is a voluntary program. If a small business owns or operates an emissions repair facility or a vehicle salvage operation that does business through the LIRAP program, or owns or operates a participating dealership that sells vehicles to eligible participants through the program, they could be negatively impacted if the county in which they operate decides to opt out of the LIRAP program. However, drivers in Collin County with vehicles that fail emissions inspections would still be obligated to remediate the reason for the failure of the vehicle to pass the emissions test and vouchers from vehicle owners in other participating counties can still be used in Collin County, so the impact to businesses in counties that may opt out of the LIRAP program may be minimal.

Small Business Regulatory Flexibility Analysis

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

Local Employment Impact Statement

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

Draft Regulatory Impact Analysis Determination

The commission reviewed this proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225 and determined that it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means "a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." Additionally, this proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The amendments to Chapter 114 are proposed in accordance with HB 2134, which authorized the LIRAP found in THSC, Chapter 382. HB 2134 was enacted to enhance the objective of the vehicle emissions I/M program. The LIRAP provides financial assistance to low-income individuals for repair, retrofit, or retirement of vehicles that fail an emissions inspection. The proposed rulemaking is not expected to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the National Ambient Air Quality Standards (NAAQS) in each air quality control region of the state. The LIRAP was designed to enhance the objectives of the I/M program, and the commission previously submitted the I/M rules to the EPA as a revision to the Texas SIP, which the EPA approved effective July 25, 2014. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (42 USC, Chapter 85). The provisions of the Federal Clean Air Act (FCAA) recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410 and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule.

The requirement to provide a fiscal analysis of adopted regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These rules are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 concluding that "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The

commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted the adopted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule adopted for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the LBB in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a) because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially un-amended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ). Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied);* and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of these proposed rules is to amend sections of the TAC, which would allow any participating county to opt out of the LIRAP, including the collection of the LIRAP fee collected at the time of vehicle registration, without a future rulemaking. By providing a mechanism for participating counties to opt out of the LIRAP, this proposed rulemaking creates a more comprehensive program in accordance with the TCEQ's statutory obligation to create and implement the LIRAP. Additionally, even if the proposed rulemaking was a major environmental rule, it does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this proposed rulemaking. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b) because it does not meet the definition of a "major environmental rule," nor does it meet any of the four applicability criteria for a major environmental rule.

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

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The specific intent of these proposed rules is to amend sections of the TAC, which would allow any participating county to opt out of the LIRAP, including the collection of program-related LIRAP fee, without a future rulemaking. The proposed rules would substantially advance this stated purpose by amending sections in Chapter 114, Subchapters A and C to include revisions of the definitions and fees and to provide a mechanism for participating counties to opt out of the LIRAP. By providing a mechanism for participating counties to opt out of the LIRAP, this proposed rulemaking creates a more comprehensive program in accord with the TCEQ's statutory obligation to create and implement the LIRAP.

Texas Government Code, §2007.003(b)(4) provides that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by state law. THSC, Chapter 382 requires the commission to establish and authorize the commissioners court of a participating county to implement a LIRAP subject to agency oversight that may include reasonable, periodic commission audits. Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4). Nevertheless, the commission further evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a "taking" under Texas Government Code, Chapter 2007. Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking would not burden (constitutionally), nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These proposed rules create a voluntary program for counties in the state to participate in and opt out of the LIRAP. In addition, because the subject proposed regulations do not provide more stringent requirements they do not burden, restrict, or limit an owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these proposed rules would not constitute a taking under the Texas Government Code, Chapter 2007. For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

Consistency with the Coastal Management Program

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

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is editorial and procedural in nature and will have no substantive effect on commission actions subject to the CMP and therefore, is consistent with CMP goals and policies. Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on January 6, 2015, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

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

Submittal of Comments

Written comments may be submitted to Kris Hogan, 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 2014-027-114-AI. The comment period closes on January 9, 2015. 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 Jamie Zech, Air Quality Planning Section, (512) 239-3935.

SUBCHAPTER A. DEFINITIONS

30 TAC §114.2, §114.7

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning the State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Additionally, the amendments are proposed under THSC, §382.209, concerning the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP), that authorizes the commission and the Public Safety Commission to adopt rules implementing the LIRAP; and THSC, §382.210, concerning Implementation Guidelines and Requirements for the LIRAP, that authorizes the commission to adopt rules creating guidelines to assist participating counties in implementing the LIRAP.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.017, 382.209, and 382.210.

§114.2. Inspection and Maintenance Definitions.

Unless specifically defined in Texas Health and Safety Code, Chapter 382, also known as the Texas Clean Air Act (TCAA), or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following words and terms, when used in Subchapter C of this chapter (relating to Vehicle Inspection and Maintenance; Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program [~~LIRAP~~]; and Early Action Compact Counties), have the following meanings, unless the context clearly indicates otherwise.

(1) Acceleration simulation mode (ASM-2) test--An emissions test using a dynamometer (a set of rollers on which a test vehicle's tires rest) that applies an increasing load or resistance to the drive train of a vehicle, thereby simulating actual tailpipe emissions of a vehicle as it is moving and accelerating. The ASM-2 vehicle emissions test is comprised of two phases:

(A) the 50/15 mode--in which the vehicle is tested for 90 seconds upon reaching and maintaining a constant speed of 15 miles per hour (mph) on a dynamometer that simulates acceleration at a rate of 3.3 mph per second by using 50% of the vehicle available horsepower; and

(B) the 25/25 mode--in which the vehicle is tested for 90 seconds upon reaching and maintaining a constant speed of 25 mph on a dynamometer that simulates acceleration at a rate of 3.3 mph per second by using 25% of the vehicle available horsepower.

(2) Consumer price index--The consumer price index for any calendar year is the average of the consumer price index for all-urban consumers published by the United States Department of Labor, as of the close of the 12-month period ending on August 31 of the calendar year.

(3) Controller area network (CAN)--A vehicle manufacturer's communications protocol that connects to the various electronic modules in a vehicle. CAN provides one protocol that collects information from the vehicle's electronic systems including the on-board diagnostics (OBD) emissions testing system. The United States Environmental Protection Agency requires the CAN protocol to be installed in OBD-compliant vehicles beginning with some model year 2003 vehicles and phasing in to all OBD-compliant vehicles by the 2008 model year.

(4) Low-volume emissions inspection station--A vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety.

(5) Motorist--A person or other entity responsible for the inspection, repair, and maintenance of a motor vehicle, which may include, but is not limited to, owners and lessees.

(6) On-board diagnostic (OBD) system--The computer system installed in a vehicle by the manufacturer that monitors the performance of the vehicle emissions control equipment, fuel metering system, and ignition system for the purpose of detecting malfunction or deterioration in performance that would be expected to cause the vehicle not to meet emissions standards. All references to OBD should be interpreted to mean the second generation of this equipment, sometimes referred to as OBD II.

(7) On-road test--Utilization of remote sensing technology to identify vehicles operating within the inspection and maintenance program areas that have a high probability of being high-emitters.

(8) Out-of-cycle test--Required emissions test not associated with vehicle safety inspection testing cycle.

(9) Primarily operated--Use of a motor vehicle greater than 60 calendar days per testing cycle in an affected county. Motorists shall comply with emissions requirements for such counties. It is presumed that a vehicle is primarily operated in the county in which it is registered.

(10) Program area--County or counties in which the Texas Department of Public Safety, in coordination with the commission, administers the vehicle emissions inspection and maintenance program contained in the Texas Inspection and Maintenance State Implementation Plan. These program areas include:

(A) the Dallas-Fort Worth program area, consisting of the following counties: Collin, Dallas, Denton, and Tarrant;

(B) the El Paso program area, consisting of El Paso County;

(C) the Houston-Galveston-Brazoria program area, consisting of Brazoria, Fort Bend, Galveston, Harris, and Montgomery Counties; and

(D) the extended Dallas-Fort Worth program area, consisting of Ellis, Johnson, Kaufman, Parker, and Rockwall Counties. These counties became part of the program area as of May 1, 2003.

(11) Retests--Successive vehicle emissions inspections following the failing of an initial test by a vehicle during a single testing cycle.

(12) Testing cycle--Before the single sticker transition date as defined in §114.1 of this title (relating [~~related~~] to Definitions), the annual cycle commencing with the first safety inspection certificate expiration date for which a motor vehicle is subject to a vehicle emissions inspection or beginning on the single sticker transition date, the annual cycle commencing with the first vehicle registration expiration date for which a motor vehicle is subject to a vehicle emissions inspection.

(13) Two-speed idle (TSI) inspection and maintenance test--A measurement of the tailpipe exhaust emissions of a vehicle while the vehicle idles, first at a lower speed and then again at a higher speed.

(14) Uncommon part--A part that takes more than 30 days for expected delivery and installation where a motorist can prove that a reasonable attempt made to locate necessary emission control parts by retail or wholesale part suppliers will exceed the remaining time prior to expiration of:

(A) the vehicle safety inspection certificate prior to the single sticker transition date as defined in §114.1 of this title (relating to Definitions);

(B) the vehicle registration beginning on the single sticker transition date as defined in §114.1 of this title; or

(C) the 30-day period following an out-of-cycle inspection.

§114.7. Low Income Vehicle Repair Assistance, Retrofit [~~Retrofits~~], and Accelerated Vehicle Retirement Program Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used in this chapter have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, §§3.2, 101.1, and 114.1 of this title (relating to Definitions), the following words and terms, when used in Subchapter C, Division 2[~~,~~] of this chapter (relating to Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program) have the following meanings, unless the context clearly indicates otherwise.

(1) Affected county--A county with a motor vehicle emissions inspection and maintenance program established under Texas Transportation Code, §548.301.

(2) Automobile dealership--A business that regularly and actively buys, sells, or exchanges vehicles at an established and permanent location as defined under Texas Transportation Code, §503.301. The term includes a franchised motor vehicle dealer and an independent motor vehicle dealer.

(3) Car--A motor vehicle, other than a golf cart, truck or bus, designed or used primarily for the transportation of persons. A passenger van or sports utility vehicle may be considered a car under this section.

(4) Commercial vehicle--A vehicle that is owned or leased in the regular course of business of a commercial or business entity.

(5) Destroyed--Crushed, shredded, scrapped, or otherwise dismantled to render a vehicle, vehicle's engine, or emission control components permanently and irreversibly incapable of functioning as originally intended.

(6) Dismantled--Extraction of parts, components, and accessories for use in the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program [~~low income vehicle repair assistance, retrofit, and accelerated vehicle retirement program~~] or sold as used parts.

(7) Electric vehicle--A motor vehicle that draws propulsion energy only from a rechargeable energy storage system.

(8) Emissions control equipment--Relating to a motor vehicle that is subject to §114.50(a) of this title (relating to Vehicle Emissions Inspection Requirements). If the vehicle is so equipped, these include: exhaust gas recirculation system, power control module, catalytic converter, oxygen sensors, evaporative purge canister, positive crankcase ventilation valve, and gas cap.

(9) Engine--The fuel-based power source of a motor vehicle that is subject to §114.50(a) of this title (relating to Vehicle Emissions Inspection Requirements).

(10) Fleet vehicle--A motor vehicle operated as one of a group that consists of more than ten motor vehicles and that is owned

and operated by a public or commercial entity or by a private entity other than a single household.

(11) Hybrid vehicle--A motor vehicle that draws propulsion energy from both gasoline or conventional diesel fuel and a rechargeable energy storage system.

(12) LIRAP--Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program [~~Low income vehicle repair assistance, retrofit, and accelerated vehicle retirement program~~].

(13) LIRAP fee--The portion of the vehicle emissions inspection fee that is required to be remitted to the state at the time of annual vehicle registration, as authorized by Texas Health and Safety Code, §382.202, in counties participating in the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program.

(14) LIRAP fee termination date--The first day of the month for the month that the Texas Department of Motor Vehicles issues registration notices without the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) fee, as defined in this section, in a participating county opting out of the LIRAP.

(15) LIRAP opt-out effective date--The date upon which a county that was participating in the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) becomes a non-participating county, which occurs when the grant contract between the county and the executive director, established in §114.64(a) of this title (relating to LIRAP Requirements), is ended, but no earlier than the LIRAP fee termination effective date.

(16) [~~(13)~~] Motor vehicle--A fully self-propelled vehicle having four wheels that has as its primary purpose the transport of a person, persons, or property on a public highway.

(17) [~~(14)~~] Natural gas vehicle--A motor vehicle that uses only compressed natural gas or liquefied natural gas as fuel.

(18) Non-participating county--An affected county that has either:

(A) not opted into the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) authorized by Texas Health and Safety Code, §382.209; or

(B) opted out of the LIRAP according to the procedures specified in §114.64(g) of this title (relating to LIRAP Requirements) and has been released from all program requirements, including assessment of the LIRAP fee as defined in this section and participation in LIRAP grant programs.

(19) [~~(15)~~] Participating county--An affected county in which the commissioners court by resolution has chosen to implement a Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) [~~low income vehicle repair assistance, retrofit, and accelerated vehicle retirement program~~] authorized by Texas Health and Safety Code, §382.209. An affected county that is in the process of opting out of the LIRAP is considered a participating county until the LIRAP opt-out effective date as defined in this section.

(20) [~~(16)~~] Proof of sale--A notice of sale or transfer filed with the Texas Department of Transportation as required under Texas Transportation Code, §503.005, or if unavailable, an affidavit from the selling dealer or documents approved by the commission.

(21) [~~(17)~~] Proof of transfer--A TCEQ form that identifies the vehicle to be destroyed and tracks the transfer of the vehicle to the recycler from the participating county, automobile dealer, and dismantler.

(22) [~~(18)~~] Qualifying motor vehicle--A motor vehicle that meets the requirements for replacement in §114.64 of this title (relating to LIRAP Requirements).

(23) [~~(19)~~] Recognized emissions repair facility--An automotive repair facility as provided in 37 Texas Administrative Code §23.51 (relating to Vehicle Emissions Inspection Requirements) [~~§23.93, relating to Vehicle Emissions Inspection Requirements~~].

(24) [~~(20)~~] Recycled--Conversion of metal or other material into raw material products that have prepared grades; an existing or potential economic value; and using these raw material products in the production of new products.

(25) [~~(21)~~] Replacement vehicle--A vehicle that is in a class or category of vehicles that has been certified to meet federal Tier 2, Bin 5 or cleaner Bin certification under 40 Code of Federal Regulations §86.1811-04, as published in the February 10, 2000, *Federal Register;* has a gross vehicle weight rating of less than 10,000 pounds; have an odometer reading of not more than 70,000 miles; the total cost does not exceed $35,000 and up to $45,000 for hybrid, electric, or natural gas vehicles, or vehicles certified as Tier 2 Bin 3 or cleaner Bin certification under 40 Code of Federal Regulations §86.1811-04, as published in the February 10, 2000, issue of the *Federal Register* (65 FR 6698); has passed a Texas Department of Public Safety motor vehicle safety inspection or safety and emissions inspection within the 15-month period before the application is submitted.

(26) [~~(22)~~] Retrofit--To equip, or the equipping of, an engine or an exhaust or fuel system with new, emissions-reducing parts or equipment designed to reduce air emissions and improve air quality, after the manufacture of the original engine or exhaust or fuel system, so long as the parts or equipment allow the vehicle to meet or exceed state and federal air emissions reduction standards.

(27) [~~(23)~~] Retrofit equipment--Emissions-reducing equipment designed to reduce air emissions and improve air quality that is approved by the United States Environmental Protection Agency and is installed after the manufacture of the original engine, exhaust, or fuel system.

(28) [~~(24)~~] Total cost--The total amount of money paid or to be paid for the purchase of a motor vehicle as set forth as the sales price in the form entitled "Application for Texas Certificate of Title" promulgated by the Texas Department of Transportation. In a transaction that does not involve the use of that form, the term means an amount of money that is equivalent, or substantially equivalent, to the amount that would appear as the sales price on the application for Texas Certificate of Title if that form were used.

(29) [~~(25)~~] Truck--A motor vehicle having a gross vehicle weight rating of less than 10,000 pounds and designed primarily for the transport of persons and cargo.

(30) [~~(26)~~] Vehicle--A motor vehicle subject to §114.50(a) of this title (relating to Vehicle Emissions Inspection Requirements).

(31) [~~(27)~~] Vehicle owner--For the purposes of repair assistance or retrofit, the person who holds the Certificate of Title for the vehicle and/or the operator who is granted possession and is authorized to make repairs under a lease or purchase agreement; and for the purposes of accelerated retirement, the person who holds the Certificate of Title for the vehicle.

(32) [~~(28)~~] Vehicle retirement facility--A facility that, at a minimum, is licensed, certified, or otherwise authorized by the Texas

Department of Transportation to destroy, recycle, or dismantle vehicles.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state 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. VEHICLE INSPECTION AND MAINTENANCE; LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT PROGRAM; AND EARLY ACTION COMPACT COUNTIES

DIVISION 1. VEHICLE INSPECTION AND MAINTENANCE

30 TAC §114.53

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning the State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Additionally, the amendment is proposed under THSC, §382.209, concerning the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP), that authorizes the commission and the Public Safety Commission to adopt rules implementing the LIRAP; and THSC, §382.210, concerning Implementation Guidelines and Requirements for the LIRAP, that authorizes the commission to adopt rules creating guidelines to assist participating counties in implementing the LIRAP.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.209, and 382.210.

§114.53. Inspection and Maintenance Fees.

(a) The following fees must be paid for an emissions inspection of a vehicle at an inspection station. This fee must include one free retest should the vehicle fail the emissions inspection provided that the motorist has the retest performed at the same station where the vehicle originally failed and submits, prior to the retest, a properly completed vehicle repair form showing that emissions-related repairs were performed and the retest is conducted within 15 days of the initial emissions test.

(1) In El Paso County beginning May 1, 2002 and ending on the day before the single sticker transition date as defined in §114.1 of this title (relating to Definitions), any emissions inspection station required to conduct an emissions test in accordance with §114.50(a)(4)(A), (B), or (C) of this title (relating to Vehicle Emissions Inspection Requirements) must collect a fee of $14 and remit $2.50 to the Texas Department of Public Safety (DPS). If the El Paso County Commissioners Court adopts a resolution that is approved by the commission to participate in the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP), the emissions inspection station in El Paso County must collect a fee of $16 and remit to the DPS $4.50 beginning upon the date specified by the commission and ending on the day before the single sticker transition date. Beginning on the single sticker transition date, any emissions inspection station in El Paso County required to conduct an emissions test in accordance with §114.50(a)(4)(A), (B), or (C) of this title must collect a fee not to exceed $11.50.

(2) In the Dallas-Fort Worth program area beginning May 1, 2002 and ending on the day before the single sticker transition date as defined in §114.1 of this title, any emissions inspection station required to conduct an emissions test in accordance with §114.50(a)(1)(A) or (B) of this title and in the extended Dallas-Fort Worth program area beginning May 1, 2003 and ending on the day before the single sticker transition date, any emissions inspection station required to conduct an emissions test in accordance with §114.50(a)(2)(A) or (B) of this title must collect a fee not to exceed $27. Beginning May 1, 2002 and ending on the day before the single sticker transition date in the Dallas-Fort Worth and the extended Dallas-Fort Worth program areas, the emissions inspection station must remit to the DPS $2.50 for each acceleration simulation mode (ASM-2) test and $8.50 for each on-board diagnostics (OBD) test. Beginning on the single sticker transition date in the Dallas-Fort Worth and the extended Dallas-Fort Worth program areas, any emissions inspection station required to conduct an emissions test in accordance with §114.50(a)(1)(A) or (B) and (2)(A) or (B) of this title must collect a fee not to exceed $24.50 for each ASM-2 test and $18.50 for each OBD test.

(3) In the Houston-Galveston-Brazoria program area beginning May 1, 2002 and ending on the day before the single sticker transition date as defined in §114.1 of this title, any emissions inspection station in Harris County required to conduct an emissions test in accordance with §114.50(a)(3)(A) or (B) of this title and beginning May 1, 2003 and ending on the day before the single sticker transition date, any emissions inspection station in Brazoria, Fort Bend, Galveston, and Montgomery Counties required to conduct an emissions test in accordance with §114.50(a)(3)(D) or (E) of this title must collect a fee not to exceed $27. Beginning May 1, 2002 and ending on the day before the single sticker transition date in Brazoria, Fort Bend, Galveston, Harris, and Montgomery Counties, the emissions inspection station must remit to the DPS $2.50 for each ASM-2 test and $8.50 for each OBD test. Beginning on the single sticker transition date in Brazoria, Fort Bend, Galveston, Harris, and Montgomery Counties, any emissions inspection station required to conduct an emissions test in accordance with §114.50(a)(3)(A), (B), (D), or (E) of this title must collect a fee not to exceed $24.50 for each ASM-2 test and $18.50 for each OBD test.

(b) The per-vehicle fee and the amount the inspection station remits to the DPS for a challenge test at an inspection station designated by the DPS, must be the same as the amounts set forth in subsection (a) of this section. The challenge fee must not be charged if the vehicle is retested within 15 days of the initial test.

(c) Inspection stations performing out-of-cycle vehicle emissions inspections for the state's remote sensing element must charge a motorist for an out-of-cycle emissions inspection in the amount specified in subsection (a) of this section resulting from written notification that subject vehicle failed on-road testing. If the vehicle passes the vehicle emissions inspection, the vehicle owner may request reimbursement from the DPS.

(d) Beginning on the single sticker transition date as defined in §114.1 of this title, vehicle owners shall remit as part of the annual vehicle registration fee collected by the Texas Department of Motor Vehicles (DMV) or county tax assessor-collector the amount of the vehicle emissions inspection fee that is required to be remitted to the state.[~~, as specified by the following requirements:~~]

(1) In El Paso County, the following requirements apply. [~~vehicle owners shall remit $2.50 for motor vehicles subject to vehicle emissions inspections to the DMV or county tax assessor-collector at the time of the annual vehicle registration as part of the vehicle emissions inspection fee. If the El Paso County Commissioners Court adopts a resolution that is approved by the commission to participate in the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program, vehicle owners shall remit $4.50 for motor vehicles subject to vehicles emissions inspections to the DMV or county tax assessor-collector at the time of the annual vehicle registration as part of the vehicle emissions inspection fee beginning upon the date specified by the commission.~~]

(A) If participating in the LIRAP, vehicle owners shall remit $4.50 for motor vehicles subject to vehicle emissions inspections to the DMV or county tax assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee. Of the $4.50 remitted, $2.00 constitutes the LIRAP fee as defined in §114.7 of this title (relating to Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program Definitions).

(B) If participating in the LIRAP and in the process of opting out, vehicle owners shall remit $4.50 for motor vehicles subject to vehicle emissions inspections to the DMV or county tax assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee until the LIRAP fee termination effective date as defined in §114.7 of this title. Of the $4.50 remitted, $2.00 constitutes the LIRAP fee as defined in §114.7 of this title. Upon the LIRAP fee termination effective date, vehicle owners shall remit $2.50 for motor vehicles subject to vehicle emissions inspections to the DMV or county tax-assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee.

(C) If not participating in the LIRAP, vehicle owners shall remit $2.50 for motor vehicles subject to vehicle emissions inspections to the DMV or county tax-assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee.

(2) In the Dallas-Fort Worth and the extended Dallas-Fort Worth program areas, the following requirements apply. [~~vehicle owners shall remit $2.50 for motor vehicles subject to ASM-2 tests and $8.50 for motor vehicles subject to OBD tests to the DMV or county tax assessor-collector at the time of the annual vehicle registration as part of the vehicle emissions inspection fee.~~]

(A) Vehicle owners in counties participating in the LIRAP shall remit $2.50 for motor vehicles subject to ASM-2 tests and $8.50 for motor vehicles subject to OBD tests to the DMV or county tax assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee. Of the $8.50 remitted for OBD tests, $6.00 constitutes the LIRAP fee as defined in §114.7 of this title.

(B) Vehicle owners in counties participating in the LIRAP that are in the process of opting out shall remit $2.50 for motor vehicles subject to ASM-2 tests and $8.50 for motor vehicles subject to OBD tests to the DMV or county tax assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee until the LIRAP fee termination effective date as defined in §114.7 of this title. Of the $8.50 remitted for OBD tests, $6.00 constitutes the LIRAP fee as defined in §114.7 of this title. Upon the LIRAP fee termination effective date, vehicle owners in participating counties that are in the process of opting out of the LIRAP shall remit $2.50 for motor vehicles subject to vehicle emissions inspections to the DMV or county tax-assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee.

(C) Vehicle owners in counties not participating in the LIRAP shall remit $2.50 for motor vehicles subject to vehicle emissions inspections to the DMV or county tax-assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee.

(3) In the Houston-Galveston-Brazoria program area, the following requirements apply. [~~vehicle owners shall remit $2.50 for motor vehicles subject to ASM-2 tests and $8.50 for motor vehicles subject to OBD tests to the DMV or county tax assessor-collector at the time of the annual vehicle registration as part of the vehicle emissions inspection fee.~~]

(A) Vehicle owners in counties participating in the LIRAP shall remit $2.50 for motor vehicles subject to ASM-2 tests and $8.50 for motor vehicles subject to OBD tests to the DMV or county tax assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee. Of the $8.50 remitted for OBD tests, $6.00 constitutes the LIRAP fee as defined in §114.7 of this title.

(B) Vehicle owners in counties participating in the LIRAP that are in the process of opting out shall remit $2.50 for motor vehicles subject to ASM-2 tests and $8.50 for motor vehicles subject to OBD tests to the DMV or county tax assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee until the LIRAP fee termination effective date as defined in §114.7 of this title. Of the $8.50 remitted for OBD tests, $6.00 constitutes the LIRAP fee as defined in §114.7 of this title. Upon the LIRAP fee termination effective date, vehicle owners in participating counties that are in the process of opting out of the LIRAP shall remit $2.50 for motor vehicles subject to vehicle emissions inspections to the DMV or county tax-assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee.

(C) Vehicle owners in counties not participating in the LIRAP shall remit $2.50 for motor vehicles subject to vehicle emissions inspections to the DMV or county tax-assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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DIVISION 2. LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT PROGRAM

30 TAC §§114.60, 114.62, 114.64, 114.70

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act (TCAA). The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning the State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Additionally, the amendments are proposed under THSC, §382.209, concerning the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP), that authorizes the commission and the Public Safety Commission to adopt rules implementing the LIRAP; and THSC, §382.210, concerning Implementation Guidelines and Requirements for the LIRAP, that authorizes the commission to adopt rules creating guidelines to assist participating counties in implementing the LIRAP.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.017, 382.209, and 382.210.

§114.60. Applicability for LIRAP.

(a) The provisions of §114.7 of this title (relating to Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program Definitions) and Division 2 of this subchapter (relating to Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program) provide the minimum requirements for county implementation of a Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) and apply to counties that implement a vehicle emissions inspection program and have elected to implement LIRAP provisions.

(b) To be eligible for assistance under this division, vehicles must be subject to §114.50(a) of this title (relating to Vehicle Emissions Inspection Requirements).

(c) LIRAP does not apply to a vehicle that is a:

(1) fleet vehicle;

(2) commercial vehicle;

(3) vehicle owned or leased by a governmental entity;

(4) vehicle registered as a classic motor vehicle as defined by Texas Transportation Code, §502.274;

(5) vehicle registered as an exhibition vehicle, including antique or military vehicles, as defined by Texas Transportation Code, §502.275; [~~or~~]

(6) vehicle not regularly used for transportation during the normal course of daily activities; or[~~.~~]

(7) vehicle subject to §114.50(a) of this title that is registered in a non-participating county.

(d) A participating county must ensure that owners of vehicles under subsection (c) of this section do not receive monetary or compensatory assistance under LIRAP.

§114.62. LIRAP Funding.

(a) The executive director shall provide funding for the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) with available funds from fees collected under §114.53 of this title (relating to Inspection and Maintenance Fees) or other designated and available funds from participating counties.

(b) The program shall be administered in accordance with Texas Government Code, Chapter 783. Programmatic costs may include call-center management, application oversight, invoice analysis, education, outreach, and advertising.

(c) A participating county shall receive, to the extent practicable, funds appropriated for the program [~~funding~~] in reasonable proportion to the amount in fees collected in the participating [~~affected~~] county or area from emissions testing fees designated by the commission.

(d) In a county with a vehicle emissions inspection and maintenance program under Texas Health and Safety Code, §382.202 or §382.302, not more than 10 percent of the money provided for LIRAP may be used for administration of the program.

§114.64. LIRAP Requirements.

(a) Implementation. Participation in the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) is voluntary. An affected county may choose to participate in the program at its discretion. Upon receiving a written request to participate in the LIRAP [~~implement a Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP)~~] by a county commissioners court, the executive director shall authorize the implementation of a LIRAP in the requesting county. The executive director and county shall enter into a grant contract for the implementation of the LIRAP.

(1) The grant contract must provide conditions, requirements, and projected funding allowances for the implementation of the LIRAP.

(2) A participating county may contract with an entity approved by the executive director for services necessary to implement the LIRAP. A participating county or its designated entity shall demonstrate to the executive director that, at a minimum, the county or its designated entity has provided for appropriate measures for determining applicant eligibility and repair effectiveness and ensuring against fraud.

(3) The participating county shall remain the contracted entity even if the county contracts with another county or another entity approved by the executive director to administer the LIRAP.

(b) Repair and retrofit assistance. A LIRAP must provide for monetary or other compensatory assistance to eligible vehicle owners for repairs directly related to bringing certain vehicles that have failed a required emissions test into compliance with emissions requirements or for installing retrofit equipment on vehicles that have failed a required emissions test, if practically and economically feasible, in lieu of or in combination with repairs performed to bring a vehicle into compliance with emissions requirements. Vehicles under the LIRAP must be repaired or retrofitted at a recognized emissions repair facility. To determine eligibility, the participating county or its designated entity shall make applications available for LIRAP participants. The application, at a minimum, must require the vehicle owner to demonstrate that:

(1) the vehicle has failed a vehicle emissions test within 30 days of application submittal;

(2) the vehicle can be driven under its own power to the emissions inspection station or vehicle retirement facility;

(3) the vehicle is currently registered in and has been registered in the participating program county for at least 12 of the 15 months immediately preceding the application for assistance;

(4) the vehicle has passed the safety portion of the Texas Department of Public Safety (DPS) motor vehicle safety and emissions inspection as recorded in the Vehicle Inspection Report (VIR), or provide assurance that actions will be taken to bring the vehicle into compliance with safety requirements;

(5) the vehicle owner's net family income is at or below 300% of the federal poverty level; and

(6) any other requirements of the participating county or the executive director are met.

(c) Accelerated vehicle retirement. A LIRAP must provide monetary or other compensatory assistance to eligible vehicle owners to be used toward the purchase of a replacement vehicle.

(1) To determine eligibility, the participating county or its designated entity shall make applications available for LIRAP participants. The application, at a minimum, must require the vehicle owner to demonstrate that:

(A) the vehicle meets the requirements under subsection (b)(1) - (3) and (5) of this section;

(B) the vehicle has passed a DPS motor vehicle safety or safety and emissions inspection within 15 months prior to application submittal; and

(C) any other requirements of the participating county or the executive director are met.

(2) Eligible vehicle owners of pre-1996 model year vehicles that pass the required United States Environmental Protection Agency (EPA) Start-Up Acceleration Simulation Mode (ASM) standards emissions test, but would have failed the EPA Final ASM standards emissions test, or some other criteria determined by the commission, may be eligible for accelerated vehicle retirement and replacement compensation under this section.

(3) Notwithstanding the vehicle requirement provided under subsection (b)(1) of this section, an eligible vehicle owner of a vehicle that is gasoline powered and is at least 10 years old as determined from the current calendar year (i.e., 2010 minus 10 years equals 2000) and meets the requirements under subsection (b)(2), (3), and (5) of this section, may be eligible for accelerated vehicle retirement and compensation.

(4) Replacement vehicles must:

(A) be in a class or category of vehicles that has been certified to meet federal Tier 2, Bin 5 or cleaner Bin certification under 40 Code of Federal Regulations §86.1811-04, as published in the February 10, 2000, *Federal Register* (65 FR 6698);

(B) have a gross vehicle weight rating of less than 10,000 pounds;

(C) have an odometer reading of not more than 70,000 miles;

(D) be a vehicle, the total cost of which does not exceed $35,000 and up to $45,000 for hybrid, electric, or natural gas vehicles, or vehicles certified as Tier 2 Bin 3 or cleaner Bin certification under 40 Code of Federal Regulations §86.1811-04, as published in the February 10, 2000, issue of the *Federal Register* (65 FR 6698); and

(E) have passed a DPS motor vehicle safety inspection or safety and emissions inspection within the 15-month period before the application is submitted.

(d) Compensation. The participating county shall determine eligibility and approve or deny the application promptly. If the requirements of subsection (b) or (c) of this section are met and based on available funding, the county shall authorize monetary or other compensations to the eligible vehicle owner.

(1) Compensations must be:

(A) no more than $600 and no less than $30 per vehicle to be used for emission-related repairs or retrofits performed at recognized emissions repair facilities, including diagnostics tests performed on the vehicle; or

(B) based on vehicle type and model year of a replacement vehicle for the accelerated retirement of a vehicle meeting the requirements under this subsection. Only one retirement compensation can be used toward one replacement vehicle annually per applicant. The maximum amount toward a replacement vehicle must not exceed:

(i) $3,000 for a replacement car of the current model year or previous three model years, except as provided by clause (iii) of this subparagraph;

(ii) $3,000 for a replacement truck of the current model year or the previous two model years, except as provided by clause (iii) of this subparagraph;

(iii) $3,500 for a replacement hybrid, electric, natural gas, and federal Tier 2 Bin 3 or cleaner Bin certification under 40 Code of Federal Regulations §86.1811-04, as published in the February 10, 2000, issue of the *Federal Register* (65 FR 6698) vehicle of the current model year or the three previous model years.

(2) Vehicle owners shall be responsible for paying the first $30 of emission-related repairs or retrofit costs that may include diagnostics tests performed on the vehicle.

(3) For accelerated vehicle retirement, provided that the compensation levels in paragraph (1)(B) of this subsection are met and minimum eligibility requirements under subsection (c) of this section are met, a participating county may set a specific level of compensation or implement a level of compensation schedule that allows flexibility. The following criteria may be used for determining the amount of financial assistance:

(A) model year of the vehicle;

(B) miles registered on the vehicle's odometer;

(C) fair market value of the vehicle;

(D) estimated cost of emission-related repairs necessary to bring the vehicle into compliance with emission standards;

(E) amount of money the vehicle owner has already spent to bring the vehicle into compliance, excluding the cost of the vehicle emissions inspection; and

(F) vehicle owner's income.

(e) Reimbursement for repairs and retrofits. A participating county shall reimburse the appropriate recognized emissions repair facility for approved repairs and retrofits within 30 calendar days of receiving an invoice that meets the requirements of the county or designated entity. Repaired or retrofitted vehicles must pass a DPS safety and emissions inspection before the recognized emissions repair facility is reimbursed. In the event that the vehicle does not pass the emissions retest after diagnosed repairs are performed, the participating county has the discretion, on a case-by-case basis, to make payment for diagnosed emissions repair work performed.

(f) Reimbursements for replacements. A participating county shall ensure that funds are transferred to a participating automobile dealership no later than 10 business days after the county receives proof of the sale, proof of transfer to a dismantler, and any administrative documents that meet the requirements of the county or designated entity. A list of all administrative documents must be included in the agreements that are entered into by the county or designated entity and the participating automobile dealerships.

(1) A participating county shall provide an electronic means for distributing replacement funds to a participating automobile dealership once all program criteria have been met. The replacement funds may be used as a down payment toward the purchase of a replacement vehicle. Participating automobile dealers shall be located in the State of Texas. Participation in the LIRAP by an automobile dealer is voluntary.

(2) Participating counties shall develop a document for confirming a person's eligibility for purchasing a replacement vehicle and for tracking such purchase.

(A) The document must include at a minimum, the full name of applicant, the vehicle identification number of the retired vehicle, expiration date of the document, the program administrator's contact information, and the amount of money available to the participating vehicle owner.

(B) The document must be presented to a participating dealer by the person seeking to purchase a replacement vehicle before entering into negotiations for a replacement vehicle.

(C) A participating dealer who relies on the document issued by the participating county has no duty to confirm the eligibility of the person purchasing a replacement vehicle in the manner provided by this section.

(g) Opting out of the LIRAP. Participation in the LIRAP is voluntary. A participating county may opt out of the program. Procedures to release a participating county from the LIRAP shall be initiated upon the receipt of a written request to the executive director by the county commissioners court in a participating county.

(1) A written request to opt out of the LIRAP shall request release from the LIRAP fee as defined in §114.7 of this title (relating to Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program Definitions) and the grant contract established in subsection (a) of this section. The written request shall include one of the following possible LIRAP opt-out effective dates as defined in §114.7 of this title:

(A) the LIRAP fee termination effective date as defined in §114.7 of this title; or

(B) the last day of the legislative biennium in which the LIRAP fee termination effective date as defined in §114.7 of this title occurred.

(2) Upon receipt of a written request to be released from participation in the LIRAP, the executive director shall notify, in writing, with a copy sent to the requesting county, the Texas Department of Motor Vehicles (DMV), DPS, and the Legislative Budget Board of Texas that the LIRAP fee should no longer be collected for vehicles undergoing inspection and registration in the affected county.

(3) A county opting out of the LIRAP remains a participating county until the LIRAP opt-out effective date as defined in §114.7 of this title, on which date the county is no longer subject to the LIRAP fee, and the grant contract established in subsection (a) of this section is ended. On the LIRAP opt-out effective date, any unspent balance of allocated funds shall be returned to the commission.

§114.70. Records, Audits, and Enforcement.

(a) A participating county shall submit quarterly audit reports to ensure that the funds provided to implement the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) have been used in accordance with requirements of this division. The quarterly reports (September - November, December - February, March - May, June - August) must be transmitted to the executive director in paper copies or in an electronic database format to be determined by mutual agreement between the state and the participating county no later than 30 days after the end of the quarter.

(b) At a minimum, the quarterly reports must include the following:

(1) name of the county department or entity implementing the program and their mailing address;

(2) name of the official representative of the county department or entity;

(3) amount of funds received during the reporting period;

(4) amount distributed for repair assistance, retrofitting, accelerated retirement, and administrative costs;

(5) information regarding the recognized emissions repair facilities and vehicle retirement facilities participating in the LIRAP, including the number of approved assistance transactions, the amount of each transaction, and the total amounts paid to each facility;

(6) pending amount of funds that must be paid out;

(7) information for each vehicle participating in program, including:

(A) vehicle identification number (VIN);

(B) vehicle license plate number;

(C) name and business address of the Texas Department of Public Safety recognized emissions repair facility or vehicle retirement facility; and

(D) date of vehicle repair, retrofit, or retirement; [~~and~~]

(8) information for each replacement vehicle including:

(A) VIN [~~vehicle identification number (VIN)~~];

(B) make of vehicle;

(C) model year;

(D) odometer reading;

(E) name and business address of seller; and

(9) any other information requested by the executive director.

(c) Records on LIRAP must be maintained for a minimum period of three years by a participating county, its designated entity, a participating recognized emissions repair facility, and a participating vehicle retirement facility. Upon the LIRAP opt out effective date as defined in §114.7 of this title (relating to Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program Definitions), the non-participating county, its designated entity, a participating recognized emissions repair facility, and a participating vehicle retirement facility must maintain program records for the non-participating county for a period of three years. Such records must be available upon request by the executive director for auditing purposes.

(d) A participating county, its designated entity, a participating recognized emissions repair facility, and a participating vehicle retirement facility shall allow the executive director to conduct audits and inspections. For a period of three years after the LIRAP opt-out effective date as defined in §114.7 of this title, a non-participating county, its designated entity, a participating recognized emissions repair facility, and a participating vehicle retirement facility shall allow the executive director to conduct audits and inspections of records from the non-participating county.

(e) A person who, with intent to defraud, sells a vehicle in an accelerated vehicle retirement program under LIRAP commits an offense that is classified as a third degree felony.

(f) A person who causes, suffers, allows, or permits a violation of §114.66(c) and (d) of this title (relating to Disposition of Retired Vehicle) is subject to a civil penalty under Texas Water Code, Chapter 7, Subchapter D, [~~Chapter 7,~~] for each violation. A separate violation occurs with each fraudulent certification or prohibited resale.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Robert Martinez
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Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6812

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DIVISION 3. EARLY ACTION COMPACT COUNTIES

30 TAC §114.87

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC) §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning the State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Additionally, the amendment is proposed under THSC, §382.209, concerning the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP), that authorizes the commission and the Public Safety Commission to adopt rules implementing the LIRAP; and THSC, §382.210, concerning Implementation Guidelines and Requirements for the LIRAP, that authorizes the commission to adopt rules creating guidelines to assist participating counties in implementing the LIRAP.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.209, and 382.210.

§114.87. Inspection and Maintenance Fees.

(a) The following fees must be paid for an emissions inspection of a vehicle at an inspection station in an affected early action compact program county. This fee must include one free retest if the vehicle fails the emissions inspection, provided that the motorist has the retest performed at the same station where the vehicle originally failed; the motorist submits, prior to the retest, a properly completed vehicle repair form showing that emissions-related repairs were performed; and the retest is conducted within 15 days of the initial emissions test. In Travis and Williamson Counties beginning September 1, 2005 and ending on the day before the single sticker transition date as defined in §114.1 of this title (relating to Definitions), any emissions inspection station required to conduct an emissions test in accordance with §114.80 of this title (relating to Applicability) must collect a fee not to exceed $16 and remit $4.50 to the Texas Department of Public Safety (DPS) for each on-board diagnostic and two-speed idle test. In Travis and Williamson Counties beginning on the single sticker transition date, any emissions inspection station required to conduct an emissions test in accordance with §114.80 of this title must collect a fee not to exceed $11.50 for each on-board diagnostic and two-speed idle test.

(b) The per-vehicle fee and the amount the inspection station remits to the DPS for a challenge test at an inspection station designated by the DPS must be the same as the amounts specified in subsection (a) of this section. The challenge fee must not be charged if the vehicle is retested within 15 days of the initial test.

(c) Inspection stations performing out-of-cycle vehicle emissions inspections resulting from written notification that the subject vehicle failed on-road testing (remote sensing) must charge a motorist for an out-of-cycle emissions inspection in the amount specified in subsection (a) of this section. If the vehicle passes the vehicle emissions inspection, the vehicle owner may request reimbursement from the DPS.

(d) Beginning [~~Effective~~] on the single sticker transition date as defined in §114.1 of this title in Travis and Williamson Counties, the following requirements apply. [~~vehicle owners shall remit $4.50 for motor vehicles subject to vehicle emissions inspections to the Texas Department of Motor Vehicles or county tax assessor-collector at the~~

~~time of the annual vehicle registration as part of the vehicle emissions inspection fee.~~]

(1) Vehicle owners in counties participating in Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) shall remit $4.50 for motor vehicles subject to vehicle emissions inspections to the Texas Department of Motor Vehicles (DMV) or county tax assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee. Of the $4.50 remitted, $2.00 constitutes the LIRAP fee as defined in §114.7 of this title (relating to Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program Definitions).

(2) Vehicle owners in counties participating in the LIRAP and in the process of opting out shall remit $4.50 for motor vehicles subject to emissions inspection to the DMV or county tax assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee until the LIRAP fee termination effective date as defined in §114.7 of this title. Of the $4.50 remitted, $2.00 constitutes the LIRAP fee as defined in §114.7 of this title. Upon the LIRAP fee termination effective date, vehicle owners in participating counties that are in the process of opting out of the LIRAP shall remit $2.50 for motor vehicles subject to vehicle emissions inspections to the DMV or county tax-assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee.

(3) Vehicle owners in counties not participating in the LIRAP shall remit $2.50 for motor vehicles subject to vehicle emissions inspection to the DMV or county tax-assessor-collector at the time of annual vehicle registration as part of the vehicle emissions inspection fee.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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CHAPTER 336. RADIOACTIVE SUBSTANCE RULES

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§336.2, 336.105, 336.1111, and 336.1127; and new §336.739.

Background and Summary of the Factual Basis for the Proposed Rules

The purpose of this rulemaking is to implement Senate Bill (SB) 347, 83rd Texas Legislature, 2013, and its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)) and to add non-substantive changes to rules to ensure the commission's continued compatibility with the United States Nuclear Regulatory Commission (NRC). This proposed rulemaking also creates new provisions in Chapter 336 for the compact waste disposal facility license holder who may accept nonparty compact waste for disposal at the facility only if it has been volume reduced.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapter 37, Financial Assurance.

Section by Section Discussion

§336.2, Definitions

The commission proposes to amend §336.2 to revise the definitions of "Perpetual care account" and "Radiation and Perpetual Care Account" to reflect the new name of the dedicated general revenue account created by SB 347. The definitions have been reorganized to keep them in alphabetical order and renumbered accordingly. The commission proposes to amend §336.2(139) to make a non-substantive revision to the definition of "Total effective dose equivalent (TEDE)" to conform to updated federal regulations by adding two sets of parentheses.

§336.105, Schedule of Fees for Other Licenses

The commission proposes to amend §336.105(h)(1) to reflect the new name of the dedicated general revenue account created by SB 347.

§336.739, Volume Reduction

The commission proposes new §336.739 to establish new restrictions on the disposal of low-level radioactive waste in Texas, that was generated outside of Texas or Vermont. Those restrictions require that any such waste to be disposed in Texas must have been volume reduced to a certain degree.

§336.1111, Special Requirements for a License Application for Source Material Recovery and By-product Material Disposal Facilities

The commission proposes to amend §336.1111(1)(H) regarding the application requirements for a new license for source material recovery (i.e., uranium mining) and by-product disposal facilities. Under the current rule, an applicant is required to submit a signed certification from the landowners on which radioactive substances are recovered, stored, processed or disposed to reflect the landowner's consent to that activity and to acknowledge that decommissioning of the licensed site is required even if the licensee fails to perform the required decommissioning. The purpose of this provision was to assure that landowners are fully informed of both on-going licensed activities involving radioactive substances on the property and future closure requirements. The landowner acknowledgement was not intended to provide landowner approval power of a proposed project or disrupt the ability of an applicant to prepare a complete application. In addition, changes in land ownership can complicate and delay an applicant's need for timely application development and processing. Arrangements between landowners and uranium miners regarding use of the property should be made in private agreements and not be made part of the commission's license application processing. Instead of requiring landowners' signatures and consent, the proposed amendment will require the applicant to provide notification to the landowners. The notification is in addition to any required public notice under 30 TAC Chapter 39 of the commission's rules. The proposed revisions to §336.1111(1)(H) require an applicant to submit proof of the effort to provide the landowners with notification by certified and regular United States mail that radioactive materials will be recovered, stored, processed or disposed on the property and that the decommissioning of the property may be required and performed on the licensed site even if the licensee is unable to per-

form the decommissioning. An applicant may be able to submit the required proof in a variety of ways, such as an affidavit from the person responsible for mailing the notification, proof of certified mail receipts, or a description of the efforts implemented to comply with the requirements that is included in the sworn application.

§336.1127, Long-term Care and Maintenance Requirements

The commission proposes to amend §336.1127(a) and (c) to reflect the new name of the dedicated general revenue account created by SB 347. The commission also proposes to amend §336.1127(c) to decrease the assumed annual real interest rate allowed for certain licensee's financial assurance in order to comply with new federal requirements.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no direct fiscal implications are anticipated for the agency or for other units of state or local government as a result of the administration or enforcement of the proposed rules. However, fiscal implications are anticipated for the state and units of local government in as much as the proposed rules relate to the passage of SB 347. In concurrent rulemaking, the commission is proposing provisions in Chapter 37 which would implement other provisions of SB 347. The fiscal implications for these amendments are discussed in the fiscal note for the Chapter 37 rulemaking.

The proposed rulemaking would implement portions of SB 347. SB 347 created a new account within the General Revenue Fund to be called the Environmental Radiation and Perpetual Care Account, for the use of the TCEQ to prevent or mitigate the adverse effects of radioactive substances and ensure protection of public health. Funds in the account could be used for the decontamination, decommissioning, stabilization, reclamation, maintenance, surveillance, control, storage, and disposal of radioactive substances for the protection of the public health and safety, and the environment. The account would consist of fees on licenses and registrations as well as revenues from the 20% surcharge on nonparty compact waste previously deposited into the Low Level Radioactive Waste Account 088. This surcharge would now be deposited into the newly-created Environmental Radiation and Perpetual Care Account instead of Account 088. However, as part of the legislature's funds consolidation efforts, through the passage of House Bill 6, 83rd Texas Legislature, 2013, the new account was abolished just after it was established. Fee revenue that was required by SB 347 to be deposited into the new Environmental Radiation and Perpetual Care Account is now going into the General Revenue Fund.

In anticipation of the re-creation of the Environmental Radiation and Perpetual Care Account by the 84th Texas Legislature, 2015, and the re-dedication of funds in the account for low-level radioactive site closure, post closure and corrective action activities, and to implement provisions of SB 347, the commission is proposing this rulemaking.

The proposed amendments to Chapter 336 would revise the definitions of "Perpetual care account" and "Radiation and Perpetual Care Account" to reflect the name of the dedicated general revenue account created by SB 347. The proposed rules would also make a non-substantive revision to the definition of "Total effective dose equivalent" to conform to updated federal regulations. The proposed rulemaking would amend the schedule of fees in §336.105(h)(1) to reflect the name of the dedicated general revenue account created by SB 347. No fiscal implications are anticipated from these proposed changes. This account was created and then abolished by the 83rd Texas Legislature, 2013, but it is assumed that the account will be re-created as TCEQ and the Texas Department of State Health Services (DSHS) each require their respective perpetual care accounts for the entities they regulate.

As required by SB 347, the proposed rules also require that waste generated outside of Texas or Vermont that is to be disposed of in Texas, must be volume reduced. The commission also proposes to amend §336.1127(c) to decrease the assumed annual real interest rate allowed for certain licensee's financial assurance in order to comply with new federal requirements. This proposed revision is not anticipated to have significant fiscal implications.

Because SB 347 increases the curie capacity of nonparty waste that may be disposed at the site to 275,000 curies per year, an increase in revenue was anticipated from the 20% surcharge fee on nonparty waste. This revenue was to be deposited to the credit of Environmental Radiation and Perpetual Care Account. The agency estimated that $4.6 million would be generated from the surcharge on nonparty waste per year. However, because this account was abolished, this anticipated revenue will now go into the General Revenue Fund. This will be in addition to the already estimated $4.6 million that is currently collected from the 20% surcharge fee.

SB 347 provided that beginning September 1, 2015, the license holder may only accept nonparty waste for disposal if the waste has been volume-reduced and the license holder collects a fee to support the compact commission. However, if volume reduction would change the waste classification to greater than Class C, volume reduction will not be required. Further, the license holder may not dispose of nonparty Class A waste unless it is containerized. The license holder may collect a fee and dispose of not more than the greater of 1.167 million curies of nonparty waste or an amount of nonparty waste equal to 30% of the initial licensed capacity of the facility. SB 347 sets the annual nonparty waste curie limit at 275,000 curies. The legislature may revise these limits based on the TCEQ's capacity study due in 2016.

SB 347 also requires TCEQ and DSHS to collect a 5% fee on the annual license cost for radioactive material licensees. The 5% fee and the transportation fee required in THSC, §401.052(d) collected by TCEQ were to be deposited into the Environmental Radiation and Perpetual Care Account. Further, SB 347 repeals the $500,000 cap on the 5% and transportation fees, and sets a new cap of $100 million (total for both the Radiation and Perpetual Care Account and the Environmental Radiation and Perpetual Care Account) and requires reinstatement of the fees if the combined balance of the funds is subsequently reduced to $50 million or less. SB 347 further provides that the 20% surcharge on disposing of nonparty low-level radioactive waste continues to be collected regardless of whether the cap is reached. SB 347 carves out two separate caps within the $100 million cap for both compact generators and the uranium industry. Compact generators retain the original $500,000 cap on the amount of the transportation fee they are required to pay. The cap for the 5% fee of the annual cost for licensees for the extraction, processing, or concentration of uranium or thorium from ore is set at $2 million and they are not required to pay the 5% fee until they begin operations.

Based on 2012 revenue from the annual license for the extraction, processing, or concentration of uranium or thorium from

ore, it is estimated that the 5% license surcharge will generate $50,000 per year in new revenue. It is estimated the $2 million cap will be reached in 40 years based on the 2012 revenue. This additional revenue was to be deposited to the credit of the Environmental Radiation and Perpetual

Care Account but will now be deposited into the General Revenue Fund.

The 5% surcharge for Compact Waste Disposal Facility License (CWF) and By-Product Licenses (BYP) will be collected until their cap is reached. As a result of raising the cap it is estimated that an additional $88,000 per year will be collected based on 2012 collected revenue from the 5% license surcharge on BYP and CWF. This additional revenue was to be deposited to the credit of the Environmental Radiation and Perpetual Care Account. It is projected that this fee will be suspended within three years as a result of cap being reached.

The total additional revenue deposited into the Environmental Radiation and Perpetual Care Account was estimated to be approximately $9.2 million per year based on the 275,000 curie capacity and the 5% license surcharges.

In addition, the revenue deposited into General Revenue from the 5% Gross Receipts Fee was projected to increase. It was assumed that receipts by the facility will increase by $22 million from the increase in non-party curie capacity to 275,000. This will correlate to an increase of $1.1 million per year from for the 5% Gross Receipts Fee beginning in 2015. Andrews County is estimated to collect an additional $1.1 million from additional 5% gross receipts as result of the increase in curie capacity to 275,000 per year. Due to the abolishment of the Environmental Radiation and Perpetual Care Account, it is estimated that an additional $9.2 million per year will be deposited into the General Revenue Fund.

Public Benefits and Costs

Mr. Horvath has 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 in compliance with state law and the potential for a dedicated account and funding for post closure and corrective action activities associated with the low-level radioactive waste disposal site, assuming the legislature re-creates the account.

No direct fiscal implications are anticipated for individuals as a result of the proposed rulemaking. Any additional costs to businesses are an indirect result of this rulemaking and a direct result of the passage of SB 347.

It is assumed that receipts by the low-level radioactive waste facility will increase by $22 million from the increase in non-party curie capacity to 275,000. All radioactive material licensees will be required to pay a 5% fee of their annual license cost. At this time, TCEQ has 14 radioactive material licenses issued to 11 companies. Costs from the 5% surcharge on licenses is estimated to be approximately $138,000 for the first three years the rules are in effect as the surcharge for CWF and BYP is expected to reach its cap. The remaining two years of the five-year period would see an increase in costs of $50,000 each year for the annual license costs for the extraction, processing, or concentration of uranium or thorium from ore. Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect. There are an estimated six small or micro-businesses that may be subject to the 5% surcharge on licenses. This surcharge is not a direct result of this rulemaking but rather a result of the passage of SB 347.

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 implement state law and therefore are consistent with the health, safety, or environmental and economic welfare of the state.

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 proposes the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking action implements legislative requirements in SB 347 regarding funding and subject to appropriation by the legislature of the Environmental Radiation and Perpetual Care Account. The proposed rulemaking action also implements the option for the low-level radioactive waste disposal compact waste facility license holder to accept non-party compact waste for disposal only if it is volume-reduced as provided by commission rule and subject to the license holder's surcharge and may be subject to a commission fee. The fees and surcharge if collected at all will be deposited into the Environmental Radiation and Perpetual Care Account. The proposal to Chapter 336 is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because financial assurance and this fund was already required for these licensing programs. The proposed rulemaking only changes the name for the fund that is administered by the commission and the commission will only be implementing an appropriation of the state budget from the legislature following an order from the Texas Comptroller of Public Accounts. While there could be new costs associated with obtaining a financial assurance mechanism that meets the requirements of the proposed rules, the commission does not expect that the costs to adversely affect the economy, productivity, or competition in a material way.

Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by

federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

THSC, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, Texas is an "Agreement State" authorized by the NRC to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The proposed rules are compatible with federal law.

The proposed rules do not exceed an express requirement of state law. THSC, Chapter 401, establishes general requirements, including requirements for public notices, for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. The purpose of the rulemaking is to implement statutory requirements consistent with recent amendments to THSC, Chapter 401, as provided in SB 347.

The proposed rules are compatible with a requirement of a delegation agreement or contract between the state and an agency of the federal government. Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rules are compatible with the NRC requirements and the requirements for retaining status as an "Agreement State." This rulemaking is proposed under the specific authority of THSC, Chapter 401. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances.

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

Takings Impact Assessment

The commission evaluated this proposed rulemaking and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that the Private Real Property Rights Preservation Act does not apply to this proposed rulemaking because these rules implement SB 1604, 80th Texas Legislature, 2007, transferring certain regulatory responsibilities from DSHS to the commission and is an action reasonably taken to fulfill an obligation mandated by federal law. Financial assurance is required for these licensing programs under the NRC's requirements.

Nevertheless, the commission further evaluated this proposed rulemaking and performed a preliminary assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of this proposed rulemaking is to implement changes to the TRCA required by SB 347, for the deposit of funds into the Environmental Radiation and Perpetual Care Account. The proposed rule amendments to Chapter 336 would require nonparty compact waste, if eligible, for disposal at the low-level radioactive waste compact disposal facility by the license holder to be volume reduced by a factor of three subject to proposed volume reduction rules and a surcharge collected by the license holder. The surcharge, if collected, will be deposited to the credit of the Environmental Radiation and Perpetual Care Account.

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

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.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on January 13, 2015, at 10:00 a.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

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

Submittal of Comments

Written comments may be submitted to Kris Hogan, 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 2013-056-037-WS. The comment period closes on January 20, 2015. 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 Bobby Janecka, Radioactive Material Licensing Section, (512) 239-6415.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §336.2

Statutory Authority

The amendment is proposed under the specific authority of Texas Health and Safety Code (THSC), Chapter 401. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. The amendment is also proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under TWC and other laws of the state. The amendment is proposed to implement Senate Bill 347, 83rd Texas Legislature, 2013, and its amendments to THSC, Chapter 401 and to add nonsubstantive changes to rules to ensure the commission's continued compatibility with the United States Nuclear Regulatory Commission.

§336.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, or as described in Chapter 3 of this title (relating to Definitions), unless the context clearly indicates otherwise. Additional definitions used only in a certain subchapter will be found in that subchapter.

(1) Absorbed dose--The energy imparted by ionizing radiation per unit mass of irradiated material. The units of absorbed dose are the rad and the gray (Gy).

(2) Accelerator-produced radioactive material--Any material made radioactive by a particle accelerator.

(3) Activity--The rate of disintegration (transformation) or decay of radioactive material. The units of activity are the curie (Ci) and the becquerel (Bq).

(4) Adult--An individual 18 or more years of age.

(5) Agreement state--Any state with which the United States Nuclear Regulatory Commission (NRC) or the Atomic Energy Commission has entered into an effective agreement under the Atomic Energy Act of 1954, §274b, as amended through October 24, 1992 (Public Law 102-486).

(6) Airborne radioactive material--Any radioactive material dispersed in the air in the form of dusts, fumes, particulates, mists, vapors, or gases.

(7) Airborne radioactivity area--A room, enclosure, or area in which airborne radioactive materials, composed wholly or partly of licensed material, exist in concentrations:

(A) in excess of the derived air concentrations (DACs) specified in Table I of §336.359(d) [~~§336.359, Appendix B, Table I, Column 1,~~] of this title (relating to Appendix B. Annual Limits on Intake (ALI) and Derived Air Concentrations (DAC) of Radionuclides for Occupational Exposure; Effluent Concentrations; Concentrations for Release to Sanitary Sewerage); or

(B) to a degree that an individual present in the area without respiratory protective equipment could exceed, during the hours an individual is present in a week, an intake of 0.6% of the ALI or 12 DAC-hours.

(8) Air-purifying respirator--A respirator with an air-purifying filter, cartridge, or canister that removes specific air contaminants by passing ambient air through the air-purifying element.

(9) Annual limit on intake (ALI)--The derived limit for the amount of radioactive material taken into the body of an adult worker by inhalation or ingestion in a year. ALI is the smaller value of intake of a given radionuclide in a year by the "reference man" that would result in a committed effective dose equivalent of 5 rems (0.05 sievert) or a committed dose equivalent of 50 rems (0.5 sievert) to any individual organ or tissue. ALI values for intake by ingestion and by inhalation of selected radionuclides are given in Table I, Columns 1 and 2[~~,~~] of §336.359(d)[~~, Appendix B,~~] of this title (relating to Appendix B. Annual Limits on Intake (ALI) and Derived Air Concentrations (DAC) of Radionuclides for Occupational Exposure; Effluent Concentrations; Concentrations for Release to Sanitary Sewerage).

(10) As low as is reasonably achievable (ALARA)--Making every reasonable effort to maintain exposures to radiation as far below the dose limits in this chapter as is practical, consistent with the purpose for which the licensed activity is undertaken, taking into account the state of technology, the economics of improvements in relation to the state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of ionizing radiation and licensed radioactive materials in the public interest.

(11) Assigned protection factor (APF)--The expected workplace level of respiratory protection that would be provided by a properly functioning respirator or a class of respirators to properly fitted and trained users. Operationally, the inhaled concentration can be estimated by dividing the ambient airborne concentration by the APF.

(12) Atmosphere-supplying respirator--A respirator that supplies the respirator user with breathing air from a source independent of the ambient atmosphere, and includes supplied-air respirators (SARs) and self-contained breathing apparatus (SCBA) units.

(13) Background radiation--Radiation from cosmic sources; non-technologically enhanced naturally-occurring radioactive material, including radon (except as a decay product of source or special nuclear material) and global fallout as it exists in the environment from the testing of nuclear explosive devices or from past nuclear accidents such as Chernobyl that contribute to background radiation and are not under the control of the licensee. "Background radiation" does not include radiation from radioactive materials regulated by the commission, Texas Department of State Health Services, NRC, or an Agreement State.

(14) Becquerel (Bq)--See §336.4 of this title (relating to Units of Radioactivity).

(15) Bioassay--The determination of kinds, quantities, or concentrations, and, in some cases, the locations of radioactive material in the human body, whether by direct measurement (in vivo counting) or by analysis and evaluation of materials excreted or removed from the human body. For purposes of the rules in this chapter, "radiobioassay" is an equivalent term.

(16) Byproduct material--

(A) A radioactive material, other than special nuclear material, that is produced in or made radioactive by exposure to radiation incident to the process of producing or using special nuclear material;

(B) The tailings or wastes produced by or resulting from the extraction or concentration of uranium or thorium from ore pro-

cessed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes, and other tailings having similar radiological characteristics. Underground ore bodies depleted by these solution extraction processes do not constitute "byproduct material" within this definition;

(C) Any discrete source of radium-226 that is produced, extracted, or converted after extraction, for use for a commercial, medical, or research activity;

(D) Any material that has been made radioactive by use of a particle accelerator, and is produced, extracted, or converted for use for a commercial, medical, or research activity; and

(E) Any discrete source of naturally occurring radioactive material, other than source material, that is extracted or converted after extraction for use in a commercial, medical, or research activity and that the NRC, in consultation with the Administrator of the United States Environmental Protection Agency (EPA), the United States Secretary of Energy, the United States Secretary of Homeland Security, and the head of any other appropriate Federal agency, determines would pose a threat similar to the threat posed by a discrete source of radium-226 to the public health and safety or the common defense and security.

(17) CFR--Code of Federal Regulations.

(18) Class--A classification scheme for inhaled material according to its rate of clearance from the pulmonary region of the lung. Materials are classified as D, W, or Y, which applies to a range of clearance half-times: for Class D (Days) of less than ten days, for Class W (Weeks) from 10 to 100 days, and for Class Y (Years) of greater than 100 days. For purposes of the rules in this chapter, "lung class" and "inhalation class" are equivalent terms.

(19) Collective dose--The sum of the individual doses received in a given period of time by a specified population from exposure to a specified source of radiation.

(20) Committed dose equivalent ($H_{T,50}$) (CDE)--The dose equivalent to organs or tissues of reference (T) that will be received from an intake of radioactive material by an individual during the 50-year period following the intake.

(21) Committed effective dose equivalent ($H_{E,50}$) (CEDE)--The sum of the products of the weighting factors applicable to each of the body organs or tissues that are irradiated and the committed dose equivalent to each of these organs or tissues.

(22) Compact--The Texas Low-Level Radioactive Waste Disposal Compact established under Texas Health and Safety Code, §403.006 and Texas Low-Level Radioactive Waste Disposal Compact Consent Act, Public Law Number 105-236 (1998).

(23) Compact waste--Low-level radioactive waste that:

(A) is generated in a host state or a party state; or

(B) is not generated in a host state or a party state, but has been approved for importation to this state by the compact commission under §3.05 of the compact established under Texas Health and Safety Code, §403.006.

(24) Compact waste disposal facility--The low-level radioactive waste land disposal facility licensed by the commission under Subchapter H of this chapter (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) for the disposal of compact waste.

(25) Constraint (dose constraint)--A value above which specified licensee actions are required.

(26) Critical group--The group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances.

(27) Curie (Ci)--See §336.4 of this title (relating to Units of Radioactivity).

(28) Declared pregnant woman--A woman who has voluntarily informed the licensee, in writing, of her pregnancy and the estimated date of conception. The declaration remains in effect until the declared pregnant woman withdraws the declaration in writing or is no longer pregnant.

(29) Decommission--To remove (as a facility) safely from service and reduce residual radioactivity to a level that permits:

(A) release of the property for unrestricted use and termination of license; or

(B) release of the property under restricted conditions and termination of the license.

(30) Deep-dose equivalent (H_d) (which applies to external whole-body exposure)--The dose equivalent at a tissue depth of one centimeter (1,000 milligrams/square centimeter).

(31) Demand respirator--An atmosphere-supplying respirator that admits breathing air to the facepiece only when a negative pressure is created inside the facepiece by inhalation.

(32) Depleted uranium--The source material uranium in which the isotope uranium-235 is less than 0.711%, by weight, of the total uranium present. Depleted uranium does not include special nuclear material.

(33) Derived air concentration (DAC)--The concentration of a given radionuclide in air which, if breathed by the "reference man" for a working year of 2,000 hours under conditions of light work (inhalation rate of 1.2 cubic meters of air/hour), results in an intake of one ALI. DAC values are given in Table I, Column 3, of §336.359(d)[~~, Appendix B,~~] of this title (relating to Appendix B. Annual Limits on Intake (ALI) and Derived Air Concentrations (DAC) of Radionuclides for Occupational Exposure; Effluent Concentrations; Concentrations for Release to Sanitary Sewerage).

(34) Derived air concentration-hour (DAC-hour)--The product of the concentration of radioactive material in air (expressed as a fraction or multiple of the derived air concentration for each radionuclide) and the time of exposure to that radionuclide, in hours. A licensee shall take 2,000 DAC-hours to represent one ALI, equivalent to a committed effective dose equivalent of 5 rems (0.05 sievert).

(35) Discrete source--A radionuclide that has been processed so that its concentration within a material has been purposely increased for use for commercial, medical, or research activities.

(36) Disposal--With regard to low-level radioactive waste, the isolation or removal of low-level radioactive waste from mankind and mankind's environment without intent to retrieve that low-level radioactive waste later.

(37) Disposable respirator--A respirator for which maintenance is not intended and that is designed to be discarded after excessive breathing resistance, sorbent exhaustion, physical damage, or end-of-service-life renders it unsuitable for use. Examples of this type of respirator are a disposable half-mask respirator or a disposable escape-only SCBA [~~self-contained breathing apparatus (SCBA)~~].

(38) Distinguishable from background--The detectable concentration of a radionuclide is statistically different from the background concentration of that radionuclide in the vicinity of the

site or, in the case of structures, in similar materials using adequate measurement technology, survey, and statistical techniques.

(39) Dose--A generic term that means absorbed dose, dose equivalent, effective dose equivalent, committed dose equivalent, committed effective dose equivalent, total organ dose equivalent, or total effective dose equivalent. For purposes of the rules in this chapter, "radiation dose" is an equivalent term.

(40) Dose equivalent (H_T)--The product of the absorbed dose in tissue, quality factor, and all other necessary modifying factors at the location of interest. The units of dose equivalent are the rem and sievert (Sv).

(41) Dose limits--The permissible upper bounds of radiation doses established in accordance with the rules in this chapter. For purposes of the rules in this chapter, "limits" is an equivalent term.

(42) Dosimetry processor--An individual or organization that processes and evaluates individual monitoring devices in order to determine the radiation dose delivered to the monitoring devices.

(43) Effective dose equivalent (H_E)--The sum of the products of the dose equivalent to each organ or tissue (H_T) and the weighting factor (w_T) applicable to each of the body organs or tissues that are irradiated.

(44) Embryo/fetus--The developing human organism from conception until the time of birth.

(45) Entrance or access point--Any opening through which an individual or extremity of an individual could gain access to radiation areas or to licensed radioactive materials. This includes portals of sufficient size to permit human access, irrespective of their intended use.

(46) Environmental Radiation and Perpetual Care Account--An account in the general revenue fund established for the purposes specified in the Texas Health and Safety Code, §401.306.

(47) [~~(46)~~] Exposure--Being exposed to ionizing radiation or to radioactive material.

(48) [~~(47)~~] Exposure rate--The exposure per unit of time.

(49) [~~(48)~~] External dose--That portion of the dose equivalent received from any source of radiation outside the body.

(50) [~~(49)~~] Extremity--Hand, elbow, arm below the elbow, foot, knee, and leg below the knee. The arm above the elbow and the leg above the knee are considered part of the whole body.

(51) [~~(50)~~] Federal facility waste--Low-level radioactive waste that is the responsibility of the federal government under the Low-Level Radioactive Waste Policy Act, as amended by the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 United States Code, §2021b - 2021j). Excluded from this definition is low-level radioactive waste that is classified as greater than Class C in §336.362 of this title (relating to Appendix E. Classification and Characteristics of Low-Level Radioactive Waste).

(52) [~~(51)~~] Federal facility waste disposal facility--A low-level radioactive waste land disposal facility for the disposal of federal facility waste licensed under Subchapters H and J of this chapter (relating to Licensing Requirement of Near-Surface Land Disposal of Low-Level Radioactive Waste, and Federal Facility Waste Disposal Facility).

(53) [~~(52)~~] Filtering facepiece (dust mask)--A negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium, not equipped with elastomeric sealing surfaces and adjustable straps.

(54) [~~(53)~~] Fit factor--A quantitative estimate of the fit of a particular respirator to a specific individual, and typically estimates the ratio of the concentration of a substance in ambient air to its concentration inside the respirator when worn.

(55) [~~(54)~~] Fit test--The use of a protocol to qualitatively or quantitatively evaluate the fit of a respirator on an individual.

(56) [~~(55)~~] General license--An authorization granted by an agency under its rules which is effective without the filing of an application with that agency or the issuance of a licensing document to the particular person.

(57) [~~(56)~~] Generally applicable environmental radiation standards--Standards issued by the EPA under the authority of the Atomic Energy Act of 1954, as amended through October 4, 1996, that impose limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material.

(58) [~~(57)~~] Gray (Gy)--See §336.3 of this title (relating to Units of Radiation Exposure and Dose).

(59) [~~(58)~~] Hazardous waste--Hazardous waste as defined in §335.1 of this title (relating to Definitions).

(60) [~~(59)~~] Helmet--A rigid respiratory inlet covering that also provides head protection against impact and penetration.

(61) [~~(60)~~] High radiation area--An area, accessible to individuals, in which radiation levels from radiation sources external to the body could result in an individual receiving a dose equivalent in excess of 0.1 rem (1 millisievert) in one hour at 30 centimeters from the radiation source or 30 centimeters from any surface that the radiation penetrates.

(62) [~~(61)~~] Hood--A respiratory inlet covering that completely covers the head and neck and may also cover portions of the shoulders and torso.

(63) [~~(62)~~] Host state--A party state in which a compact facility is located or is being developed. The State of Texas is the host state under the Texas Low-Level Radioactive Waste Disposal Compact, §2.01, established under Texas Health and Safety Code, §403.006.

(64) [~~(63)~~] Individual--Any human being.

(65) [~~(64)~~] Individual monitoring--The assessment of:

(A) dose equivalent by the use of individual monitoring devices; [~~or~~]

(B) committed effective dose equivalent by bioassay or by determination of the time-weighted air concentrations to which an individual has been exposed, that is, DAC-hours; or

(C) dose equivalent by the use of survey data.

(66) [~~(65)~~] Individual monitoring devices--Devices designed to be worn by a single individual for the assessment of dose equivalent such as film badges, thermoluminescence dosimeters (TLDs), pocket ionization chambers, and personal ("lapel") air sampling devices.

(67) [~~(66)~~] Inhalation class--See "Class."

(68) [~~(67)~~] Inspection--An official examination and/or observation including, but not limited to, records, tests, surveys, and mon-

itoring to determine compliance with the Texas Radiation Control Act (TRCA) and rules, orders, and license conditions of the commission.

(69) [~~(68)~~] Internal dose--That portion of the dose equivalent received from radioactive material taken into the body.

(70) [~~(69)~~] Land disposal facility--The land, buildings and structures, and equipment which are intended to be used for the disposal of low-level radioactive wastes into the subsurface of the land. For purposes of this chapter, a "geologic repository" as defined in 10 CFR §60.2 as amended through October 27, 1988 (53 FR 43421) (relating to Definitions - high-level radioactive wastes in geologic repositories) is not considered a "land disposal facility."

(71) [~~(70)~~] Lens dose equivalent (LDE)--The external exposure of the lens of the eye and is taken as the dose equivalent at a tissue depth of 0.3 centimeter (300 mg/cm^2).

(72) [~~(71)~~] License--See "Specific license."

(73) [~~(72)~~] Licensed material--Radioactive material received, possessed, used, processed, transferred, or disposed of under a license issued by the commission.

(74) [~~(73)~~] Licensee--Any person who holds a license issued by the commission in accordance with the Texas Health and Safety Code, Chapter 401 (Radioactive Materials and Other Sources of Radiation) and the rules in this chapter. For purposes of the rules in this chapter, "radioactive material licensee" is an equivalent term. Unless stated otherwise, "licensee" as used in the rules of this chapter means the holder of a "specific license."

(75) [~~(74)~~] Licensing state--Any state with rules equivalent to the Suggested State Regulations for Control of Radiation relating to, and having an effective program for, the regulatory control of naturally occurring or accelerator-produced radioactive material (NARM) and which has been designated as such by the Conference of Radiation Control Program Directors, Inc.

(76) [~~(75)~~] Loose-fitting facepiece--A respiratory inlet covering that is designed to form a partial seal with the face.

(77) [~~(76)~~] Lost or missing licensed radioactive material--Licensed material whose location is unknown. This definition includes material that has been shipped but has not reached its planned destination and whose location cannot be readily traced in the transportation system.

(78) [~~(77)~~] Low-level radioactive waste--

(A) Except as provided by subparagraph (B) of this paragraph, low-level radioactive waste means radioactive material that:

(i) is discarded or unwanted and is not exempt by a Texas Department of State Health Services rule adopted under the Texas Health and Safety Code, §401.106;

(ii) is waste, as that term is defined by 10 CFR §61.2; and

(iii) is subject to:

(I) concentration limits established under this chapter; and

(II) disposal criteria established under this chapter.

(B) Low-level radioactive waste does not include:

(i) high-level radioactive waste defined by 10 CFR §60.2;

(ii) spent nuclear fuel as defined by 10 CFR §72.3;

(iii) transuranic waste as defined in this section;

(iv) byproduct material as defined by paragraph (16)(B) - (E) of this section;

(v) naturally occurring radioactive material (NORM) waste; or

(vi) oil and gas NORM waste.

(C) When used in this section, the references to 10 CFR sections mean those CFR sections as they existed on September 1, 1999, as required by Texas Health and Safety Code, §401.005.

(79) [~~(78)~~] Lung class--See "Class."

(80) [~~(79)~~] Member of the public--Any individual except when that individual is receiving an occupational dose.

(81) [~~(80)~~] Minor--An individual less than 18 years of age.

(82) [~~(81)~~] Mixed waste--A combination of hazardous waste, as defined in §335.1 of this title (relating to Definitions) and low-level radioactive waste. The term includes compact waste and federal facility waste containing hazardous waste.

(83) [~~(82)~~] Monitoring--The measurement of radiation levels, radioactive material concentrations, surface area activities, or quantities of radioactive material and the use of the results of these measurements to evaluate potential exposures and doses. For purposes of the rules in this chapter, "radiation monitoring" and "radiation protection monitoring" are equivalent terms.

(84) [~~(83)~~] Nationally tracked source--A sealed source containing a quantity equal to or greater than Category 1 or Category 2 levels of any radioactive material listed in §336.351 of this title (relating to Reports of Transactions Involving Nationally Tracked Sources). In this context a sealed source is defined as radioactive material that is sealed in a capsule or closely bonded, in a solid form and which is not exempt from regulatory control. It does not mean material encapsulated solely for disposal, or nuclear material contained in any fuel assembly, subassembly, fuel rod, or fuel pellet. Category 1 nationally tracked sources are those containing radioactive material at a quantity equal to or greater than the Category 1 threshold. Category 2 nationally tracked sources are those containing radioactive material at a quantity equal to or greater than the Category 2 threshold but less than the Category 1 threshold.

(85) [~~(84)~~] Naturally occurring or accelerator-produced radioactive material (NARM)--Any naturally occurring or accelerator-produced radioactive material except source material or special nuclear material.

(86) [~~(85)~~] Naturally occurring radioactive material (NORM) waste--Solid, liquid, or gaseous material or combination of materials, excluding source material, special nuclear material, and byproduct material, that:

(A) in its natural physical state spontaneously emits radiation;

(B) is discarded or unwanted; and

(C) is not exempt under rules of the Texas Department of State Health Services adopted under Texas Health and Safety Code, §401.106.

(87) [~~(86)~~] Near-surface disposal facility--A land disposal facility in which low-level radioactive waste is disposed of in or within the upper 30 meters of the earth's surface.

(88) [~~(87)~~] Negative pressure respirator (tight fitting)--A respirator in which the air pressure inside the facepiece is negative during inhalation with respect to the ambient air pressure outside the respirator.

(89) [~~(88)~~] Nonstochastic effect--A health effect, the severity of which varies with the dose and for which a threshold is believed to exist. Radiation-induced cataract formation is an example of a nonstochastic effect. For purposes of the rules in this chapter, "deterministic effect" is an equivalent term.

(90) [~~(89)~~] Occupational dose--The dose received by an individual in the course of employment in which the individual's assigned duties involve exposure to radiation and/or to radioactive material from licensed and unlicensed sources of radiation, whether in the possession of the licensee or other person. Occupational dose does not include dose received from background radiation, as a patient from medical practices, from voluntary participation in medical research programs, or as a member of the public.

(91) [~~(90)~~] Oil and gas naturally occurring radioactive material (NORM) waste--NORM [~~Naturally occurring radioactive material (NORM)~~] waste that constitutes, is contained in, or has contaminated oil and gas waste as that term is defined in the Texas Natural Resources Code, §91.1011.

(92) [~~(91)~~] On-site--The same or geographically contiguous property that 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 that the property owner controls and to which the public does not have access, is also considered on-site property.

(93) [~~(92)~~] Particle accelerator--Any machine capable of accelerating electrons, protons, deuterons, or other charged particles in a vacuum and discharging the resultant particulate or other associated radiation at energies usually in excess of 1 million electron volts (MeV).

(94) [~~(93)~~] Party state--Any state that has become a party to the compact in accordance with Article VII of the Texas Low-Level Radioactive Waste Disposal Compact, established under Texas Health and Safety Code, §403.006.

(95) [~~(94)~~] Perpetual care account--The Environmental Radiation and Perpetual Care Account [~~radiation and perpetual care account~~] as defined in this section.

(96) [~~(95)~~] Personnel monitoring equipment--See "Individual monitoring devices."

(97) [~~(96)~~] Planned special exposure--An infrequent exposure to radiation, separate from and in addition to the annual occupational dose limits.

(98) [~~(97)~~] Positive pressure respirator--A respirator in which the pressure inside the respiratory inlet covering exceeds the ambient air pressure outside the respirator.

(99) [~~(98)~~] Powered air-purifying respirator (PAPR)--An air-purifying respirator that uses a blower to force the ambient air through air-purifying elements to the inlet covering.

(100) [~~(99)~~] Pressure demand respirator--A positive pressure atmosphere-supplying respirator that admits breathing air to the facepiece when the positive pressure is reduced inside the facepiece by inhalation.

(101) [~~(100)~~] Principal activities--Activities authorized by the license which are essential to achieving the purpose(s) for which the license is issued or amended. Storage during which no licensed material is accessed for use or disposal and activities incidental to decontamination or decommissioning are not principal activities.

(102) [~~(101)~~] Public dose--The dose received by a member of the public from exposure to radiation and/or radioactive material released by a licensee, or to any other source of radiation under the control of the licensee. It does not include occupational dose or doses received from background radiation, as a patient from medical practices, or from voluntary participation in medical research programs.

(103) [~~(102)~~] Qualitative fit test (QLFT)--A pass/fail test to assess the adequacy of respirator fit that relies on the individual's response to the test agent.

(104) [~~(103)~~] Quality factor (Q)--The modifying factor listed in Table I or II of §336.3(c) or (d) of this title (relating to Units of Radiation Exposure and Dose) that is used to derive dose equivalent from absorbed dose.

(105) [~~(104)~~] Quantitative fit test (QNFT)--An assessment of the adequacy of respirator fit by numerically measuring the amount of leakage into the respirator.

(106) [~~(105)~~] Quarter (Calendar quarter)--A period of time equal to one-fourth of the year observed by the licensee (approximately 13 consecutive weeks), providing that the beginning of the first quarter in a year coincides with the starting date of the year and that no day is omitted or duplicated in consecutive quarters.

(107) [~~(106)~~] Rad--See §336.3 of this title (relating to Radiation Exposure and Dose).

(108) [~~(107)~~] Radiation--Alpha particles, beta particles, gamma rays, x-rays, neutrons, high-speed electrons, high-speed protons, and other particles capable of producing ions. For purposes of the rules in this chapter, "ionizing radiation" is an equivalent term. Radiation, as used in this chapter, does not include non-ionizing radiation, such as radio- or microwaves or visible, infrared, or ultraviolet light.

~~[(108) Radiation and Perpetual Care Account--An account in the general revenue fund established for the purposes specified in the Texas Health and Safety Code, §401.305.]~~

(109) Radiation area--Any area, accessible to individuals, in which radiation levels could result in an individual receiving a dose equivalent in excess of 0.005 rem (0.05 millisievert) in one hour at 30 centimeters from the source of radiation or from any surface that the radiation penetrates.

(110) Radiation machine--Any device capable of producing ionizing radiation except those devices with radioactive material as the only source of radiation.

(111) Radioactive material--A naturally-occurring or artificially-produced solid, liquid, or gas that emits radiation spontaneously.

(112) Radioactive substance--Includes byproduct material, radioactive material, low-level radioactive waste, source material, special nuclear material, source of radiation, and NORM waste, excluding oil and gas NORM waste.

(113) Radioactivity--The disintegration of unstable atomic nuclei with the emission of radiation.

(114) Radiobioassay--See "Bioassay."

(115) Reference man--A hypothetical aggregation of human physical and physiological characteristics determined by international consensus. These characteristics shall be used by researchers and

public health workers to standardize results of experiments and to relate biological insult to a common base. A description of "reference man" is contained in the International Commission on Radiological Protection report, ICRP Publication 23, "Report of the Task Group on Reference Man."

(116) Rem--See §336.3 of this title (relating to Units of Radiation Exposure and Dose).

(117) Residual radioactivity--Radioactivity in structures, materials, soils, groundwater, and other media at a site resulting from activities under the licensee's control. This includes radioactivity from all licensed and unlicensed sources used by the licensee, but excludes background radiation. It also includes radioactive materials remaining at the site as a result of routine or accidental releases of radioactive material at the site and previous burials at the site, even if those burials were made in accordance with the provisions of 10 CFR Part 20.

(118) Respiratory protection equipment--An apparatus, such as a respirator, used to reduce an individual's intake of airborne radioactive materials. For purposes of the rules in this chapter, "respiratory protective device" is an equivalent term.

(119) Restricted area--An area, access to which is limited by the licensee for the purpose of protecting individuals against undue risks from exposure to radiation and radioactive materials. Restricted area does not include areas used as residential quarters, but separate rooms in a residential building shall be set apart as a restricted area.

(120) Roentgen (R)--See §336.3 of this title (relating to Units of Radiation Exposure and Dose).

(121) Sanitary sewerage--A system of public sewers for carrying off waste water and refuse, but excluding sewage treatment facilities, septic tanks, and leach fields owned or operated by the licensee.

(122) Sealed source--Radioactive material that is permanently bonded or fixed in a capsule or matrix designed to prevent release and dispersal of the radioactive material under the most severe conditions that are likely to be encountered in normal use and handling.

(123) Self-contained breathing apparatus (SCBA)--An atmosphere-supplying respirator for which the breathing air source is designed to be carried by the user.

(124) Shallow-dose equivalent (H_s) (which applies to the external exposure of the skin of the whole body or the skin of an extremity)--The dose equivalent at a tissue depth of 0.007 centimeter (seven milligrams/square centimeter).

(125) SI--The abbreviation for the International System of Units.

(126) Sievert (Sv)--See §336.3 of this title (relating to Units of Radiation Exposure and Dose).

(127) Site boundary--That line beyond which the land or property is not owned, leased, or otherwise controlled by the licensee.

(128) Source material--

(A) Uranium or thorium, or any combination thereof, in any physical or chemical form; or

(B) ores that contain, by weight, 0.05% or more of uranium, thorium, or any combination thereof. Source material does not include special nuclear material.

(129) Special form radioactive material--Radioactive material which is either a single solid piece or is contained in a sealed capsule that can be opened only by destroying the capsule and which has at least one dimension not less than five millimeters and which satisfies the test requirements of 10 CFR §71.75 as amended through September 28, 1995 (60 FR 50264) (Transportation of License Material).

(130) Special nuclear material--

(A) Plutonium, uranium-233, uranium enriched in the isotope 233 or in the isotope 235, and any other material that the NRC, under the provisions of the Atomic Energy Act of 1954, §51, as amended through November 2, 1994 (Public Law 103-437), determines to be special nuclear material, but does not include source material; or

(B) any material artificially enriched by any of the foregoing, but does not include source material.

(131) Special nuclear material in quantities not sufficient to form a critical mass--Uranium enriched in the isotope 235 in quantities not exceeding 350 grams of contained uranium-235; uranium-233 in quantities not exceeding 200 grams; plutonium in quantities not exceeding 200 grams; or any combination of these in accordance with the following formula: For each kind of special nuclear material, determine the ratio between the quantity of that special nuclear material and the quantity specified in this paragraph [~~above~~] for the same kind of special nuclear material. The sum of such ratios for all of the kinds of special nuclear material in combination shall not exceed 1. For example, the following quantities in combination would not exceed the limitation: (175 grams contained U-235/350 grams) + (50 grams U-233/200 grams) + (50 grams Pu/200 grams) = 1.

(132) Specific license--A licensing document issued by an agency upon an application filed under its rules. For purposes of the rules in this chapter, "radioactive material license" is an equivalent term. Unless stated otherwise, "license" as used in this chapter means a "specific license."

(133) State--The State of Texas.

(134) Stochastic effect--A health effect that occurs randomly and for which the probability of the effect occurring, rather than its severity, is assumed to be a linear function of dose without threshold. Hereditary effects and cancer incidence are examples of stochastic effects. For purposes of the rules in this chapter, "probabilistic effect" is an equivalent term.

(135) Supplied-air respirator (SAR) or airline respirator--An atmosphere-supplying respirator for which the source of breathing air is not designed to be carried by the user.

(136) Survey--An evaluation of the radiological conditions and potential hazards incident to the production, use, transfer, release, disposal, and/or presence of radioactive materials or other sources of radiation. When appropriate, this evaluation includes, but is not limited to, physical examination of the location of radioactive material and measurements or calculations of levels of radiation or concentrations or quantities of radioactive material present.

(137) Termination--As applied to a license, a release by the commission of the obligations and authorizations of the licensee under the terms of the license. It does not relieve a person of duties and responsibilities imposed by law.

(138) Tight-fitting facepiece--A respiratory inlet covering that forms a complete seal with the face.

(139) Total effective dose equivalent (TEDE)--The sum of the effective dose equivalent (for external exposures) and the committed effective dose equivalent (for internal exposures).

(140) Total organ dose equivalent (TODE)--The sum of the deep-dose equivalent and the committed dose equivalent to the organ receiving the highest dose as described in §336.346(a)(6) of this title (relating to Records of Individual Monitoring Results).

(141) Transuranic waste--For the purposes of this chapter, wastes containing alpha emitting transuranic radionuclides with a half-life greater than five years at concentrations greater than 100 nanocuries/gram.

(142) Type A quantity (for packaging)--A quantity of radioactive material, the aggregate radioactivity of which does not exceed A 1 for special form radioactive material or A2 for normal form radioactive material, where A1 and A2 are given in or shall be determined by procedures in Appendix A to 10 CFR Part 71 as amended through September 28, 1995 (60 FR 50264) (Packaging and Transportation of Radioactive Material).

(143) Type B quantity (for packaging)--A quantity of radioactive material greater than a Type A quantity.

(144) Unrefined and unprocessed ore--Ore in its natural form before any processing, such as grinding, roasting, beneficiating, or refining.

(145) Unrestricted area--Any area that is not a restricted area.

(146) User seal check (fit check)--An action conducted by the respirator user to determine if the respirator is properly seated to the face. Examples include negative pressure check, positive pressure check, irritant smoke check, or isoamyl acetate check.

(147) Very high radiation area--An area, accessible to individuals, in which radiation levels from radiation sources external to the body could result in an individual receiving an absorbed dose in excess of 500 rads (five grays) in one hour at one meter from a source of radiation or one meter from any surface that the radiation penetrates.

(148) Violation--An infringement of any provision of the TRCA [~~Texas Radiation Control Act (TRCA)~~] or of any rule, order, or license condition of the commission issued under the TRCA or this chapter.

(149) Waste--Low-level radioactive wastes containing source, special nuclear, or byproduct material that are acceptable for disposal in a land disposal facility. For the purposes of this definition, low-level radioactive waste means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in paragraph (16)(B) - (E) of this section.

(150) Week--Seven consecutive days starting on Sunday.

(151) Weighting factor (w_T) for an organ or tissue (T)--The proportion of the risk of stochastic effects resulting from irradiation of that organ or tissue to the total risk of stochastic effects when the whole body is irradiated uniformly. For calculating the effective dose equivalent, the values of w_T are:
Figure: 30 TAC §336.2(151) (No change.)

(152) Whole body--For purposes of external exposure, head, trunk including male gonads, arms above the elbow, or legs above the knee.

(153) Worker--An individual engaged in activities under a license issued by the commission and controlled by a licensee, but does not include the licensee.

(154) Working level (WL)--Any combination of short-lived radon daughters in one liter of air that will result in the ultimate emission of 1.3×10^5 MeV of potential alpha particle energy. The short-lived radon daughters are: for radon-222: polonium-218, lead-214, bismuth-214, and polonium-214; and for radon-220: polonium-216, lead-212, bismuth-212, and polonium-212.

(155) Working level month (WLM)--An exposure to one working level for 170 hours (2,000 working hours per year divided by 12 months per year is approximately equal to 170 hours per month).

(156) Year--The period of time beginning in January used to determine compliance with the provisions of the rules in this chapter. The licensee shall change the starting date of the year used to determine compliance by the licensee provided that the change is made at the beginning of the year and that no day is omitted or duplicated in consecutive years.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER B RADIOACTIVE SUBSTANCE FEES

30 TAC §336.105

Statutory Authority

The amendment is proposed under the specific authority of Texas Health and Safety Code (THSC), Chapter 401. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. The amendment is also proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under TWC and other laws of the state. The amendment is proposed to implement Senate Bill 347, 83rd Texas Legislature, 2013, and its amendments to THSC, Chapter 401 and to add nonsubstantive changes to rules to ensure the commission's continued compatibility with the United States Nuclear Regulatory Commission.

§336.105. Schedule of Fees for Other Licenses.

(a) Each application for a license under Subchapter F of this chapter (relating to Licensing of Alternative Methods of Disposal of Radioactive Material), Subchapter G of this chapter (relating to Decommissioning Standards), Subchapter K of this chapter (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste from Public Water Systems), Subchapter L of this chapter (relating to Licensing of Source Material Recovery and By-product Material Disposal Facilities), or Subchapter M of this chapter (relating to Licensing of Radioactive Substances Processing and Storage Facilities) must be accompanied by an application fee as follows:

(1) facilities regulated under Subchapter F of this chapter: $50,000;

(2) facilities regulated under Subchapter G of this chapter: $10,000;

(3) facilities regulated under Subchapter K of this chapter: $50,000;

(4) facilities regulated under Subchapter L of this chapter: $463,096 for conventional mining; $322,633 for in situ mining; $325,910 for heap leach; and $374,729 for disposal only; or

(A) if the application fee is not sufficient to cover costs incurred by the commission, then the applicant shall submit a supplemental fee to recover the actual costs incurred by the commission for review of the application and any hearings associated with an application for commercial by-product material disposal under Subchapter L of this chapter in accordance with Texas Health and Safety Code, §401.301(g);

(B) the executive director shall invoice for the amount of the costs incurred quarterly. Payment shall be made within 30 days following the date of the invoice;

(5) facilities regulated under Subchapter M of this chapter: $3,830 for Waste Processing - Class I Exempt; $39,959 for Waste Processing - Class I; $94,661 for Waste Processing - Class II; and $273,800 for Waste Processing - Class III.

(b) An annual license fee shall be paid for each license issued under Subchapters F, G, K, L, and M [~~Subchapter F, Subchapter G, Subchapter K, Subchapter L, and Subchapter M~~] of this chapter. The amount of each annual fee is as follows:

(1) facilities regulated under Subchapter F of this chapter: $25,000;

(2) facilities regulated under Subchapter G of this chapter: $8,400;

(3) facilities regulated under Subchapter K of this chapter: $25,000;

(4) facilities regulated under Subchapter L of this chapter that are operational: $60,929.50; or

(A) if the annual fee is not sufficient to cover costs incurred by the commission, a holder of a license for commercial by-product material disposal issued under Subchapter L of this chapter shall submit a supplemental license fee sufficient to recover the actual costs incurred by the commission. This fee shall recover for the state the actual expenses arising from the regulatory activities associated with the license in accordance with Texas Health and Safety Code, §401.412(d);

(B) the executive director shall invoice for the amount of the costs incurred quarterly. Payment shall be made within 30 days following the date of the invoice;

(5) facilities regulated under Subchapter L of this chapter that are in closure: $60,929.50;

(6) facilities regulated under Subchapter L of this chapter that are in post-closure: $52,011.50 for conventional mining; $26,006 for in situ mining; and $52,011.50 for disposal only;

(7) facilities regulated under Subchapter L of this chapter, if additional noncontiguous source material recovery facility sites are authorized under the same license, the annual fee shall be increased by 25% for each additional site and 50% for sites in closure;

(8) facilities regulated under Subchapter L of this chapter, if an authorization for disposal of by-product material is added to a license, the annual fee shall be increased by 25%;

(9) facilities regulated under Subchapter L of this chapter, the following one-time fees apply if added after an environmental assessment has been completed on a facility:

(A) $28,658 for in situ wellfield on noncontiguous property;

(B) $71,651 for in situ satellite;

(C) $11,235 for wellfield on contiguous property;

(D) $50,756 for non-vacuum dryer; or

(E) $71,651 for disposal (including processing, if applicable) of by-product material; or

(10) facilities regulated under Subchapter M of this chapter: $3,830 for Waste Processing - Class I Exempt; $39,959 for Waste Processing - Class I; $94,661 for Waste Processing - Class II; and $273,800 for Waste Processing - Class III.

(c) An application for a major amendment of a license issued under Subchapter F, G, K, L, or M [~~Subchapter F, Subchapter G, Subchapter K, Subchapter L, or Subchapter M~~] of this chapter must be accompanied by an application fee of $10,000.

(d) An application for renewal of a license issued under Subchapter F, G, K, L, or M [~~Subchapter F, Subchapter G, Subchapter K, Subchapter L, or Subchapter M~~] of this chapter must be accompanied by an application fee of $35,000.

(e) Upon permanent cessation of all disposal activities and approval of the final decommissioning plan, holders of licenses issued under Subchapter F, K, L, or M [~~Subchapter F, Subchapter K, Subchapter L, or Subchapter M~~] of this chapter shall use the applicable fee schedule for subsections (b) and (c) of this section.

(f) For any application for a license issued under this chapter, the commission may assess and collect additional fees from the applicant to recover costs. Recoverable costs include costs incurred by the commission for administrative review, technical review, and hearings associated with the application. The executive director shall send an invoice for the amount of the costs incurred during the period September 1 through August 31 of each year. Payment shall be made within 30 days following the date of the invoice.

(g) If a licensee remitted a biennial licensing fee to the Texas Department of State Health Services during the one year period prior to June 17, 2007, the licensee is not subject to an annual fee under subsection (b) of this section until the expiration of the second year for which the biennial fee was paid.

(h) The commission may charge an additional 5% of annual fee assessed under subsection (b) of this section and §336.103 of this title (relating to Schedule of Fees for Subchapter H Licenses). The fee is non-refundable and will be deposited to the perpetual care account.

(1) The fees collected by the agency in accordance with this subsection shall be deposited to the credit of the Environmental Radiation and Perpetual Care Account, until the fees collectively total $500,000.

(2) If the balance of fees collected in accordance with this subsection is subsequently reduced to $350,000 or less, the agency shall reinstitute assessment of the fee until the balance reaches $500,000.

(i) The holder of a license authorizing disposal of a radioactive substance from other persons shall remit to the commission 5% of the holder's gross receipts received from disposal operations under a license. Payment shall be made within 30 days of the end of each quarter. The end of each quarter is the last day of the months of November,

February, May, and August. This subsection does not apply to the disposal of compact waste or federal facility waste.

(j) The holder of a license authorizing disposal of a radioactive substance from other persons shall remit directly to the host county 5% of the gross receipts disposal operations under a license as required in Texas Health and Safety Code, §401.271(2). Payment shall be made within 30 days of the end of each quarter. The end of each quarter is the last day of the months of November, February, May, and August. This subsection does not apply to the disposal of compact waste or federal facility waste.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER H. LICENSING REQUIREMENTS FOR NEAR-SURFACE LAND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE

30 TAC §336.739

Statutory Authority

The new section is proposed under the specific authority of Texas Health and Safety Code (THSC), Chapter 401. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. The new section is also proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under TWC and other laws of the state. The new section is proposed to implement Senate Bill 347, 83rd Texas Legislature, 2013, and its amendments to THSC, Chapter 401.

§336.739. Volume Reduction.

(a) Beginning September 1, 2015, a licensee may not dispose of low-level radioactive waste, other than party state compact waste, at the Compact Waste Disposal Facility, unless the generator of that waste certifies that the waste has been volume-reduced by at least a factor of three, or less to the greatest extent possible if it is not technically feasible to reduce it by a factor of three, provided that:

(1) volume reduction of that waste does not result in a change of waste classification to a class higher than Class C;

(2) volume reduction does not cause concentrations of radioactivity of that waste to exceed concentration levels, as determined by the executive director; and

(3) at least two unaffiliated commercial radioactive waste processors are licensed companies in operation in the United States and offer low-level radioactive waste volume reduction for that waste.

(b) Wastes that are exempt from these volume reduction requirements include:

(1) irradiated hardware;

(2) solid forms such as non-compactible metals or monoliths;

(3) soils and demolition debris;

(4) sealed sources; and

(5) other waste, as determined by the executive director on a case-by-case basis.

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SUBCHAPTER L. LICENSING OF SOURCE MATERIAL RECOVERY AND BY-PRODUCT MATERIAL DISPOSAL FACILITIES

30 TAC §336.1111, §336.1127

Statutory Authority

The amendments are proposed under the specific authority of Texas Health and Safety Code (THSC), Chapter 401. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. The amendments are also proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under TWC and other laws of the state. The proposed amendments implement Senate Bill 347, 83rd Texas Legislature, 2013, and its amendments to THSC, Chapter 401 and to add nonsubstantive changes to rules to ensure the commission's continued compatibility with the United States Nuclear Regulatory Commission and implement THSC, §401.2625, regarding the commission's authority to grant licenses for source material recovery and by-product disposal.

§336.1111. Special Requirements for a License Application for Source Material Recovery and By-product Material Disposal Facilities.

In addition to the requirements in §336.1109 of this title (relating to General Requirements for the Issuance of Specific Licenses), a license may be issued if the applicant submits the items in paragraph (1) of this section for agency approval and meets the conditions in paragraphs (2) and (3) of this section.

(1) An application for a license must include the following:

(A) for new licenses, an environmental report that includes the results of a one-year preoperational monitoring program and for renewal of licenses, an environmental report containing the results of the operational monitoring program. Both must also include the following:

(i) description of the proposed project or action;

(ii) area/site characteristics including ecology, geology, topography, hydrology, meteorology, historical and cultural landmarks, and archaeology;

(iii) radiological and nonradiological impacts of the proposed project or action, including waterway and groundwater impacts and any long-term impacts;

(iv) environmental effects of accidents;

(v) by-product material disposal, decommissioning, decontamination, and reclamation and impacts of these activities; and

(vi) site and project alternative;

(B) a closure plan for decontamination, decommissioning, restoration, and reclamation of buildings and the site to levels that would allow unrestricted use and for reclamation of the by-product material disposal areas in accordance with the technical requirements of §336.1129 of this title (relating to Technical Requirements);

(C) proposal of an acceptable form and amount of financial security consistent with the requirements of §336.1125 of this title (relating to Financial Assurance [~~Security~~] Requirements);

(D) procedures describing the means employed to meet the requirements of §336.1113(1) and (2) of this title (relating to Specific Terms and Conditions of Licenses) and §336.1129(o) of this title during the operational phase of any project;

(E) specifications for the emissions control and disposition of the by-product material; [~~and~~]

(F) for disposal of by-product material received from others, information on the chemical and radioactive characteristics of the wastes to be received, detailed procedures for receiving and documenting incoming waste shipments, and detailed waste acceptance criteria;[~~.~~]

(G) an adequate operating, radiation safety, and emergency procedures manual; and

(H) for applications for a new license or applications for license amendments to expand the licensed site, proof of mailed notification to the owner or owners of the real property on which radioactive substances are recovered, stored, processed or disposed. The application for a new license must demonstrate that the owner or owners of the real property were sent by certified and regular United States mail, notification from the applicant stating that: [~~a signed certification from the owner or owners of the real property on which radioactive substances are recovered, stored, processed, or disposed acknowledging that:~~]

(i) radioactive substances will be [~~are~~] recovered, stored, processed or disposed on the property [~~with the consent of the property owner or owners~~]; and

(ii) decommissioning by the agency, a surety, or as directed by order may be required and performed on [~~of~~] the licensed site even if the [~~may be required even if the applicant or~~] licensee is unable or fails to decommission the licensed site as required by a license, rule or order of the commission.

(2) Except as provided in this section, the applicant shall not commence construction at the site until the agency has issued the license. Commencement of construction prior to issuance of the license shall be grounds for denial of a license. For an application for a new license to dispose of by-product material that was filed with the Texas Department of State Health Services on or before January 1, 2007, the applicant may commence construction as provided in §336.1135 of this title (relating to Construction Activities), at the applicant's own risk, upon the executive director's issuance of the Environmental Analysis provided under §281.21(f) of this title (relating to Draft Permit, Technical Summary, Fact Sheet, and Compliance History).

(3) An application for a license must be submitted according to the applicable requirements of the Texas Engineering Practice Act, the Texas Geoscience Practice Act, and the Professional Land Surveying Practices Act.

§336.1127. Long-term Care and Maintenance Requirements.

(a) Unless otherwise provided by the agency, each licensee licensed in accordance with this part for disposal of by-product material shall make payments into the Environmental Radiation and Perpetual Care Account in amounts specified by the agency. The agency shall make such determinations on a case-by-case basis.

(b) The final disposition of by-product material should be such that the need for ongoing active maintenance is eliminated to the maximum extent practicable.

(c) A minimum charge of $250,000 (1978 dollars) or more, if determined by the agency, must be paid into the Environmental Radiation and Perpetual Care Account to cover the costs of long-term care and maintenance. The total charge must be paid prior to the termination of a license. With agency approval, the charge may be paid in installments. The total or unpaid portion of the charge must be covered during the term of the license by additional security meeting the requirements of §336.1125 of this title (relating to Financial Assurance [~~Security~~] Requirements). If site surveillance, control, or maintenance requirements at a particular site are determined, on the basis of a site-specific evaluation, to be significantly greater (for example, if fencing or monitoring is determined to be necessary), the agency may specify a higher charge. The total charge must be such that, with an assumed 1.0% [~~2.0%~~] annual real interest rate, the collected funds will yield interest in an amount sufficient to cover the annual costs of site care, surveillance, and where necessary, maintenance. Prior to actual payment, the total charge will be adjusted annually for inflation. The inflation rate to be used is that indicated by the change in the Consumer Price Index published by the United States Department of Labor, Bureau of Labor Statistics.

(d) The requirements of this section apply only to those sites whose ownership is subject to being transferred to the state or the federal government. The total amount of funds collected by the agency in accordance with this section must be transferred to the federal government if title and custody of the by-product material disposal site is transferred to the federal government upon termination of the license.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 21, 2014.

TRD-201405578

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: January 4, 2015
For further information, please call: (512) 239-6812

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 20. TEXAS PROCUREMENT AND SUPPORT SERVICES

SUBCHAPTER G. CONTRACT PROCEDURES

34 TAC §20.384

The Comptroller of Public Accounts proposes an amendment to §20.384, concerning protests. This section is being amended to provide for determinations of protests involving the comptroller's Strategic Sourcing Division by the director of that division.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman 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 by streamlining the Strategic Sourcing Division's procedures with regard to vendor protests. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the amendments may be submitted to Chuks Amajor, Director, Strategic Sourcing, Texas Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

This amendment is proposed under Government Code, §2155.076 which requires the comptroller to adopt rules to provide for protest procedures for resolving vendor protests relating to purchasing issues.

This amendment implements Government Code, §2155.076.

§20.384. Protests.

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

(1) Comptroller's office--The Office of the Comptroller of Public Accounts[~~, an agency of the state~~].

(2) Chief clerk--Deputy [~~deputy~~] comptroller of the comptroller's office.

(3) Director--For protests relating to purchasing issues involving the Texas Procurement and Support Services Division of the comptroller's office (TPASS), the director of TPASS; or, for protests relating to purchasing issues involving the Strategic Sourcing Division [~~Texas Procurement and Support Services~~] of the comptroller's office (SS), the director of SS.

(4) General counsel--General [~~general~~] counsel of the comptroller's office.

(5) Interested parties--All vendors who have submitted bids, proposals or other expressions of interest for the provision of goods or services pursuant to a contract with TPASS or SS [~~Texas Procurement and Support Services of the comptroller's office~~].

(6) Using agency--A state agency, governmental entity, or other entity involved in the contract.

(b) Any actual or prospective bidder, offeror, or contractor who considers himself to have been aggrieved in connection with the solicitation, evaluation, or award of a contract by TPASS or SS [~~Texas Procurement and Support Services~~] may formally protest to the director of the applicable division [~~Texas Procurement and Support Services~~]. Such protests must be made in writing and received by the director [~~of Texas Procurement and Support Services~~] within 10 working days after the protesting party knows, or should have known, of the occurrence of the action that is protested. Formal protests must conform to the requirements of subsections (b) and (d) of this section, and shall be resolved through use of the procedures that are described in subsections (e) - (i) of this section. The protesting party must mail or deliver copies of the protest to the using agency and other interested parties.

(c) In the event of a timely protest under this section, the state shall not proceed further with the solicitation or award of the contract unless the chief clerk, after consultation with the director [~~of Texas Procurement and Support Services~~] and the using agency, makes a written determination that the contract must be awarded without delay, to protect the best interests of the state.

(d) A formal protest must be sworn and contain:

(1) a specific identification of the statutory or regulatory provision that the protesting party alleges has been violated;

(2) a specific description of each action by TPASS or SS, as applicable, [~~Texas Procurement and Support Services~~] that the protesting party alleges to be a violation of the statutory or regulatory provision that the protesting party has identified pursuant to paragraph (1) of this subsection;

(3) a precise statement of the relevant facts;

(4) a statement of any issues of law or fact that the protesting party contends must be resolved;

(5) a statement of the argument and authorities that the protesting party offers in support of the protest; and

(6) a statement that copies of the protest have been mailed or delivered to the using agency and all other identifiable interested parties.

(e) The director [~~of Texas Procurement and Support Services~~] may settle and resolve the dispute over the solicitation or award of a contract at any time before the matter is submitted on appeal to the general counsel. The director [~~of Texas Procurement and Support Services~~] may solicit written responses to the protest from other interested parties.

(f) If the protest is not resolved by mutual agreement, the director [~~of Texas Procurement and Support Services~~] shall issue a written determination that resolves the protest.

(1) If the director [~~of Texas Procurement and Support Services~~] determines that no violation of statutory or regulatory provisions has occurred, then the director [~~of Texas Procurement and Support Services~~] shall inform the protesting party, the using agency, and other interested parties by letter that sets forth the reasons for the determination.

(2) If the director [~~of Texas Procurement and Support Services~~] determines that a violation of any statutory or regulatory provisions has occurred in a situation in which a contract has not been awarded, then the director [~~of Texas Procurement and Support Services~~] shall inform the protesting party, the using agency, and other interested parties of that determination by letter that details the reasons for the determination and the appropriate remedy.

(3) If the director [~~of Texas Procurement and Support Services~~] determines that a violation of any statutory or regulatory provisions has occurred in a situation in which a contract has been awarded, then the director [~~of Texas Procurement and Support Services~~] shall inform the protesting party, the using agency, and other interested parties of that determination by letter that details the reasons for the determination. This letter may include an order that declares the contract void.

(g) The protesting party may appeal a determination of a protest by the director [~~of Texas Procurement and Support Services~~] to the general counsel. An appeal of the director's determination must be in writing and received in the office of the general counsel by not later than 10 working days after the date on which the director has sent written notice of his determination. The scope of the appeal shall be limited to review of the director's determination. The protesting party must mail or deliver to the using agency and all other interested parties a copy of the appeal, which must contain a certified statement that such copies have been provided.

(h) The general counsel may refer the matter to the chief clerk for consideration or may issue a written decision that resolves the protest.

(i) The following requirements shall apply to a protest that the general counsel refers to the chief clerk.

(1) The general counsel shall deliver copies of the appeal and any responses by interested parties to the chief clerk.

(2) The chief clerk may consider any documents that agency staff or interested parties have submitted.

(3) The chief clerk shall issue a written letter of determination of the appeal to the parties which shall be final. In a subsequent open meeting conducted by the chief clerk under §20.383 of this title (relating to Open Meetings for Certain Contract Awards), the chief clerk shall inform the Statewide Procurement Advisory Council of any such recent determinations by the chief clerk on any contract awards made in any open meeting attended by the council.

(4) A protest or appeal that is not filed timely shall not be considered unless good cause for delay is shown or the chief clerk determines that an appeal raises issues that are significant to agency procurement practices or procedures in general.

(5) A written decision that either the chief clerk or the general counsel has issued shall be the final administrative action of the comptroller's office.

(j) TPASS [~~Texas Procurement and Support Services~~] shall maintain all documentation on the purchasing process that is the subject of a TPASS protest or appeal in accordance with the retention schedule of TPASS. SS shall maintain all documentation on the purchasing process that is the subject of a SS protest or appeal in accordance with the retention schedule of SS [~~Texas Procurement and Support Services~~].

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2014.

TRD-201405511
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 4, 2015
For further information, please call: (512) 475-0387

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 362. DEFINITIONS

40 TAC §362.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to §362.1, concerning definitions in that section. The amendment will clarify existing definitions with regard to and add new definitions related to telehealth.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline has also determined that for each of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be the expansion of occupational therapy services for consumers. There will be no effect on small businesses and no anticipated economic cost to persons having to comply.

Comments on the proposal may be submitted in writing to Lea Weiss, Occupational Therapy Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701, (512) 305-6900. Comments may also be submitted electronically to lea@ptot.texas.gov.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 454 of the Occupations Code is affected by this proposal.

§362.1. Definitions.

The following words, terms, and phrases, when used in this part shall have the following meaning, unless the context clearly indicates otherwise.

(1) Act--The Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454 of the Occupations Code.

(2) AOTA--American Occupational Therapy Association.

(3) Applicant--A person who applies for a license to the Texas Board of Occupational Therapy Examiners.

(4) Board--The Texas Board of Occupational Therapy Examiners (TBOTE).

(5) Certified Occupational Therapy Assistant (COTA®)--An individual who uses this term must hold a regular or provisional license to practice or represent self as an occupational therapy assistant in Texas and must practice under the general supervision of an OTR® or OT. An individual who uses this term is responsible for ensuring that he or she is otherwise qualified to use it by maintaining certification with NBCOT.

(6) Class A Misdemeanor--An individual adjudged guilty of a Class A misdemeanor shall be punished by:

(A) A fine not to exceed $4,000;

(B) Confinement in jail for a term not to exceed one year; or

(C) Both such fine and imprisonment (Vernon's Texas Codes Annotated Penal Code §12.21).

(7) Client--The entity that receives occupational therapy. Clients may be individuals (including others involved in the individual's life who may also help or be served indirectly such as a caregiver, teacher, parent, employer, spouse), groups, or populations (i.e., organizations, communities).

(8) Complete Application--Notarized application form with photograph, license fee, jurisprudence examination with at least 70% of questions answered correctly and all other required documents.

(9) Complete Renewal--Contains renewal fee, renewal form with signed continuing education affidavit, home/work address(es) and phone number(s), and jurisprudence examination with at least 70% of questions answered correctly.

(10) Continuing Education Committee--Reviews and makes recommendations to the board concerning continuing education requirements and special consideration requests.

(11) Coordinator of Occupational Therapy Program--The employee of the Executive Council who carries out the functions of the Texas Board of Occupational Therapy Examiners.

[~~(12) Direct Contact--Refers to contact with the client which is face-to-face in person.~~]

(12) [~~(13)~~] Endorsement--The process by which the board issues a license to a person currently licensed in another state, the District of Columbia, or territory of the United States that maintains professional standards considered by the board to be substantially equivalent to those set forth in the Act, and is applying for a Texas license for the first time.

(13) [~~(14)~~] Evaluation--The process of planning, obtaining, documenting and interpreting data necessary for intervention. This process is focused on finding out what the client wants and needs to do and on identifying those factors that act as supports or barriers to performance.

(14) [~~(15)~~] Examination--The Examination as provided for in Section 17 of the Act. The current Examination is the initial certification Examination given by the National Board for Certification in Occupational Therapy (NBCOT).

(15) [~~(16)~~] Executive Council--The Executive Council of Physical Therapy and Occupational Therapy Examiners.

(16) [~~(17)~~] Executive Director--The employee of the Executive Council who functions as its agent. The Executive Council delegates implementation of certain functions to the Executive Director.

(17) Face-to-face--Refers to contact with the client which is visual, real time interaction via electronic/communications technology methods or physical presence.

(18) First Available Examination--Refers to the first scheduled Examination after successful completion of all educational requirements.

(19) Intervention--The process of planning and implementing specific strategies based on the client's desired outcome, evaluation data and evidence, to effect change in the client's occupational performance leading to engagement in occupation to support participation.

(20) Investigation Committee--Reviews and makes recommendations to the board concerning complaints and disciplinary actions regarding licensees and facilities.

(21) Investigator--The employee of the Executive Council who conducts all phases of an investigation into a complaint filed against a licensee, an applicant, or an entity regulated by the board.

(22) Jurisprudence Examination--An examination covering information contained in the Texas Occupational Therapy Practice Act and Texas Board of Occupational Therapy Examiners rules. This test is an open book examination with multiple choice or true-false questions. The passing score is 70%.

(23) License--Document issued by the Texas Board of Occupational Therapy Examiners which authorizes the practice of occupational therapy in Texas.

(24) Medical Condition--A condition of acute trauma, infection, disease process, psychiatric disorders, addictive disorders, or post surgical status. Synonymous with the term health care condition.

(25) NBCOT--National Board for Certification in Occupational Therapy.

(26) Non-licensed Personnel--OT Aide or OT Orderly or other person not licensed by this board who provides support services to occupational therapy practitioners and whose activities require on-the-job training and close personal supervision.

(27) Non-Medical Condition--A condition where the ability to perform occupational roles is impaired by developmental disabilities, learning disabilities, the aging process, sensory impairment, psychosocial dysfunction, or other such conditions which do [~~does~~] not require the routine intervention of a physician.

(28) Occupation--Activities of everyday life, named, organized, and given value and meaning by individuals and a culture. Occupation is everything people do to occupy themselves, including looking after themselves, enjoying life and contributing to the social and economic fabric of their communities.

(29) Occupational Therapist (OT)--An individual who holds a valid regular or provisional license to practice or represent self as an Occupational Therapist in Texas. This definition includes an Occupational Therapist or one who is designated as an Occupational Therapist, Registered (OTR®).

(30) Occupational Therapist, Registered (OTR®)--An individual who uses this term must hold a regular or provisional license to practice or represent self as an Occupational Therapist in Texas by maintaining registration through NBCOT.

(31) Occupational Therapy Practice--Includes:

(A) Methods or strategies selected to direct the process of interventions such as:

(i) Establishment, remediation, or restoration of a skill or ability that has not yet developed or is impaired.

(ii) Compensation, modification, or adaptation of activity or environment to enhance performance.

(iii) Maintenance and enhancement of capabilities without which performance in everyday life activities would decline.

(iv) Health promotion and wellness to enable or enhance performance in everyday life activities.

(v) Prevention of barriers to performance, including disability prevention.

(B) Evaluation of factors affecting activities of daily living (ADL), instrumental activities of daily living (IADL), education, work, play, leisure, and social participation, including:

(i) Client factors, including body functions (such as neuromuscular, sensory, visual, perceptual, cognitive) and body structures (such as cardiovascular, digestive, integumentary, genitourinary systems).

(ii) Habits, routines, roles and behavior patterns.

(iii) Cultural, physical, environmental, social, and spiritual contexts and activity demands that affect performance.

(iv) Performance skills, including motor, process, and communication/interaction skills.

(C) Interventions and procedures to promote or enhance safety and performance in activities of daily living (ADL), instrumental activities of daily living (IADL), education, work, play, leisure, and social participation, including:[~~.~~]

(i) Therapeutic use of occupations, exercises, and activities.

(ii) Training in self-care, self-management, home management and community/work reintegration.

(iii) Development, remediation, or compensation of physical, cognitive, neuromuscular, sensory functions and behavioral skills.

(iv) Therapeutic use of self, including one's personality, insights, perceptions, and judgments, as part of the therapeutic process.

(v) Education and training of individuals, including family members, caregivers, and others.

(vi) Care coordination, case management and transition services.

(vii) Consultative services to groups, programs, organizations, or communities.

(viii) Modification of environments (home, work, school, or community) and adaptation of processes, including the application of ergonomic principles.

(ix) Assessment, design, fabrication, application, fitting and training in assistive technology, adaptive devices, and orthotic devices, and training in the use of prosthetic devices.

(x) Assessment, recommendation, and training in techniques to enhance functional mobility including wheelchair management.

(xi) Driver rehabilitation and community mobility.

(xii) Management of feeding, eating, and swallowing to enable eating and feeding performance.

(xiii) Application of physical agent modalities, and use of a range of specific therapeutic procedures (such as wound care management; techniques to enhance sensory, perceptual, and cognitive processing; manual therapy techniques) to enhance performance skills.

(32) Occupational Therapy Assistant (OTA)--An individual who holds a valid regular or provisional license to practice or represent self as an Occupational Therapy Assistant in Texas, and who is required to be under the continuing supervision of an OT. This definition includes an individual who is designated as a Certified Occupational Therapy Assistant (COTA®) or an Occupational Therapy Assistant (OTA).

(33) Occupational Therapy Plan of Care--A written statement of the planned course of Occupational Therapy intervention for a patient/client. It must include goals, objectives and/or strategies, recommended frequency and duration, and may also include methodologies and/or recommended activities.

(34) Occupational Therapy Practitioners--Occupational Therapists, and Occupational Therapy Assistants licensed by this board.

(35) On-Site--Refers to when the client, the occupational therapy practitioner, and any non-licensed personnel supervised by an occupational therapy practitioner are present at the same time with visual contact via electronic/communications technology methods or physical presence.

(36) [~~(35)~~] Outcome--The focus and targeted end objective of occupational therapy intervention. The overarching outcome of occupational therapy is engagement in occupation to support participation in context(s).

(37) [~~(36)~~] Place(s) of Business--Any facility in which a licensee practices.

(38) [~~(37)~~] Practice--Providing occupational therapy as a clinician, practitioner, educator, or consultant. Only a person holding a license from TBOTE may practice occupational therapy in Texas.

(39) [~~(38)~~] Accredited Educational Program--An educational institution offering a course of study in occupational therapy that has been accredited or approved by the Accreditation Council for Occupational Therapy Education (ACOTE) of the American Occupational Therapy Association.

(40) [~~(39)~~] Rules--Refers to the TBOTE Rules.

(41) [~~(40)~~] Screening--A process used to determine a potential need for occupational therapy interventions, educational and/or other client needs. Screening information may be compiled using observation, client records, the interview process, self-reporting, and/or other documentation.

(42) Telehealth--A mode of service delivery through the use of electronic information or communications technologies to support long-distance clinical health care, client and provider health-related education, public health, and supervision of health-care providers. As a mode of service delivery, telehealth is on-site contact with the client and the occupational therapy practitioner. Telehealth refers only to the practice of occupational therapy by occupational therapy practitioners who are licensed by this board with clients who are located in Texas at the time of the provision of occupational therapy services. Also may be known as other terms including but not limited to telepractice, telemedicine, telecare, telerehabilitation, and e-health services.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2014.

TRD-201405546
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: January 4, 2015
For further information, please call: (512) 305-6900

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CHAPTER 372. PROVISION OF SERVICES

40 TAC §372.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to §372.1, concerning the provision of services. The amendment will clarify the existing rule in general and with regard to telehealth. The amendment will also add the requirement that the occupational therapist who screens, evaluates, or implements the plan of care is responsible for determining the need for the physical presence of an occupational therapy practitioner during any interactions with clients.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline has also determined that for each of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be the expansion of occupational therapy services for consumers. There will be no effect on small businesses and no anticipated economic cost to persons having to comply.

Comments on the proposal may be submitted in writing to Lea Weiss, Occupational Therapy Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701, (512) 305-6900. Comments may also be submitted electronically to lea@ptot.texas.gov.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 454 of the Occupations Code is affected by this proposal.

§372.1. Provision of Services.

(a) The occupational therapist who screens, evaluates, or implements the plan of care is responsible for determining the need for the physical presence of an occupational therapy practitioner during any interactions with clients.

(b) [~~(a)~~] Medical Conditions.

(1) Occupational therapists may evaluate the patient/client to determine the need for occupational therapy services without a referral.

(2) Intervention for a medical condition by an occupational therapy practitioner requires a referral from a licensed referral source.

(3) The referral may be an oral or signed written order. The occupational therapy practitioner must ensure that all oral orders are followed with a signed written order.

(4) If a written referral signed by the referral source is not received by the third treatment or within two weeks from the receipt of the oral referral, whichever is later, the therapist must have documented evidence of attempt(s) to contact the referral source for the written referral (e.g., registered letter, fax, certified letter, email, return receipt, etc.). The therapist must exercise professional judgment to determine cessation or continuation of treatment with a receipt of the written referral.

(c) [~~(b)~~] Non-Medical Conditions.

(1) Consultation, monitored services, and evaluation for need of services may be provided without a referral.

(2) Non-medical conditions do not require a referral. However, a referral must be requested at any time during the evaluation or treatment process when necessary to ensure [~~insure~~] the safety and welfare of the consumer.

(d) [~~(c)~~] Screening. A screening may be performed by an occupational therapy practitioner.

(e) [~~(d)~~] Evaluation.

(1) Only an occupational therapist may perform the evaluation.

(2) An occupational therapy plan of care must be based on an occupational therapy evaluation.

(3) The occupational therapist must have face-to-face, real time interaction with the patient or client during the evaluation process.

(4) The occupational therapist may delegate to an occupational therapy assistant or temporary licensee the collection of data for the assessment. The occupational therapist is responsible for the accuracy of the data collected by the assistant.

(f) [~~(e)~~] Plan of Care.

(1) Only an occupational therapist may initiate, develop, modify or complete an occupational therapy plan of care. It is a violation of the OT Practice Act for anyone other than the evaluating or treating occupational therapist to dictate, or attempt to dictate, when occupational therapy services should or should not be provided, the nature and frequency of services that are provided, when the patient should be discharged, or any other aspect of the provision of occupational therapy as set out in the OT Act and Rules.

(2) The occupational therapist and an occupational therapy assistant may work jointly to revise the short-term goals, but the final determination resides with the occupational therapist. Revisions to the plan of care and goals must be documented by the occupational therapist and/or occupational therapy assistant to reflect revisions at the time of the change.

(3) An occupational therapy plan of care may be integrated into an interdisciplinary plan of care, but the occupational therapy goals or objectives must be easily identifiable in the plan of care.

(4) Only occupational therapy practitioners may implement the written plan of care once it is completed by the occupational therapist.

(5) Only the occupational therapy practitioner may train non-licensed personnel or family members to carry out specific tasks that support the occupational therapy plan of care.

(6) The occupational therapist is responsible for determining whether intervention is needed and if a referral is required for occupational therapy intervention.

(7) The occupational therapy practitioners must have face-to-face, real time interaction with the [~~patient or~~] client during the intervention process.

(8) Except where otherwise restricted by rule, the supervising occupational therapist may only delegate to an occupational therapy assistant or temporary licensee tasks that they both agree are within the competency level of that occupational therapy assistant or temporary licensee.

(g) [~~(f)~~] Documentation.

(1) The patient's/client's records include the medical referral, if required,[~~:~~] and the plan of care. The plan of care includes the initial examination and evaluation; the goals and any updates or change of the goals; the documentation of each intervention session by the OT or OTA providing the service; progress notes, any re-evaluations, if required; any written communication and the discharge documentation.

(2) The licensee providing occupational therapy services must document for each intervention session. The documentation must accurately reflect the intervention, decline of intervention, and/or modalities provided.

(3) The occupational therapy assistant must include the name of his or her available supervising occupational therapist in each intervention note. If there is not a current supervising occupational therapist, the occupational therapy assistant cannot intervene.

(h) [~~(g)~~] Discharge.

(1) Only an occupational therapist has the authority to discharge patients from occupational therapy services. The discharge is based on whether the patient or client has achieved predetermined goals, has achieved maximum benefit from occupational therapy services; or when other circumstances warrant discontinuation of occupational therapy services.

(2) The occupational therapist must review any information from the occupational therapy assistant(s), determine if goals were met or not, complete and sign the discharge documentation and/or make recommendations for any further needs of the patient in another continuum of care.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2014.

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John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: January 4, 2015
For further information, please call: (512) 305-6900

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CHAPTER 373. SUPERVISION

40 TAC §§373.1 - 373.3

The Texas Board of Occupational Therapy Examiners proposes amendments to §§373.1 - 373.3, concerning supervision requirements for non-licensed personnel, temporary licensees, and occupational therapy assistants. The amendments will clarify supervision requirements in general and with regard to supervision via telehealth.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the amended rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Mr. Maline has also determined that for each of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be the expansion of occupational therapy services for consumers. There will be no effect on small businesses and no anticipated economic cost to persons having to comply.

Comments on the proposal may be submitted in writing to Lea Weiss, Occupational Therapy Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701, (512) 305-6900. Comments may also be submitted electronically to lea@ptot.texas.gov.

The amendments are proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 454 of the Occupations Code is affected by this proposal.

§373.1. Supervision of Non-Licensed Personnel.

(a) Occupational Therapists are fully responsible for the planning and delivery of occupational therapy services. They may use non-licensed personnel to extend their services; however, the non-licensed personnel must be under the supervision of an occupational therapy practitioner.

(b) [~~Close Personal~~] Supervision in this section is [~~implies direct,~~] on-site contact whereby the supervising occupational therapy licensee is able to respond immediately to the needs of the client [~~patient~~]. This type of supervision is required for non-licensed personnel providing support services to the occupational therapy practitioners.

(c) When occupational therapy practitioners delegate occupational therapy tasks to non-licensed personnel, the occupational therapy practitioners are responsible for ensuring that this person is adequately trained in the tasks delegated.

(d) The Occupational therapy practitioners providing the treatment must interact with the patient regarding the patient's condition, progress, and/or achievement of goals during each treatment session.

(e) Delegation of tasks to non-licensed personnel includes but is [~~it~~] not limited to:

(1) routine department maintenance;

(2) transportation of patients/clients;

(3) preparation or set up of treatment equipment and work area;

(4) assisting patients/clients with their personal needs during treatment;

(5) assisting in the construction of adaptive/assistive equipment and splints. The licensee must be on-site and attending for any initial applications to the patient;

(6) carrying out a predetermined segment or task in the patient's care for which the patient has demonstrated some previous performance ability in executing the task.

(f) The Non-Licensed Personnel may not:

(1) perform occupational therapy evaluative procedures;

(2) initiate, plan, adjust, or modify occupational therapy procedures;

(3) act on behalf of the occupational therapist in any matter relating to occupational therapy which requires decision making or professional judgments;

(4) write or sign occupational therapy documents in the permanent record. However, non-licensed personnel may record quantitative data for tasks delegated by the supervising occupational therapy practitioner. Any documentation reflecting activities by non-licensed personnel must identify the name and title of that person and the name of the supervising occupational therapy practitioner.

§373.2. Supervision of a Temporary Licensee.

(a) Requirements for all temporary licensees:

(1) A temporary licensee works under the supervision of a regular licensed occupational therapist, whose name and license number are on file on the Board's "Supervision of a Temporary Licensee" form.

(2) All documentation completed by an individual holding a temporary license which becomes part of the patient's/client's permanent file, must be approved and co-signed by the supervising occupational therapist.

(3) Temporary licensees may not supervise anyone.

(4) A temporary licensee does not become a regular licensee with those privileges until the regular license is in hand.

(b) Supervision of an occupational therapy assistant with a temporary license includes:

(1) sixteen hours of supervision a month of which at least twelve hours are through electronic/communications technology methods [~~telephone~~], written report or conference, including the review of progress of [~~patients/~~]clients assigned,[~~:~~] plus

(2) four or more hours of physical presence supervision a month [~~which are face-to-face, real time supervision~~] with the temporary licensee providing services to one or more [~~patients/~~]clients.

(3) When providing occupational therapy services, a temporary licensee must have [~~on-site~~] supervision by an occupational therapist or occupational therapy assistant who is on the premises and holds [~~with~~] a regular license [~~when providing occupational therapy services~~].

(c) Supervision of an occupational therapist with a temporary license includes documentation regarding:

(1) frequent communication between the supervising occupational therapist and the temporary licensee by electronic/communications technology methods [~~telephone~~], written report or conference, including the review of progress of [~~patients/~~]clients assigned,[~~:~~] plus

(2) encounters twice a month where the occupational therapist directly observes the temporary licensee providing services to one or more [~~patients/~~]clients with physical presence [~~face-to-face, real time,~~] interaction.

(3) When providing occupational therapy services, a temporary licensee must have [~~on-site~~] supervision by an occupational therapist who is on the premises and holds [~~with~~] a regular license [~~when providing occupational therapy services~~].

§373.3. Supervision of an Occupational Therapy Assistant.

(a) An occupational therapy assistant shall provide occupational therapy services only under the supervision of an occupational therapist(s).

(1) These hours shall be documented on a Supervision Log for each employer. The occupational therapist(s) or employer may request a copy of the Supervision Log. The Supervision Log is kept by the occupational therapy assistant and signed by occupational therapist(s) when supervision is given.

(2) All the occupational therapist(s), whether working full time, PRN or part-time, who delegate to the occupational therapy assistant, must be participating in the supervision time, whether on a rotational or shared basis.

(b) Supervision of a full time employed occupational therapy assistant by the occupational therapist(s) in all settings includes:

(1) A minimum of six hours a month of frequent communication between the supervising occupational therapist(s) and the occupational therapy assistant(s) including but not limited to by electronic/communications technology methods [~~telephone~~], written report, and [~~email,~~] conference [~~etc.~~], including review of progress of clients [~~patients'/clients'~~] assigned, plus

(2) A minimum of two hours of supervision a month of [~~face-to-face, real time~~] interaction with the physical presence of the occupational therapist(s) observing the occupational therapy assistant providing services with [~~patients/~~]clients.

[~~(3) These hours shall be documented on a Supervision Log for each employer. The occupational therapist(s) or employer may request a copy of the Supervision Log. The Supervision Log is kept by the occupational therapy assistant and signed by occupational therapist(s) when supervision is given.~~]

[~~(4) All the occupational therapist(s), whether working full time, PRN or part-time, who delegate to the occupational therapy assistant, must be participating in the supervision time, whether on a rotational or shared basis.~~]

(c) Occupational therapy assistants working part-time or less than a full month within a given month may pro-rate these hours, but shall document no less than four hours of supervision per month, one hour of which is physical presence [~~includes face-to-face, real time~~] interaction by the occupational therapist(s) observing the occupational therapy assistant providing services with [~~patients/~~]clients.

(d) Those months where the occupational therapy assistant licensee does not work as an [~~a~~] occupational therapy assistant, he or she shall write N/A in the Supervision Log for that month.

(e) Occupational therapy assistants with more than one employer must have a supervisor at each job whose name is on file with the board and must receive supervision by an occupational therapist(s), as outlined for part-time employment in this section. Occupational therapy assistants who work for more than one employer must submit the name and license number of at least one OT at each employer, though any of the occupational therapist(s) at the employer may supervise.

(f) The occupational therapy assistant must include the name of the supervising OT in each patient's intervention note. This may not

necessarily be the occupational therapist who wrote the plan of care, but an occupational therapist who is readily available to answer questions about the patient's/client's intervention.

(g) If the occupational therapy assistant has no occupational therapist's name to write in their notes, or available to call, the occupational therapy assistant cannot provide OT services.

(h) Occupational therapy assistants' Supervision Logs are subject to audit by the board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2014.

TRD-201405549
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: January 4, 2015
For further information, please call: (512) 305-6900

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 4. EMPLOYMENT PRACTICES
SUBCHAPTER D. SUBSTANCE ABUSE PROGRAM

43 TAC §§4.31, 4.33, 4.36, 4.37, 4.39, 4.41, 4.43, 4.44

The Texas Department of Transportation (department) proposes amendments to §§4.31, 4.33, 4.36, 4.37, 4.39, 4.41, 4.43, and 4.44, all relating to the Substance Abuse Program.

EXPLANATION OF PROPOSED AMENDMENTS

The proposed amendments are necessary to implement additional testing requirements for employees, to revise existing language for clarification, and to better reflect current practice and the department's commitment to safety in the workplace.

Amendments to §4.31, Definitions, change the term "safety-sensitive" to "safety-impact" to reduce confusion due to a different definition of the term in federal regulations, change the definitions of "directly involved" and "serious accident" to better conform to the proposed expansion of criteria for reasonable-cause testing for all employees, and change safety-impact to require standard application of the term by position within the department for proposed added random testing.

Amendments to §4.33, Prohibited Conduct, add a prohibition on any department employee's using alcohol within eight hours after an accident or before undergoing a post-accident test. This will apply the federal standard for use of alcohol following an accident to all department employees.

Amendments to §4.36, Testing, add the district administrator and business services coordinator to list of approvers for testing for cause and add causing a serious accident or injury as grounds to believe that an employee is using alcohol or drugs on the job, warranting a reasonable-cause test. This will better reflect the department's continued commitment to safety.

Amendments to §4.37, Test Results, change safety-sensitive to safety-impact to reduce confusion between the federal regulation use and the department's use.

Amendments to §4.39, Refusal to Test, expand to all department employees the presumption that failure to remain available for any mandatory testing is considered to be refusal to test and change safety-sensitive to safety-impact to reduce confusion between the federal regulation use and the department's use.

Amendments to §4.41, Voluntary Admissions, change safety-sensitive to safety-impact to reduce confusion between the federal regulation use and the department's use and correct the spelling of "supersedes."

Amendments to §4.43, Employees Who Drive for the Department, require employees to report the loss of their legal authority to drive regardless of the reason rather than limiting it to an alcohol- or drug-related driving offense, and increase the time span for termination for a second alcohol- or drug-related driving offense from five years to ten years to better reflect the department's commitment to safety.

Amendments to §4.44, Commercial Drivers, Safety-Sensitive Employees, and Vessel Crewmembers, change safety-sensitive to safety-impact to reduce confusion between the federal regulation use and the department's use. The section is also amended to reflect the department's commitment to safety by removing the waiver for the additional test requirement for employees before being transferred or promoted into a position as a commercial driver, safety-sensitive employee, or vessel crewmember and adding random drug and alcohol testing for all employees who perform duties that could pose a threat to public safety if performed while impaired and who work independently so that another employee is unlikely to be able to prevent mistakes in the event the employee is working under the influence of drugs or alcohol. In order to allow flexibility in the event the federal requirements change, the amendments omit specific percentages of employees to be tested and instead reference the U.S. Department of Transportation (USDOT) annual random testing rate.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Ms. Stacey Strittmatter, Interim Director, Human Resources Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Strittmatter has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be an increased focus and commitment to safety for the traveling public of the state. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§4.31, 4.33, 4.36, 4.37, 4.39, 4.41, 4.43, and 4.44 may be submitted to Rule Comments, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "Human Resources." The deadline for receipt of comments is 5:00 p.m. on January 5, 2015. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§4.31. Definitions.

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

(1) Alcohol--The intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

(2) Alcohol test result--The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test.

(3) Alcohol- or drug-related driving offense--A conviction or deferred adjudication for any offense involving the driving of a vehicle, whether on-duty or off-duty, while under the influence of alcohol or drugs or while intoxicated.

(4) Commercial driver--An employee who operates a commercial motor vehicle for the department, regardless of the frequency.

(5) Commercial motor vehicle--A motor vehicle or combination of vehicles used to transport passengers or property if it:

(A) has a gross combination weight rating of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds;

(B) has a gross vehicle weight rating of 26,001 or more pounds;

(C) is designed to transport 16 or more passengers, including the commercial driver; or

(D) is of any size and is used in the transportation of materials that are considered hazardous under the Hazardous Materials Transportation Act, 49 U.S.C. §5103(b), and that require the motor vehicle to be placarded under the Hazardous Materials Regulations, 49 C.F.R. Part 172, Subpart F.

(6) Completion of treatment--Compliance with all EAP treatment recommendations and requirements, passing all required drug and alcohol tests, and finishing all treatment as prescribed by the EAP counselor or by the treatment program's staff physician.

(7) Critical duties--Driving, commercial driving, performing safety-impact [~~safety-sensitive~~] activities, performing vessel crewmember duties, operating motorized equipment, supervising or assisting with the loading or unloading of a motor vehicle, and inspecting, servicing, or maintaining any vehicle.

(8) Department--The Texas Department of Transportation.

(9) Directly involved--The employee's order, action, or failure to act is determined to be or cannot be ruled out as a causative factor in the events leading to or causing [~~Potentially responsible for~~] a serious accident or a serious marine incident.

(10) Driving for the department--Operating a vehicle, including an automobile, truck, motor-driven equipment, roller, tractor, grader, ferry, or aircraft, during the course and scope of employment, without regard to ownership of the vehicle or the frequency of operation. An employee holds a position that involves driving for the department if the position may require driving for the department.

(11) Drug--A narcotic drug, controlled substance, or marijuana, as defined in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §802, not including a substance legally available by prescription or over the counter.

(12) Employee--A person employed by the department in a full-time, part-time, temporary, project, or seasonal position, including temporary recruitment employees, but not including other temporary employees under contract to the department.

(13) Employee Assistance Program (EAP)--A program designed to assist employees and their immediate family members in dealing with emotional and personal problems, including alcohol and drug abuse, that potentially affect an employee's work performance and safety.

(14) EAP counselors--Licensed medical doctors; licensed doctors of osteopathy; psychologists licensed or certified by the Texas State Board of Examiners of Psychologists or another regulating board; social workers licensed or certified by the Texas State Board of Social Worker Examiners or another regulating board; employee assistance professionals licensed or certified by the Employee Assistance Professionals Association, Inc., or another regulating board; and addiction counselors certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission, by the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, or by another regulating board, with knowledge of and clinical experience in the diagnosis and treatment of alcohol- and drug-related disorders, including Substance Abuse Professionals as defined in 49 C.F.R. Part 40.

(15) Final applicant--A person who is given a conditional offer of initial employment.

(16) Human Resources Division--An organizational unit in the department [~~department's Austin headquarters~~] that oversees human resource functions for the department.

(17) Inhalant--A breathable chemical that produces mind-altering vapors, including volatile solvents, aerosols, nitrites, and anesthetics.

(18) Mandatory referral--A referral to the EAP that requires an employee to report to the EAP and complete treatment or be terminated from employment with the department.

(19) Medical review officer--A licensed physician who is responsible for reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results.

(20) Possession of alcohol or drugs--The presence of alcohol or drugs in an area under an employee's effective control.

[(21) Safety-sensitive activity--Any activity, as determined by the director of the Human Resources Division, that:]

[(A) could present a threat to the health or safety of employees or the public if performed with inattentiveness, errors in judgment, diminished coordination, reduced dexterity, or lack of composure; and]

[(B) is performed with such independence that it cannot reasonably be assumed that mistakes could be prevented by a supervisor or another employee.]

(21) [(22)] Safety-impact [Safety-sensitive] employee--An employee who holds a safety-impact [safety-sensitive] position.

(22) [(23)] Safety-impact [Safety-sensitive] position--A full-time, part-time, temporary, project, or seasonal position, as determined by the director of the Human Resources Division, that requires the performance of one or more [safety-sensitive] activities that: [at least four times in twelve consecutive months.]

(A) could present a threat to the health or safety of employees or the public if performed with inattentiveness, errors in judgment, diminished coordination, reduced dexterity, or lack of composure; and

(B) are performed with such independence that it cannot reasonably be assumed that mistakes could be prevented by a supervisor or another employee.

(23) [(24)] Serious accident--Any accident that occurs in the workplace, and results in: [involving a commercial motor vehicle, or that occurs on a day in which the employee has performed or will perform a safety-sensitive activity and resulting in:]

(A) injury to an employee who is directly involved in the accident and[,] who requires professional medical treatment beyond first aid[, and who does not return to work on the day following the injury or who returns to work to perform restricted duties];

(B) death or injury to another person who requires professional medical treatment beyond first aid;

(C) damage to a vehicle that causes it to be inoperable; or

(D) receipt of a citation by the employee under state or local law for a moving traffic violation in connection with the accident.

(24) [(25)] Serious marine incident--Any reportable marine incident resulting in:

(A) injury to an employee who is directly involved in the incident, who requires professional medical treatment beyond first aid, and who does not return to work or who returns to work to perform restricted duties;

(B) death or injury to another person who requires professional medical treatment beyond first aid;

(C) damage to property in excess of $100,000;

(D) actual or constructive total loss of any ferry subject to Coast Guard inspection under 46 U.S.C. §3301 or to any self-propelled vessel of 100 gross tons or more if not subject to Coast Guard inspection;

(E) a discharge of 10,000 or more gallons of oil into navigable waters of the United States; or

(F) a discharge of a reportable quantity of a hazardous substance into the environment or into the navigable waters of the United States.

(25) [(26)] Substance control officer--An employee who administers the substance abuse program.

(26) [(27)] Treatment--Medical or psychological therapy or education for alcohol or drug dependency, whether conducted on an inpatient basis, on an intensive outpatient basis, or as educational or counseling sessions. Treatment includes any aftercare following inpatient treatment or intensive outpatient treatment, including weekly counseling sessions as designated by the EAP counselors.

(27) [(28)] Supervisor--Any employee who has formal supervisory or managerial responsibilities, who is designated to coordinate the work activities of other employees, or who is designated to direct a team of employees.

(28) [(29)] Use of alcohol or a drug--The ingestion by any means of any substance containing alcohol, including medication; the use in any way of a drug; or being under the influence of alcohol, an inhalant, or a drug. Drug use and drug abuse include the use of an inhalant in a manner other than that for which it was intended and that causes or is known to cause intoxication.

(29) [(30)] Vessel Crewmember--An individual who:

(A) is working on board a vessel, whether or not as a member of the vessel's crew;

(B) occupies or performs the functions of a position required by the vessel's Certificate of Inspection;

(C) performs the duties of a patrolman or watchman; or

(D) is assigned during an emergency to warn passengers or control the movement of passengers on a vessel.

(30) [(31)] Workplace--Any location where an employee works, whether or not on state-owned property. An employee is in the workplace when operating or riding in a state vehicle.

§4.33. Prohibited Conduct.

(a) Employee obligation. Department employees have an obligation to uphold the public's trust in the department by projecting a positive image to other employees and the public at all times.

(b) Alcohol and drug use. An employee is prohibited from using alcohol or drugs, possessing an open container of an alcoholic beverage, or possessing a drug in the workplace.

(c) Alcohol use after accident. An employee is prohibited from using alcohol within eight hours after an accident or before undergoing a post-accident alcohol test, whichever comes first.

(d) [(c)] Sale of drugs. An employee is prohibited from the illegal sale, distribution, transportation, or manufacture of drugs, whether in the workplace or outside the workplace. This prohibition includes any violation of state and federal controlled substances acts.

(e) [(d)] Lawful medication. An employee is prohibited from reporting to work, working, or operating a state vehicle while under the influence of lawfully prescribed or over-the-counter substances if the employee's performance is impaired. An employee may appropriately use prescribed or over-the-counter medications if work performance is not impaired.

(f) [(e)] Responsibilities of supervisors. A supervisor may not allow an employee to continue to work if the supervisor has actual knowledge that the employee in the workplace is using alcohol or drugs

in the workplace, possesses an open container of an alcoholic beverage in the workplace, or possesses a drug in the workplace.

§4.36. Testing.

(a) Notification to employees. An employee will be notified in writing that the employee is subject to drug and alcohol testing before being required to submit to an alcohol or drug test.

(b) Pre-employment testing.

(1) A final applicant must pass a drug test before being hired for a position that involves driving for the department.

(2) The department will notify a final applicant of the results of a pre-employment drug test if the applicant requests those results in writing within 60 calendar days after being notified of the disposition of the employment application. The department will also inform the applicant which drugs, if any, were verified as positive.

(c) Testing for cause. Any employee who is reasonably suspected of using alcohol or drugs in the workplace will be required to undergo an alcohol or drug test.

(1) An employee's direct involvement in a serious accident is considered to be grounds for reasonable suspicion that the employee is using alcohol or drugs in the workplace.

(2) [~~(1)~~] The decision to test an employee who was not directly involved in a serious accident must be based on the reasonable belief of a supervisor who has been trained on the signs and symptoms of alcohol and drug use. The decision must be based on specific, contemporaneous, articulable observations concerning appearance, behavior, speech, body odor, performance, or other indications of probable use. These observations may include indications of chronic use and withdrawal symptoms.

(3) [~~(2)~~] When a supervisor reasonably suspects an employee who was not directly involved in a serious accident of using alcohol or drugs in the workplace, the supervisor will contact the substance control officer immediately. The supervisor will make an immediate inquiry into all relevant surrounding circumstances and may confer with the employee. The substance control officer will document whether testing is justified based on the supervisor's observations and the substance control officer's independent analysis. Within 24 hours the supervisor or substance control officer will submit that person's observations in writing to the substance abuse program staff in the Human Resources Division.

(4) [~~(3)~~] Testing for cause must be approved by the director of the Human Resources Division or designee and by the relevant district engineer, district administrator, division director, office director, or designee not below the level of deputy district engineer, deputy division director, deputy office director[~~, director of administration~~], or business services coordinator [~~division administrative manager~~].

(5) [~~(4)~~] Pending a decision to test or if testing is not available, the employee will be removed from critical duties. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave. This will continue until:

(A) an alcohol test indicates a result of less than 0.02;

(B) a negative drug test result is reported; or

(C) twenty-four hours elapse after the decision to test.

(6) [~~(5)~~] An alcohol test should be administered as soon as possible and preferably within two hours after the decision to test was made. If the test is not administered within two hours, the substance control officer will record why the test was not administered until later. An alcohol test may not be administered after more than eight hours after the decision to test was made.

(7) [~~(6)~~] A drug test should be administered as soon as possible. A drug test may not be administered more than 32 hours after the decision to test was made.

(d) Required training. Before making a decision to test, a supervisor or substance control officer must have been trained in the indications of drug and alcohol use and on the department's policy and procedures related to testing for cause.

§4.37. Test Results.

(a) An employee shall complete the following requirements if the employee has a positive drug test result or an alcohol test result of 0.04 or greater, if the employee refuses to test, or if the employee is a commercial driver, safety-impact [~~safety-sensitive~~] employee, or vessel crewmember who violated §4.44(b)(1) - (5) of this subchapter.

(1) The supervisor or the substance control officer will mandatorily refer the employee to the EAP and require the employee to complete treatment.

(2) The employee will undergo a return-to-duty alcohol or drug test. An alcohol test must indicate a result of less than .02, and a drug test must indicate a verified negative result. An employee will be terminated from the department if the employee fails to pass the return-to-duty drug or alcohol test.

(3) The employee will provide a completed return-to-work form before resuming any critical duties. Commercial drivers, vessel crewmembers, and safety-impact [~~safety-sensitive~~] employees who are not required to provide a return-to-work form will still be subject to a return-to-duty test.

(4) The employee will undergo follow-up testing for alcohol or drugs for up to 60 months. Follow-up testing will include at least 6 tests in the first 12 months after the employee's return to duty. The number and frequency of follow-up tests will be established by the EAP counselors. The EAP counselors may terminate the requirement for further testing at any time after the first six tests have been administered. An employee who fails to pass a follow-up drug or alcohol test has not completed treatment and will be terminated from the department.

(b) An employee will be terminated from the department if the employee refuses to test or has a positive drug test result or an alcohol test result of 0.04 or greater and is still in the employee's initial probationary period or is a project or temporary employee.

(c) If an employee has an alcohol test with a result of 0.02 or greater but less than 0.04, the supervisor or the substance control officer will prohibit the employee from working for 24 hours and will require the employee to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

§4.39. Refusal to Test.

(a) Employees in general. The department will mandatorily refer an employee to the EAP if the employee refuses to test, except commercial drivers, safety-impact [~~safety-sensitive~~] employees, and vessel crewmembers.

(b) Commercial drivers, safety-impact [~~safety-sensitive~~] employees, and vessel crewmembers. A commercial driver, safety-impact [~~safety-sensitive~~] employee, or vessel crewmember will be terminated from the department if the employee refuses to test.

(c) Covered conduct. An employee will be considered to have refused to test under any of the following circumstances.

(1) The employee explicitly declines to take a required test, whether a first test or a subsequent test.

(2) The employee fails to appear for an alcohol or drug test, except a pre-employment test, within a reasonable time, as determined by the department, after being directed to do so.

(3) The employee fails to remain at the testing site until the testing process is complete. In the case of a pre-employment test, a final applicant who leaves the testing site before the testing process begins has not refused to test.

(4) The employee does not attempt to provide a breath specimen for a required alcohol test or to provide a urine specimen for a required drug test.

(5) The employee does not permit the observation or monitoring of the employee's provision of a specimen in the case of directly observed or monitored collection.

(6) The employee fails to provide a sufficient breath specimen or a sufficient amount of urine when directed and there is no adequate medical explanation for the failure, as determined through a required medical evaluation.

(7) The employee fails to undergo a medical examination or evaluation that was directed by an appropriate official. In the case of a pre-employment test, the final applicant has refused to test on this basis only if the test is conducted after the final applicant has been given a conditional offer of employment.

(8) The employee fails to sign the certification at Step 2 of the Alcohol Testing Form.

(9) The employee fails to cooperate in any part of the testing process, including refusing to empty pockets when so directed by the collector, behaving in a confrontational way that disrupts the collection process, fails to wash hands after being directed to do so by the collector, or any other uncooperative behavior.

(10) The specimen contains levels of a substance that is lower than expected for human urine, a specimen that contains levels of a substance that are inconsistent with human urine, or a specimen has a creatinine and specific gravity value lower than expected for human urine.

(11) An employee [~~A commercial driver, safety-sensitive employee, or vessel crewmember~~] does not remain available for any [~~a~~] mandatory [~~post-accident~~] alcohol or drug test.

(12) For an observed collection, the employee fails to follow the observer's instructions to raise clothing above the waist, lower clothing and underpants, or to turn around to permit the observer to determine if the employee has any type of prosthetic or other device that could be used to interfere with the collection process.

(13) The employee possesses or wears a prosthetic or other device that could be used to interfere with the collection process.

(14) The employee admits to the collector or medical review officer that the employee adulterated or substituted the specimen.

§4.41. Voluntary Admissions.

(a) Scope. In this section the term alcohol or drug problem includes alcohol or drug use in the workplace.

(b) Employees in general. An employee, other than a commercial driver, safety-impact [~~safety-sensitive~~] employee, or vessel crewmember, will be subject to the following provisions if the employee voluntarily admits to an alcohol or drug problem.

(1) The employee will be removed from driving duties until the employee provides a completed return-to-work form.

(2) The employee will be mandatorily referred to the EAP and required to complete treatment.

(c) Commercial drivers, safety-impact [~~safety-sensitive~~] employees, and vessel crewmembers. An employee who is a commercial driver, safety-impact [~~safety-sensitive~~] employee, or vessel crewmember will be subject to the following provisions if the employee voluntarily admits to an alcohol or drug problem.

(1) The employee will be removed from critical duties until the employee provides a completed return-to-work form. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(2) The employee will be mandatorily referred to the EAP and required to complete treatment.

(3) The employee will be subject to all the requirements of §4.37 of this subchapter, except that the employee will not be required to undergo follow-up testing unless the employee admitted using alcohol or drugs while performing a critical duty.

(d) Disciplinary action. No disciplinary action will be taken against an employee solely because the employee voluntarily admitted having a drug or alcohol problem if the admission occurred prior to a determination that the employee should be subjected to testing for cause. This subsection supersedes [~~supercedes~~] any other provision in this subchapter.

§4.43. Employees Who Drive for the Department.

(a) Scope. An employee who drives for the department is subject both to the requirements of this section and to the general requirements that apply to all employees.

(b) Records. Each employee's driving record will be checked at least once each year. Each employee who drives for the department shall sign a form acknowledging awareness of the department's driving policies.

(c) Driver's licenses. An employee must have a valid driver's license to drive for the department. An occupational driver's license will be accepted if it allows the employee to perform driving duties for the department, other than operating a commercial motor vehicle. Employees without a valid driver's license will be removed from all driving duties, and the supervisor will assign non-driving duties, if available.

(d) Loss of legal authority to drive.

(1) An employee shall notify the employee's supervisor if the employee loses the legal authority to drive as a result of any alcohol- or drug-related driving offense or any other offense involving alcohol or drugs, including administrative license revocation due to multiple tickets for moving traffic violations. If the employee fails to make this report within one day after returning to work following the loss of legal authority to drive, the employee will be suspended three days without pay.

(2) An employee will be terminated from the department if the employee drives for the department after losing the legal authority to drive as a result of any alcohol- or drug-related driving offense or any other offense involving alcohol or drugs, including administrative license revocation due to multiple tickets for moving traffic violations.

(e) Alcohol- and drug-related driving offenses. If an employee has an alcohol- or drug-related driving offense, the following procedures will be followed.

(1) An employee shall report an alcohol- or drug-related driving offense to the employee's supervisor. If the employee fails to make this report within one day after returning to work following the occurrence, the employee will be suspended three days without pay.

(2) The employee will be mandatorily referred to the EAP and required to complete treatment.

(3) The employee will be given a letter summarizing these actions. The employee shall acknowledge receipt by signing the letter and returning it to the supervisor.

(4) The employee will be removed from critical duties until the employee provides a completed return-to-work form. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(5) An employee will be terminated from the department after a second alcohol- or drug-related driving offense within ten [~~five~~] years.

(f) Final applicants.

(1) The department will not hire a final applicant for a position that may involve driving for the department if the final applicant has two alcohol- or drug-related driving offenses within three years before the date of application.

(2) The department will not hire a final applicant for a seasonal position that requires driving for the department if the final applicant has an alcohol- or drug-related driving offense within the three years before the date of application. A seasonal employee will be terminated if hired in violation of this paragraph.

(3) The department will not hire a final applicant for a position that involves driving for the department if the final applicant has an alcohol- or drug-related driving offense within three years before the date of application unless the final applicant agrees to:

(A) complete treatment; and

(B) comply with the procedures described in subsection (e) of this section.

§4.44. Commercial Drivers, Safety-Impact [~~Safety-Sensitive~~] Employees, and Vessel Crewmembers.

(a) Scope. Commercial drivers, safety-impact [~~safety-sensitive~~] employees, and vessel crewmembers are subject both to the requirements of this section and to the general requirements that apply to all employees.

(b) Prohibited activities. Commercial drivers, safety-impact [~~safety-sensitive~~] employees, and vessel crewmembers shall not:

(1) report to work within four hours of consuming alcohol;

(2) report to work or remain at work while under the influence of alcohol or drugs;

(3) consume or possess alcohol while on duty or while driving a commercial motor vehicle;

(4) use alcohol within eight hours after an accident or before undergoing a post-accident alcohol test, whichever comes first;

(5) have a positive drug test result or an alcohol test result of 0.04 or greater; or

(6) refuse to test.

(c) Testing.

(1) The department will not hire or employ a final applicant for a position as a commercial driver, a safety-impact [~~safety-sensitive~~] employee, or a vessel crewmember unless that final applicant passes a drug test.

(A) A current employee must pass a drug test before being transferred or promoted into a position as a commercial driver, safety-impact [~~safety-sensitive~~] employee, or vessel crewmember. [~~The department may waive this requirement if the employee was tested for drugs by the department during the preceding three-year period and all drug test results were negative and if the employee has never been mandatorily referred to the EAP.~~] If a current employee [~~is required to take a drug test under this subparagraph and~~] fails that drug test, the employee will not be transferred or promoted into the position and will be mandatorily referred to the EAP and required to complete treatment.

(B) The department will notify a final applicant of the results of a pre-employment drug test if the applicant requests those results in writing within 60 calendar days after being notified of the disposition of the employment application. The department will also inform the applicant which drugs, if any, were verified as positive.

(C) Pre-employment inquiries for commercial drivers and vessel crewmembers will be conducted in accordance with 49 C.F.R. Part 40.

(2) Commercial drivers are subject to post-accident testing if directly involved in a serious accident. Safety-impact [~~and safety-sensitive~~] employees are subject to post-accident testing if directly involved in a serious accident that occurs on a day in which the employee has performed or will perform a safety-impact function. Vessel crewmembers are subject to post-accident testing if directly involved in a serious marine incident.

(A) Nothing in this section requires or permits delaying medical attention for injured people or prohibits an employee from leaving the scene of an accident for as long as necessary to obtain assistance in responding to the accident or to obtain emergency medical care.

(B) Alcohol and drug tests will be administered after a serious accident or a serious marine incident.

(i) An alcohol test should be administered as soon as possible after a serious accident or a serious marine incident and preferably within two hours. If the test is not administered within two hours, it may be administered within eight hours. In that case, the substance control officer will record why the test was not promptly administered.

(ii) A drug test should be administered as soon as possible after a serious accident and in any event within 32 hours.

(iii) A drug test should be administered as soon as possible after a serious marine incident. If a drug test is not administered within 32 hours due to safety concerns, it may be administered as soon as the safety concerns are addressed. If the drug test was not administered within 32 hours, the substance control officer will record why the test was not promptly administered.

(C) The department will rely on a breath or blood test for the use of alcohol or a urine test for the use of drugs if it is conducted by federal, state, or local officials having independent authority for the test, if it conforms to applicable federal, state or local requirements, and if the department obtains the results of the tests.

(3) Commercial drivers, safety-impact employees, and vessel crewmembers are subject to random alcohol and drug testing.

(A) Commercial drivers, safety-impact employees, and vessel crewmembers will be selected for alcohol and drug testing on a random basis so that each employee has a substantially equal chance of selection. A commercial driver, safety-impact employee, or vessel crewmember will be subject to the possibility of random testing as long as the employee is employed by the department in that capacity. The department may randomly test all commercial drivers in one or more sections if each section is equally subject to selection, the department may randomly test all safety-impact employees in one or more sections if each section is equally subject to selection, and the department may randomly test all vessel crewmembers on one vessel as long as each vessel is equally subject to selection.

(B) The Human Resources Division will ensure that the [~~at least 10% of~~] commercial drivers and safety-impact employees are tested annually at a rate equal to or higher than the U.S. Department of Transportation annual random testing rate for the Federal Motor Carrier Safety Administration for alcohol and for drugs and [~~10% of~~] vessel crewmembers are tested annually at a rate equal to or higher than the U.S. Department of Transportation annual random testing rate for the U.S. Coast Guard requirements for alcohol and [~~that at least 50% are tested annually~~] for drugs.

(d) Administrative and disciplinary actions.

(1) A commercial driver, safety-impact [~~safety-sensitive~~] employee, or vessel crewmember who violates subsection (b) of this section will be subject to all potential administrative and disciplinary actions available under this subchapter.

(2) The commercial driver, safety-impact [~~safety-sensitive~~] employee, or vessel crewmember will be removed from critical duties until the employee provides a completed return-to-work form. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(3) A final applicant for a position as a commercial driver, safety-impact [~~safety-sensitive~~] employee, or vessel crewmember will not be hired if the final applicant has engaged in conduct that would violate subsection (b) of this section and has not received the equivalent of the required treatment. A commercial driver, safety-impact [~~safety-sensitive~~] employee, or vessel crewmember will be terminated from the department if it is determined that at the time of hire, the applicant had engaged in conduct that would violate subsection (b) of this section and had not received the equivalent of the required treatment.

(e) Education. Each commercial driver, safety-impact [~~safety-sensitive~~] employee, vessel crewmember, and supervisor of an employee in any of those categories will receive training on indications of alcohol or drug use and on the effects of alcohol and drug use on personal health, safety, and the work environment.

(f) Additional reporting requirements for vessel crewmembers.

(1) If a vessel crewmember receives a positive drug test result, the substance control officer shall report it in writing to the nearest Coast Guard Officer in Charge, Marine Inspection.

(2) A vessel crewmember who has received a positive drug test result may not perform vessel crewmember duties until found by the medical review officer to be drug free and to pose a sufficiently low risk for further illegal drug use and the requirements of 46 C.F.R. Part 5 have been satisfied. The employee must agree to follow-up testing determined by the medical review officer for an additional period of up to 60 months.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2014.

TRD-201405561
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 4, 2015
For further information, please call: (512) 463-8683

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Magna Vasquez

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 22. EXAMINING BOARDS

PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 539. RULES RELATING TO THE RESIDENTIAL SERVICE COMPANY ACT

SUBCHAPTER I. FINANCIAL ASSURANCES

22 TAC §539.81

The Texas Real Estate Commission withdraws the proposed amendment to §539.81 which appeared in the September 12, 2014, issue of the *Texas Register* (39 TexReg 7274).

Filed with the Office of the Secretary of State on November 20, 2014.

TRD-201405530
Kerri Lewis
General Counsel
Texas Real Estate Commission
Effective date: November 20, 2014
For further information, please call: (512) 936-3092

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PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

22 TAC §573.22

The Texas Board of Veterinary Medical Examiners withdraws the proposed amendment to §573.22, which appeared in the September 26, 2014, issue of the *Texas Register* (39 TexReg 7714).

Filed with the Office of the Secretary of State on November 20, 2014.

TRD-201405551
Loris Jones
Public Information Officer
Texas Board of Veterinary Medical Examiners
Effective date: November 20, 2014
For further information, please call: (512) 305-7563

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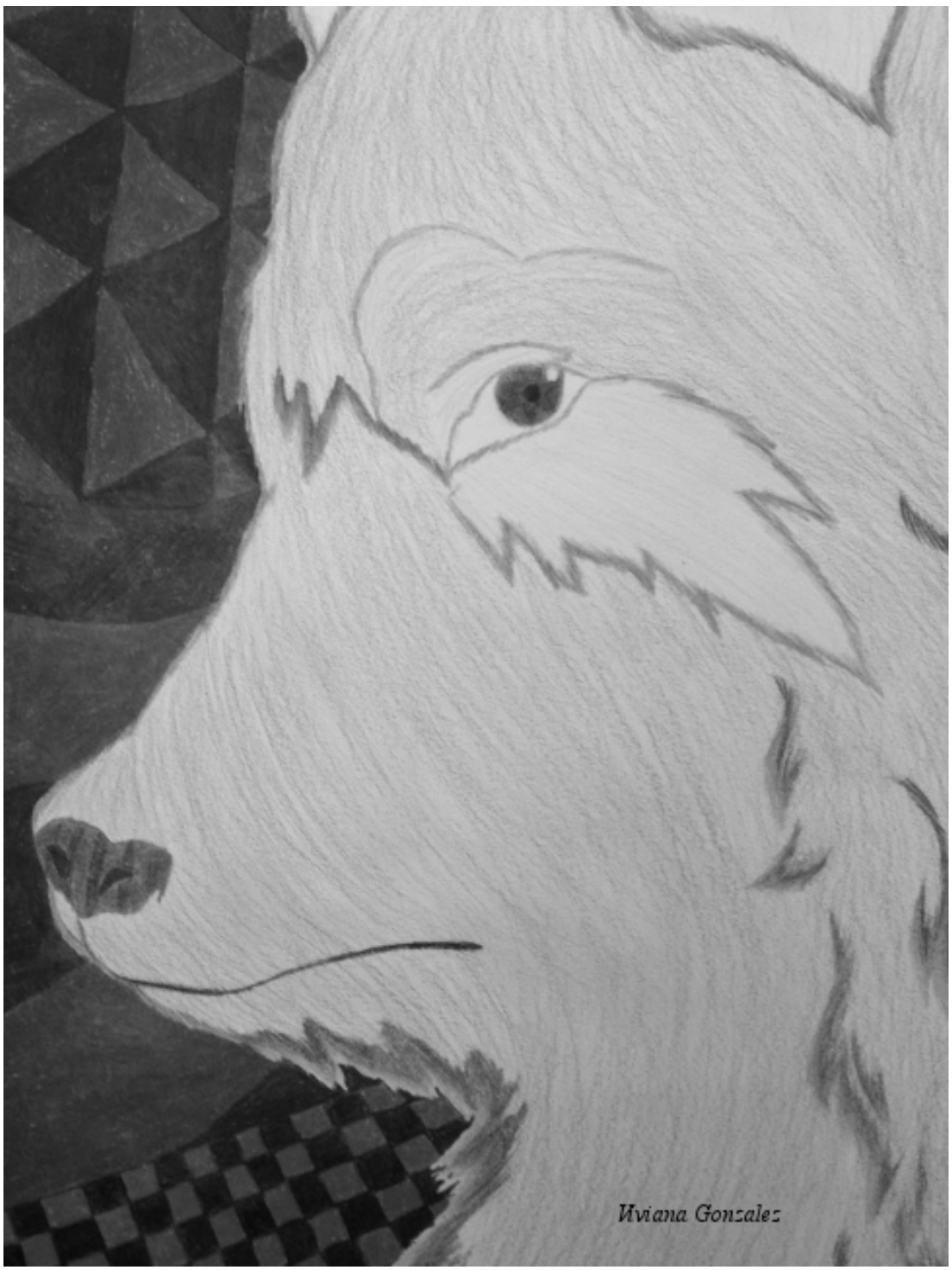
Wviana Gonzalez

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 7. STATE OFFICE OF ADMINISTRATIVE HEARINGS

CHAPTER 159. RULES OF PROCEDURE FOR ADMINISTRATIVE LICENSE SUSPENSION HEARINGS

SUBCHAPTER C. WITNESSES AND SUBPOENAS

1 TAC §159.103

The State Office of Administrative Hearings (SOAH) adopts amendments to §159.103 (concerning Subpoenas). Section 159.103 is adopted with changes to the proposed text as published in the May 23, 2014, issue of the *Texas Register* (39 TexReg 3919). The amended rule affects the process for compensating subpoenaed witnesses for their appearance at Administrative License Revocation hearings. The adopted amendments will streamline the process for compensating subpoenaed witnesses for their appearance at hearings, will minimize errors related to mailing and transmitting checks to SOAH, and will eliminate filing errors.

SOAH received comments on the proposed amendments from several attorneys, police agencies and officers, a process server, and the Department of Public Safety during the comment period of May 23, 2014, through June 22, 2014, and at the public hearing conducted on October 28, 2014.

Comments:

Comment: Several commenters expressed concern that the change would result in increased cost to attorneys and parties because alternative service of subpoenas through law enforcement agencies would no longer be possible.

SOAH's response: SOAH understands that in locations where alternative service is now utilized some adjustments would be needed, but SOAH does not believe the problem would rise to the level anticipated by the commenters. However, SOAH has revised the proposed rule to address the concern.

Comment: Several commenters expressed concern that police officers' safety and privacy would be compromised if alternative service is no longer possible.

SOAH's response: SOAH notes that in some major cities, the officers are currently being personally served with subpoenas for ALR hearings without being subjected to the concerns mentioned. However, SOAH has revised the proposed rule to address the concern.

Comment: A commenter expressed a concern that the rule change will cause problems for attorneys' IOLTA accounts because of uncertainty when an officer accepts a check, fails to appear at the hearing, but does not return the check to the attorney.

SOAH's response: SOAH understands the concern but does not believe it would rise to the level anticipated by the commenter. However, SOAH has revised the proposed rule to address the concern.

Comment: A commenter expressed concern that officers would be subject to criminal and civil actions for accepting witness fee checks, failing to appear at hearings, and failing to return the checks to the attorneys.

SOAH's response: SOAH does not agree that the concern would materialize, but SOAH has revised the proposed rule to address the concern.

Comment: Several commenters expressed concern that the proposed rule would create a burden on officers and police agencies to keep up with numerous witness fee checks.

SOAH's response: SOAH understands the concern but does not believe it would rise to the level anticipated by the commenters. However, SOAH has revised the proposed rule to address the concern.

Comment: A commenter expressed concern that the rule does not set out a procedure for checks to be returned to the attorney if the witness failed to appear at the hearing.

SOAH's response: SOAH does not agree that the rule needs to address the concern, but SOAH has revised the proposed rule to address the concern.

Comment: Several commenters expressed that the rule change is overbroad and that no problems exist with the present procedures.

SOAH's response: SOAH believes a change in the procedure will alleviate inefficiencies in the current process.

Comment: A commenter expressed concern that the change would impede defendants' rights to hearings.

SOAH's response: SOAH does not agree that the concern would materialize, but SOAH has revised the proposed rule to address the concern.

Comment: A commenter expressed concern that witness fee checks will be left lying around, making attorneys vulnerable to fraud, including identity theft.

SOAH's response: SOAH does not agree that the concern would materialize, but SOAH has revised the proposed rule to address the concern.

Comment: A commenter expressed concern that there would be no neutral verification that the checks were tendered to the witness.

SOAH's response: SOAH does not agree that the concern would materialize, but SOAH has revised the proposed rule to address the concern.

Comment: A commenter stated that SOAH has not met the procedural requirements for enacting a new procedural rule because supporting data was not published.

SOAH's response: SOAH believes all procedural requirements have been met.

Statutory Authority

The amendments are adopted under Government Code, Chapter 2003, which authorizes the State Office of Administrative Hearings to conduct contested case hearings, Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures, and §2003.050, which requires SOAH to adopt rules governing the procedures, including discovery procedures, that relate to a hearing conducted by SOAH.

Statutes Affected

The adopted amendments affect Government Code, Chapters 2001 and 2003, and Transportation Code, Chapters 522, 524, and 724.

§159.103. Subpoenas.

(a) Scope.

(1) A subpoena may command a person to give testimony for an ALR hearing and/or produce designated documents or tangible things in the actual possession of that person.

(2) The party who causes a subpoena to be issued must take reasonable steps to avoid imposing undue burden or expense on the person served.

(3) If a party that requests or issues a subpoena fails to timely appear at the hearing, any subpoenaed witnesses will be released.

(b) Attorney-issued subpoenas. An attorney who is authorized to practice law in the State of Texas may issue up to two subpoenas for witnesses to appear at a hearing. One subpoena may be issued to compel the presence of the peace officer who was primarily responsible for the defendant's stop or initial detention and the other may be issued to compel the presence of the peace officer who was primarily responsible for finding probable cause to arrest the defendant. If the same officer was primarily responsible for both the defendant's stop and arrest, the attorney may issue only one subpoena.

(c) Subpoena request filed with judge. No later than ten days prior to the hearing, a party may file a subpoena request with SOAH that demonstrates good cause to compel a witness's appearance in person or by telephone or video conference, when:

(1) a party intends to call more than two peace officers to testify as witnesses;

(2) a party seeks to compel the presence of witnesses who are not peace officers; or

(3) a defendant, who is not represented by an attorney, seeks to compel the presence of witnesses.

(d) Subpoena form. A subpoena must be issued on the form provided at www.soah.state.tx.us.

(e) Judge's discretion. The decision to issue a subpoena, as described in subsection (c) of this section, shall be in the sound discretion of the judge assigned to the case. The judge shall refuse to issue a subpoena if:

(1) the testimony or documentary evidence is immaterial, irrelevant, or would be unduly repetitious; or

(2) good cause has not been demonstrated.

(f) Service upon witness.

(1) The party who issues or is granted a subpoena shall be responsible for having the subpoena served in accordance with Texas Rule of Civil Procedure 176.5, or by accepted alternative methods established by a peace officer's law enforcement agency.

(2) A subpoena must be served at least five calendar days before the hearing.

(3) After a subpoena issued by an attorney or judge is served upon a witness, the return of service of the subpoena must be filed at SOAH at least three calendar days prior to the hearing. Upon the subpoenaed witness's appearance at the hearing, the party who issued the subpoena shall tender a witness fee check or money order in the amount of $10 to the witness. In addition, if the witness traveled more than 25 miles round-trip to the hearing from the witness's office or residence, mileage reimbursement must also be tendered at the same time. The amount of mileage reimbursement will be that listed in the state mileage guide at https://fmx.cpa.state.tx.us/fm/travel/travelrates.php.

(4) If the hearing is conducted telephonically, the party who issued the subpoena shall mail the witness fee check or money order to the witness within one business day of the conclusion of the hearing unless the witness fails to appear at the hearing. Also within one business day of the conclusion of the hearing, the party shall forward to SOAH a certification that the witness fee or money order was mailed to the witness.

(5) If a party who served a subpoena on a witness fails to appear at a hearing, that party shall mail the witness fee check or money order to the witness within one business day from receipt of a default decision or any other order issued by the Administrative Law Judge ordering payment of the fee and mileage reimbursement. Also within one business day from receipt of the Administrative Law Judge's order the party shall forward to SOAH a certification that the witness fee or money order was mailed to the witness.

(6) A party that fails to tender a witness fee or mileage reimbursement or fails to forward the certification to SOAH, as set out above, will be subject to sanctions as determined by the Administrative Law Judge, including, but not limited to, the loss of authority to issue subpoenas for Administrative License Revocation hearings.

(7) If special equipment will be required in order to offer subpoenaed documents or tangible things, the party seeking their admission shall be required to supply the necessary equipment. The party requesting a subpoena duces tecum may be required to advance the reasonable costs of reproducing the documents or tangible things requested.

(g) Service upon opposing party.

(1) A party that issues a subpoena under subsection (b) of this section must serve the opposing party with a copy of the subpoena on the same date it is issued.

(2) A party that requests a subpoena under subsection (c) of this section must serve the opposing party with a copy of the request at the time it is filed with SOAH.

(3) A party that serves a subpoena must provide the opposing party with a copy of the return of service when the subpoena has been served and no less than three calendar days prior to the hearing.

(h) Continuing effect. A properly issued subpoena remains in effect until the judge releases the witness or grants a motion to quash or for protective order. If a hearing is rescheduled and a subpoena is extended, and unless the judge specifically directs otherwise, the party who requested the continuance shall promptly notify any subpoenaed witnesses of the new hearing date.

(i) Motion to quash or for protective order.

(1) On behalf of a subpoenaed witness, a party may move to quash a subpoena or for a protective order. A party that moves to quash a subpoena must serve the motion on the other party at the time the motion is filed with SOAH.

(2) A party may seek an order from the judge at any time after the motion to quash or motion for protective order has been filed.

(3) In ruling on motions to quash or for protection, the judge must provide a person served with a subpoena an adequate time for compliance, protection from disclosure of privileged material or information, and protection from undue burden or expense. The judge also may impose reasonable conditions on compliance with a subpoena.

(4) If a subpoena request is denied or if a subpoena is quashed, any witness fee or mileage reimbursement fee that has been tendered to a witness or filed with SOAH shall be returned to the party who tendered the fees.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2014.

TRD-201405547
Thomas H. Walston
General Counsel
State Office of Administrative Hearings
Effective date: December 10, 2014
Proposal publication date: May 23, 2014
For further information, please call: (512) 475-4931

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 18. ORGANIC STANDARDS AND CERTIFICATION

SUBCHAPTER F. ADMINISTRATIVE

DIVISION 5. MISCELLANEOUS PROVISIONS

The Texas Department of Agriculture (the department) adopts the repeal of Chapter 18, Subchapter F, Division 5, §18.702 and §18.705, new §18.702, and amendments to §18.704 and §18.706, all concerning organic standards and certification, without changes to the proposed text as published in the October 10, 2014, issue of the *Texas Register* (39 TexReg 8025).

New §18.702 restructures fees for organic certification or annual update of organic certification so that the program may continue under the cost recovery requirement imposed by the 82nd Legislature. The repeal of §18.705 eliminates registration requirements for certified organic businesses and organic certifying agents. The adopted amendment to §18.704 updates the citation of the fee for transaction certificates in §18.702. The adopted amendments to §18.706 remove reference to a section that has been repealed and remove the 12-month "waiting period" before applying for transitional certification.

The department received seventeen comments on the proposal, most of which support the proposed fee change, and all of which are supportive of continuing the program, which is enabled by the adopted amendments. Eight comments were received by production and handling operations certified by TDA, two industry stakeholder groups (one of which is also certified by TDA), and seven private individuals. The Texas Food Processors Association submitted comment in support of the continuation of the TDA Organic Certification Program and stated, "Using the TDA as the certifying agent significantly reduces the cost of organic programs, even if the proposed fee restructuring is implemented." Comment was received from the Texas Organic Cotton Marketing Cooperative supporting the fee restructure and expressing their membership's desire to see the organic certification program return to operating with the quality of service and timeliness that it did prior to the budget changes of 2011, requiring the program to recover all of its direct and indirect costs in fees collected. The Cooperative is certified through the department and represents approximately 35 organic production operations also certified by TDA. The department appreciates the Cooperative's comment and shares this desire.

Of the eight comments received by production and handling operations currently certified by TDA in support of the fee restructure, several operations stated that being certified by the TDA has increased the value of their product in the marketplace.

The amendments and repeal are adopted to be effective January 1, 2015.

4 TAC §18.702, §18.705

The repeal of §18.702 and §18.705 is adopted under Texas Agriculture Code (the Code), §18.002, which provides the department with the authority to adopt rules for the certification of organic products; and §12.016, which provides the department with the authority to adopt rules as necessary for the administration of its powers and duties under the Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2014.

TRD-201405610
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: January 1, 2015
Proposal publication date: October 10, 2014
For further information, please call: (512) 463-4075

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4 TAC §§18.702, 18.704, 18.706

New §18.702 and the amendments to §18.704 and §18.706 are adopted under Texas Agriculture Code (the Code), §18.002, which provides the department with the authority to adopt rules for the certification of organic products; §18.006, which requires the department to set fees for the organic certification program in amounts that enable it to recover the costs of administering the program; and §12.016, which provides the department with the authority to adopt rules as necessary for the administration of its powers and duties under the Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2014.

TRD-201405611
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: January 1, 2015
Proposal publication date: October 10, 2014
For further information, please call: (512) 463-4075

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER E. POST AWARD AND ASSET MANAGEMENT REQUIREMENTS

10 TAC §§10.400 - 10.408

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC, Chapter 10, Subchapter E, §§10.400 - 10.408, concerning Post Award and Asset Management Requirements, without changes to the proposal as published in the September 19, 2014, issue of the *Texas Register* (39 TexReg 7443).

REASONED JUSTIFICATION. This repeal was published concurrently with the proposed new 10 TAC Chapter 10, Subchapter E, §§10.400 - 10.408. The purpose of the repeal is to allow for the adoption of the new rule.

The Department accepted public comments between September 19, 2014, and October 20, 2014. Comments regarding the repeal were accepted in writing via fax and email. No comments were received concerning the proposed repeal.

The Board approved the final order adopting the repeal on November 13, 2014.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules. Specifically Texas Government Code §2306.141 gives the Department the authority to promulgate rules governing the administration of its housing programs.

The repeal affects no other code, article or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2014.

TRD-201405506
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 9, 2014
Proposal publication date: September 19, 2014
For further information, please call: (512) 475-3959

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10 TAC §§10.400 - 10.408

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 10, Subchapter E, §§10.400 - 10.408, concerning Post Award and Asset Management Requirements. Sections 10.403 and 10.406 - 10.408 are adopted with changes to the proposed text as published in the September 19, 2014, issue of the *Texas Register* (39 TexReg 7443). Sections 10.400 - 10.402, 10.404, and 10.405 are adopted without changes and will not be republished. The purpose of the changes to the sections is to clarify and correct information from the prior rule to ensure accurate processing of post award activities and communicate more effectively with multifamily development owners regarding their responsibilities after funding or award by the Department. Post award activities include requests for action to be considered on developments awarded funding from the Department through the end of the affordability period.

REASONED JUSTIFICATION FOR THE RULE. New 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter E, §§10.400 - 10.408, concerning Post Award and Asset Management Requirements was proposed concurrently with the proposed repeal of the same sections. The new rules clarify language that was previously potentially causing uncertainty and will ensure accurate processing of post award activities and communicate more effectively with multifamily development owners regarding their responsibilities after funding or award by the Department.

REASONED RESPONSE TO PUBLIC COMMENT AND STAFF RECOMMENDATIONS. The Department's response to all comments received are set out below. The comments and responses include both administrative clarifications and corrections to the revisions recommended by staff and substantive comments on the revisions and the corresponding Departmental responses. Comments and responses are presented in the order they appear in the rules.

Public comments were accepted through October 20, 2014, with nine comments received in writing from: (1) Frank Ainsa, Ainsa Hutson LLP, (2) Rick Morrow, Locke Lord LLP, (3) Douglas W. Clapp, Holland & Knight LLP and John R. Condon, Nixon Peabody LLP, (4) Cynthia Bast, Locke Lord LLP, (5) Andrea Hope J. Steel, Coats Rose, (6) Matt Hull, Texas Association of Community Development Corporations, (7) Sarah Ander-

son, S Anderson Consulting, (8) K. Nicole Flores, City Real Estate Advisors, Inc., and (9) Frank Jackson, Texas Affiliation of Affordable Housing Providers. Commenters #7, #8, and #9 made comments to the Real Estate Analysis rule §10.302; however, since these comments directly relate to long term feasibility which is also analyzed at cost certification review, these comments will be addressed herein as well.

COMMENT SUMMARY:

§10.402, Housing Tax Credit and Tax Exempt Bond Developments

Three commenters provided comment to the REA rules out for public comment. These comments are also correlated with §10.402(j) of the Asset Management rules relating to Cost Certification. Commenter #7, #8, and #9 provided the same general comment regarding long-term feasibility analysis through the debt coverage and 65% expense/income ratios used during initial underwriting at application and at cost certification review for the issuance of IRS form 8609.

The commenters made two recommendations regarding the feasibility analysis, which was to "Limit the DCR upper limit test to sizing the award" and "Make both the 65% rule and DCR 1.15 be a determination of infeasibility - rather than one or the other" so that if you exceed the 65% rule, then you must be able to stay about 1.15 at year 15. Specific recommendations to change §10.302(d)(4)(D) Acceptable Debt Coverage Ratio Range and §10.302(i) Feasibility Conclusion will be thoroughly discussed in the response to that section of the rule.

STAFF RESPONSE: Staff believe the recommended changes to be substantive in nature, requiring additional public comment and discussion prior to implementation. A differentiation of the underwriting criteria at cost certification would create an inconsistency with how the evaluation required in IRC Section 42(m) is conducted through the full allocation process.

§10.403, Direct Loans.

Commenter #2 suggested that the initial statement in subsection (a) is "not entirely clear" as to when the closing is to occur and suggested the following amendment:

(a) Loan Closing. The loan closing must occur no more than nine (9) months from the date of the Direct Loan Commitment, which may be extended with....

STAFF RESPONSE: Staff generally agrees with commenter that the word "of" be added to clarify the Department's intent.

Commenter #2 suggested that the initial statement in this section is "not entirely clear" as to the number of items required at Closing and suggested the following amendment to subsection (a):

In Preparation for closing any Direct Loan, the Development Owner must submit the items described in paragraphs (1) - (107) of this subsection:...

STAFF RESPONSE: Staff agrees with commenter that by changing the number of items to "7", the number of items match the actual number of items required at closing.

Commenter #2 suggested that the initial statement in this section "would not be applicable to all transactions" and "the description of the type of assignment and security documents is very broad" and suggested the following amendment to subsection (b):

(b) Loan Documents. The Development Owner is required to execute all loan closing documents required by and in form and substance acceptable to the Legal Division including but not limited to a promissory note, deed of trust, construction loan agreement (if the proceeds of the loan are to be used for construction), LURA, Direct Loan contract, Architect and/or licensed engineer certification of understanding to complete environmental mitigation if such mitigation is identified in HUD's environmental clearance and by the Real Estate Analysis Division, and assignment and security instruments whereby the Developer, the Development Owner, and/or any Affiliates (if applicable) grants the Department their respective right, title, and interest in and to other collateral, including without limitation the Owner/Architect agreement and the Owner/General Contractor agreement, to secure the payment and performance of the Development Owner's obligations under the loan documents.

STAFF RESPONSE: Staff agrees with commenter that the revised language proposed in amendment will more accurately reflect the type of documents that the Department typically uses and is more specific to the Department's intent.

Commenter #2 suggested that the initial statement in this section is "not entirely clear" as to the number of items required for Disbursement of Funds and suggested the following amendment to subsection (c):

"The parenthetical '(10)' should be changed to '(9)'."

STAFF RESPONSE: Staff agrees with commenter that by changing the number of items to "9", the number of items match the actual number of items required for Disbursement of Funds.

Commenter #2 suggested that the initial statement in this section be changed to allow less funds to be withheld from initial disbursement under certain circumstances at closing and suggested the following amendment to subsection (c):

"(3) the Department will require that at least 50 percent of the funds be withheld from the initial disbursement to allow for period disbursements, or such lesser amount provided it meets all federal requirements."

STAFF RESPONSE: Staff agrees with commenter and changes have been made.

Commenter #2 suggested that the initial statement in this section be changed to clarify circumstances which the Department can withhold disbursement of Developer fee and suggested the following amendment to subsection (c)(5)(C):

"(C) upon delivery of written notice to the Development Owner, the Department may reasonably withhold any disbursement of developer fees if it reasonably determines that the Development is not progressing as necessary to meet the benchmarks for the timely completion of construction of the Development that is set forth in the loan documents, or that cost overruns have put the Development Owner's ability to repay its Direct Loan or complete the construction of the Development in accordance with the terms of the loan documents and within budget at material risk."

STAFF RESPONSE: Staff recommends the language below which gives the Department additional flexibility to withhold disbursement of developer fees in the case that the Development is not meeting the benchmarks for timely completion. Staff felt that adding "reasonably" and "material" as Commenter #2 is requesting would in fact make the language less flexible for the Department.

(C) the Department may reasonably withhold any disbursement of developer fees if it is determines that the Development is not progressing as necessary to meet the benchmarks for the timely completion of construction of the Development that is set forth in the loan documents, or that cost overruns have put the Development Owner's ability to repay its Direct Loan or complete the construction of the Development Owner's ability to repay its Direct Loan or complete the construction of the Development in accordance with the terms of the loan documents and within budget at risk.

Commenter #2 suggested that the initial statement in this section is "not entirely clear" as to the specific items required for final disbursement of funds and suggested the following amendment to subsection (c)(9):

"(B) A down date endorsement dated at least 30 calendar days after the date of completion as certified on the Certificate of Substantial Completion (AIA Form G704);"

"(C) For developments not layered with Housing Tax Credits, a Closed Final Development Inspection Letter from the Department;"

"(E) Receipt of Certificates of Occupancy for New Construction, or a Certificate of Substantial Completion (AIA Form G704); from the Development Architect for Rehabilitation;"

"(F) Development completion reports which may include documentation of full compliance with the Uniform Relocation Act, and the Davis Bacon Act, Section 3, if either are applicable to the Development, and any other applicable requirements; and"

"(G) If applicable to the Development, certification from Architect or a licensed engineer"

STAFF RESPONSE: Staff recommends the language below which adds further clarification to the AIA Form G704 and Section 3 as well as addresses punctuation and capitalization issues:

"(B) A down date endorsement dated at least 30 calendar days after the date of completion as certified on the Certificate of Substantial Completion (AIA Form G704);"

"(C) For developments not layered with Housing Tax Credits, a Closed Final Development Inspection Letter from the Department;"

"(E) Receipt of Certificates of Occupancy for New Construction, or a Certificate of Substantial Completion (AIA Form G704); from the Development Architect for Rehabilitation;"

"(F) Development completion reports which may include documentation of full compliance with the Uniform Relocation Act, the Davis Bacon Act, and Section 3 of the Housing and Urban Development Act of 1968, as applicable to the Development, and any other applicable requirements; and"

"(G) If applicable to the Development, certification from Architect or a licensed engineer that all HUD and REA environmental mitigation conditions have been met."

§10.406, Ownership Transfers (§2306.6713).

Commenter #1 provided public comment at the board meeting on September 4, 2014 which prompted a revision to the rule proposed to the board. The commenter suggested that the original language was too restrictive in complying with the statute with an undefined "good cause" term. After working with staff, the revised language for subsection (e) was presented to the Board and approved for publishing in the *Texas Register* to garner public comment.

Commenter #3 and #4 agreed with the revised language in subsection (e) but recommended the addition of language that would cover a default by the HUB general partner wherein the HUB was involuntarily removed. Commenter #3 stated that many times, the HUB general partner becomes "unable or unwilling to perform its duties as a general partner" and sustain the operation of the housing development and therefore, the requirement for a HUB to actively sell of its own volition may not be possible.

Commenter #4 recommended inserting a provision acknowledging that a Development Owner that is unable to find a replacement HUB, after a good faith effort, may request a LURA amendment. Commenter #3 suggested that language in subsection (e) be revised by making the following changes:

(e) Historically Underutilized Business ("HUB") Organizations. If a HUB is the general partner of a Development Owner and it (i) is being removed as the result of a default under the organizational documents of the Development Owner or (ii) determines to sell its ownership interest, in either case, after the issuance of 8609's, the purchaser of that general partnership interest is not required to be a HUB as long as the LURA does not require such continual ownership or a material LURA amendment is approved. Such approval can be obtained concurrent with Board approval described herein. All such transfers must be approved by the Board and require that the Board find that:

(1) the selling HUB is acting of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(2) the participation by the HUB has been substantive and meaningful, or would have been substantial and meaningful had the HUB not defaulted under the organizational documents of the Development Owner, enabling it to realize not only financial benefit but to acquire skills relating to the ownership and operation of affordable housing; and

(3) the proposed purchaser meets the Department's standards for ownership transfers.

STAFF RESPONSE: The language in this section was revised at the TDHCA Board meeting on September 4, 2014 in response to comment made by Commenter #1. Commenters #3 and #4 support these changes and staff agrees with the commenters and their additional proposed changes and this change has been incorporated as written above. However, Commenter #4 also recommended that language be added regarding the Development Owner's ability to request a LURA amendment. Language specific to a LURA amendment is already in the first paragraph of the subsection.

Staff agrees with all three commenters (aside from the LURA amendment language addition which is already in the rule) and changes have been incorporated as follows:

(e) Historically Underutilized Business ("HUB") Organizations. If a HUB is the general partner of a Development Owner and it (i) is being removed as the result of a default under the organizational documents of the Development Owner or (ii) determines to sell its ownership interest, in either case, after the issuance of 8609's, the purchaser of that general partnership interest is not required to be a HUB as long as the LURA does not require such continual ownership or a material LURA amendment is approved. Such approval can be obtained concurrent with Board

approval described herein. All such transfers must be approved by the Board and require that the Board find that:

(1) the selling HUB is acting of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(2) the participation by the HUB has been substantive and meaningful, or would have been substantial and meaningful had the HUB not defaulted under the organizational documents of the Development Owner, enabling it to realize not only financial benefit but to acquire skills relating to the ownership and operation of affordable housing; and

(3) the proposed purchaser meets the Department's standards for ownership transfers §10.407 Right of First Refusal

Some of the comments described below would require a substantive change to the proposed new rule that was published in the *Texas Register* and, therefore, even if the Department contemplated making the recommended change to the rule, it would need to be republished for public comment on this substantive change. Therefore, the Department may undertake future rulemaking to open §10.407 for public comment with regard to the changes contemplated by these comments.

Commenter #4 made comments to several subsections of this section, including (d), (d)(1)(B), (d)(3), and (e)(2). More specifically, Commenter #4 objects to an extended timeframe of thirty days to process ROFR requests under subsection (d). Currently the rule states that the Department will review the submitted documents and notify the Development Owner of any deficiencies within five (5) business days of receipt. These packages are often times complex and require extensive review of property specific documents such as an appraisal, purchase contract, LURA, and ROFR price calculation. Because of this, staff proposed a more consistent, 30 day period for review. Commenter #4 argues that this is too long and is a "burdensome delay".

STAFF RESPONSE: Staff partially agrees with the commenter and has made the following change:

(d) Process. Within ten (10) business days of receipt of all required documentation, the Department will review the submitted documents and notify the Development Owner of any deficiencies.

Commenter #4 objects to the additional language in subsection (d)(1)(B) requiring "the Development Owner to continue to go through the non-profit offerors until it finds one that can close". The actual language added to this subsection clarifies that if the Development Owner accepts an offer from a nonprofit organization and that organization either fails to close or is subsequently not approved during the ownership transfer process under previous participation review, the ROFR requirement will be deemed met as long as there are no other acceptable offers received; implying that if other offers had been received, the Development Owner would need to go through each of these and accept one and proceed to closing with another nonprofit organization.

STAFF RESPONSE: Staff understands the commenter concern, however, disagrees with incorporating the change at this time as it is inconsistent with the Departments historic approach to the ROFR. This may be reconsidered when a review of the underlying policies associated with this section is open for public comment.

Commenter #4 objects to the new language in subsection (d)(3) "imposing the most restrictive ROFR period possible" when there is an absence of a defined ROFR period in the LURA. The statute that describes the two-year ROFR time period is found in Section 2306.6726 of the Texas Government Code and was enacted effective September 1, 1997. Commenter #4 proposes that the rule should state that "in the absence of a defined ROFR period in the LURA, any Development that received a tax credit allocation prior to September 1, 1997 should use a 90-day ROFR period and any Development that received a tax credit allocation on or after September 1, 1997 should use the 2-year ROFR period".

STAFF RESPONSE: Staff agrees with the commenter and change has been incorporated as follows:

(3) If the LURA does not specify a required ROFR posting timeframe, or, is unclear on the required ROFR posting timeframe, and the required ROFR value is determined by the Minimum Purchase Price method, any Development that received a tax credit allocation prior to September 1, 1997 is required to post for a 90-day ROFR period and any Development that received a tax credit allocation on or after September 1, 1997 is required to post for a 2-year ROFR period as described in Texas Government Code, §2306.6726.

Commenter #4 objects to the changes made in subsection (e)(2) regarding the removal of the materiality standard in the review of subsequent ownership transfers that occur after satisfying the ROFR requirement of the LURA and views "the removal of the materiality standard as a fundamental change to the spirit of" the roundtable discussions held during the original drafting of this rule.

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated.

Commenter #5 suggested that there be three changes made to subsection (a). The first recommendation is to allow for the termination of the ROFR requirement in the LURA after it is satisfied once. The commenter states that "there is no IRS requirement that once the ROFR has been exercised, that the exercising entity needs to continue to be bound by a ROFR" but the entity will still be bound by the affordability requirements of the LURA. This scenario would allow the purchaser to re-syndicate the Development adding a new placement in service and a new thirty year affordability period. The second recommendation is that the Department allow purchasers that would have qualified for the non-profit set-aside, through an ownership entity structured as a partnership with a for-profit investor and a nonprofit general partner, to purchase the Development without going through the ROFR process. The commenter opined that this would allow the tax benefits to be realized by an investor while still proceeding in line with the purpose of fostering low income housing as a Qualified Nonprofit General Partner and would require any future sale to go through the ROFR process with the LURA and ROFR requirement "entirely undisturbed". The third recommendation would "allow a sale to any purchaser without going through the ROFR process, but only to the extent that Substantial Rehab will be completed and a new LURA would be put in place that would include a ROFR provision and would cover the new Compliance Period and Extended Use Period". Commenter recommends the following revision to subsection (a):

(a) General. This section applies to LURAs that provided an incentive for Development Owners to offer a Right of First Refusal (ROFR) to a Qualified ROFR Organization which is defined as a qualified nonprofit organization under §42(h)(5)(c)of the Code or tenant organizations. The Development Owner may market

the Property for sale and sell the Property to a Qualified ROFR Organization without going through the ROFR process outlined in this section and such a sale will terminate ongoing application of the ROFR requirement as to any subsequent Development Owner (but will not terminate the LURA or the Qualified Contract Requirements). The Development Owner may market the Property for sale and sell the Property to a purchaser with an ownership structure that would cause the Development to meet the definition of a "qualified low-income housing project" as defined by Section 42(h)(5)(b) without going through the ROFR process outlined in this section and such a sale will not terminate the LURA or the ongoing application of the ROFR requirement to any subsequent Development Owner. The Development Owner may market the Property for sale and sell the Property to any purchaser who is re-syndicating the Development without going through the ROFR process outlined in this section, but only so long as the purchaser is expending the minimum Rehabilitation amounts set forth in §10.101(b)(3) of this Chapter using an allocation of Housing Tax Credits and provided that the existing LURA will be terminated and replaced by a new LURA that shall include a ROFR requirement, regardless of whether any related Housing Tax Credit application or request contemplated including a ROFR provision in its LURA. The purpose of this section is to provide administrative procedures and guidance on the process and valuation of properties under the LURA. All requests for ROFR submitted to the Department, regardless of existing regulations, must adhere to this process. A ROFR request must be made in accordance with the LURA for the Development. If there is a conflict between the Development's LURA and this subchapter, requirements in the LURA supersede the subchapter. If a LURA includes the ROFR provision, the Development Owner may not request a Preliminary Qualified Contract until the requirements outlined in this section have been satisfied. The Department reviews and approves all ownership transfers, including transfers to a nonprofit or tenant organization through a ROFR. Properties subject to a LURA may not be transferred to an entity that is considered an ineligible entity under the Department's most recent Qualified Allocation Plan. In addition, ownership transfers to a Qualified ROFR Organization during the ROFR period are subject to §1.5 of this title (relating to Previous Participation Reviews). A Qualified ROFR Organization that wishes to pursue the acquisition of a Development through a ROFR but that is not approved for transfer under the Previous Participation Review, pursuant to §1.5 of this title, may appeal the denial to the Board. Satisfying the ROFR requirement does not terminate the LURA or the ongoing application of the ROFR requirement to any subsequent Development Owner.

STAFF RESPONSE: Staff thinks the recommended changes to be substantive in nature, requiring additional public comment and discussion prior to implementation, and plans to propose amendments to this specific section of the rule for public comment at an upcoming Board meeting. This action will allow for additional public comment on these changes to assist Department staff with final recommendation to the Board. However, it should be noted that the language in previous QAPs granting a point for providing a ROFR to a non-profit organization was exclusive of §42(h)(5)(C) of the Code and incorporated in the LURA. Throughout this section of the rule, the Department emphasizes that a ROFR request must be made in accordance with the LURA for the Development. The ROFR section of a Development's LURA references only §42(h)(5)(C) of the Code and therefore, the Development must be offered to an entity that meets the requirements of this section only.

Commenter #6 suggested that "several nonprofits have concerns with appraisals related to the LIHTC 15-year end of compliance and nonprofit right of first refusal for property purchases." This stems from Development Owners who protest tax assessment appraisals to the appraisal districts to keep property values as low as possible to minimize their tax obligations while they own the property but then seek appraisals that "seem based on market rate rents, not restricted rents at the end of the compliance period" for the purpose of requesting to go through the ROFR process under the fair market value assumption. In the opinion of this commenter, this inconsistency in appraisal valuation results in the ROFR price "being artificially high, often at levels that would require an amount of debt that cannot be supported with cash flow from rents". Commenter recommends a policy that encourages the sale of LIHTC properties at the end of the 15-year compliance period "at or below the appraisal district's valuation of the property".

The subsection this commenter is addressing, although not specifically identified in their letter, is (c)(2)(B) which states that the appraisal submitted must be completed within the last three months prior to submission of the ROFR request and comply with Subchapter D relating to Underwriting and Loan Policy. The appraisal should take into account the existing and continuing requirements to operate the Property under the LURA and any other restrictions that may exist.

STAFF RESPONSE: Staff disagrees with commenter. Subchapter D, §10.304(d)(10), requires appraisers to conduct various value estimates and base their final value on the "as-is as-restricted" value and therefore, the commenter's statement that values seem based on market rate rents, is not supported by current rule and processing.

§10.408, Qualified Contract.

Commenter #4 objects to the revised language in subsection (b)(2)(E) that adds a requirement to submit a physical condition assessment in the preliminary qualified contract request. Pursuant to§2306.186(e) of the Texas Government Code, beginning with the 11th year after the awarding of financial assistance the Development Owner is to contract for a third-party physical needs assessment at appropriate intervals that are consistent with the lender requirements. If the first lien lender does not require a third-party physical needs assessment or if the Department is the first lien lender, the physical needs assessment should be conducted at least once during each five-year period beginning with the 11th year after the award with copies submitted to the Department.

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated by deleting subsection (b)(2)(E) in its entirety.

The Board approved the final order adopting the new sections on November 13, 2014.

STATUTORY AUTHORITY. The new sections were adopted pursuant to the authority of Texas Government Code §2306.053, which authorizes the Department to adopt rules. Specifically Texas Government Code §2306.141 gives the Department the authority to promulgate rules governing the administration of its housing programs.

The adoption affects no other code, article or statute.

§10.403. Direct Loans.

(a) Loan Closing. The loan closing must occur no more than nine (9) months from the date of the Commitment or similar document

is executed, which may be extended in accordance with the provisions in this subchapter. In preparation for closing any Direct Loan, the Development Owner must submit the items described in paragraphs (1) - (7) of this subsection:

(1) documentation of the prior or reasonable assurance of a concurrent closing with any superior lien holders or any other sources of funds determined to be necessary for the long-term financial feasibility of the Development and all due diligence determined by the Department to be prudent and necessary to meet the Department's rules and to secure the interests of the Department. Where the Department will have a first lien position and the Applicant provides documentation that closing on other sources is reasonably expected to occur within three (3) months, the Executive Director or authorized designee may approve a closing to move forward without the closing on other sources. The Executive Director as the authorized designee of the Department must require a personal guarantee, in form and substance acceptable to the Department, from a Principal of the Development Owner for the interim period;

(2) when Department funds have a first lien position, assurance of completion of the Development in the form of payment and performance bonds in the full amount of the construction contract will be required or equivalent guarantee in the sole determination of the Department. Such assurance of completion will run to the Department as obligee. Development Owners also utilizing the USDA §515 program are exempt from this requirement but must meet the alternative requirements set forth by USDA;

(3) Owner/General Contractor agreement and Owner/ Architect agreement;

(4) survey of the Property that includes a certification to the Department, Development Owner, Title Company, and other lenders;

(5) if layered with Housing Tax Credits, a fully executed limited partnership agreement between the General Partner and the tax credit investor entity (may be provided concurrent with closing);

(6) a revised development cost schedule, sources and uses, operating proforma, planned cost categories for the use of Direct Loan funds, updated written financial commitments/term sheets and any additional budget schedules that have changed since the time of application. If the budget or sources of funds reflect material changes from what was approved by the Board that may affect the financial feasibility of the Development, the Department may request additional documentation to ensure that the Development continues to meet the requirements of Subchapter D of this chapter (relating to Underwriting and Loan Policy);

(7) if required for the Direct Loan, prior to closing, the Development Owner must have received verification of:

(A) environmental clearance;

(B) verification of HUD Site and Neighborhood clearance;

(C) documentation necessary to show compliance with the Uniform Relocation Act and any other relocation requirements that may apply; and

(D) any other documentation that is necessary or prudent to meet program requirements or state or federal law in the sole determination of the Department.

(b) Loan Documents. The Development Owner is required to execute all loan closing documents required by and in form and substance acceptable to the Legal Division including but not limited to a promissory note, deed of trust, construction loan agreement (if the proceeds of the loan are to be used for construction), LURA, HOME contract, Architect and/or licensed engineer certification of understanding to complete environmental mitigation if such mitigation is identified in HUD's environmental clearance and by the Real Estate Analysis Division (REA) and assignment and security instruments whereby the Developer, the Development Owner, and/or any Affiliates (if applicable) grants the Department their respective right, title, and interest in and to other collateral, including without limitation the Owner/Architect agreement and the Owner/General Contractor agreement, to secure the payment and performance of the Development Owner's obligations under the loan documents. Repayment provisions will require repayment on a per unit basis for units that have not been rented to eligible households within eighteen (18) months of project completion; termination and repayment of the HOME award in full will be required for any development that is not completed within four (4) years of the date of funding commitment.

(c) Disbursement of Funds (including developer fees). The Development Owner must comply with the requirements in paragraphs (1) - (9) of this subsection for a request for disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the Development Owner's compliance with these requirements may be required with a request for disbursement:

(1) except for disbursement requests made for acquisition and closing costs or requests made for soft costs only, a down-date endorsement to the title policy not older than the Architect's certification date on AIA form G702 or sixty (60) calendar days, whichever is later. For release of retainage the down-date endorsement must be dated at least thirty (30) calendar days after the date of the construction completion as certified on the Certificate of Substantial Completion (AIA Form G704);

(2) for hard construction costs, documentation of the total construction costs incurred and costs incurred since the last disbursement of funds must be submitted. Such documentation must be signed by the General Contractor and certified by the Development architect and is generally in the form of an AIA Form G702 or G703;

(3) the Department will require that at least 50 percent of the funds be withheld from the initial disbursement to allow for periodic disbursements, or such lesser amount provided it meets all federal requirements. For HOME Direct Loans: The initial draw request for the development must be entered no later than ten business days prior to the one year anniversary of the commitment date (as defined in 24 CFR Part 92) or funds may be cancelled in HUD's IDIS system;

(4) if applicable, up to 75 percent of Direct Loan funds may be drawn before providing evidence of Match. Thereafter, each Development Owner must provide evidence of Match in the form of a formal contract or commitment with the vendor clearly delineating the donated portion of the contract price, invoices showing the forgiven amount, or other equally verifiable third party documentation prior to release of the final 25 percent of funds. If funds are requested on the day of closing, an executed formal contract specifying the terms of the Match must be provided;

(5) Developer fee disbursement shall be conditioned upon:

(A) for Developments in which the loan is secured by a first lien deed of trust against the Property, 75 percent shall be disbursed in accordance with percent of construction completed (i.e. 75 percent of the total allowable fee will be multiplied by the percent completion) as documented by the construction contract and as may be verified by an inspection by the Department. The remaining 25 percent shall be disbursed at the time of release of retainage; or

(B) for Developments in which the loan is not secured by a first lien deed of trust or the Development is also utilizing Housing Tax Credits, developer fees will not be reimbursed by the Department unless the other lenders and syndicator confirm in writing that they do not have an existing or planned agreement to govern the disbursement of developer fees and expect that Department funds shall be used to fund developer fees. Provided this requirement is met, developer fees shall be reimbursed in the same manner as described in subparagraph (A) of this paragraph; and

(C) the Department may reasonably withhold any disbursement of developer fees if it is determines that the Development is not progressing as necessary to meet the benchmarks for the timely completion of construction of the Development that is set forth in the loan documents, or that cost overruns have put the Development Owner's ability to repay its Direct Loan or complete the construction of the Development Owner's ability to repay its Direct Loan or complete the construction of the Development in accordance with the terms of the loan documents and within budget at risk. Once a reasonable alternative that is deemed acceptable by the Department has been provided, disbursement of the remaining fee may occur;

(6) expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure requested. The Department may request the Development Owner make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of Department funds to Development Owner as may be necessary or advisable for compliance with all program requirements. For HOME Direct Loans: Pre-award costs for predevelopment activities, as specified in the loan documents, are allowable only if they were incurred less than 24 months prior to the commitment date (as defined in 24 CFR Part 92) and were associated with the Application Round in which the project was awarded;

(7) table funding requests will not be considered unless:

(A) a "Commitment to a specific local project" as defined in 24 CFR Part 92 has been made, if applicable; and

(B) ten (10) days prior to anticipated closing, all table funding draw documentation has been completed and submitted to the Department;

(8) each Development Owner must request a progress inspection from Department staff once the property passes 25 percent construction completion based on the AIA G702-703. Up to 50 percent of the HOME award will be released prior to receipt of documentation that the progress inspection has occurred;

(9) Following fifty percent construction completion, the remaining HOME funds will be released in accordance with the percentage of construction completion, not to exceed ninety percent of award, at which point funds will be held as retainage until the final draw request. Retainage will be held until all of the items described in subparagraphs (A) - (G) of this paragraph are received:

(A) Certificate of Substantial Completion (AIA Form G704);

(B) A down date endorsement dated at least 30 calendar days after the date of completion as certified on the Certificate of Substantial Completion (AIA Form G704);

(C) For developments not layered with Housing Tax Credits, a Closed Final Development Inspection Letter from the Department;

(D) For developments subject to the Davis-Bacon Act, evidence from the Senior Labor Standards Specialist that the final wage compliance report was received and approved;

(E) Receipt of Certificates of Occupancy for New Construction or a Certificate of Substantial Completion (AIA Form G704); from the Development Architect for Rehabilitation;

(F) Development completion reports which may include documentation of full compliance with the Uniform Relocation Act, Davis-Bacon Act, and Section 3 of the Housing and Urban Development Act of 1968, as applicable to the Development, and any other applicable requirement; and

(G) If applicable to the Development, certification from Architect or a licensed engineer that all HUD and REA environmental mitigation conditions have been met.

§10.406. Ownership Transfers (§2306.6713).

(a) Ownership Transfer Notification. All multifamily Development Owners must provide written notice to the Department at least thirty (30) calendar days prior to any sale, transfer, or exchange of the Development or any portion of or Controlling interest in the Development. Transfers that are the result of an involuntary removal of the general partner by the investment limited partner must be reported to the Department, as soon as possible due to the sensitive timing and nature of this decision. If the Department determines that the transfer, involuntary removal, or replacement was due to a default by the General Partner under the Limited Partnership Agreement, or other detrimental action that put the Development at risk of failure, staff may make a recommendation to the Board for the debarment of the entity and/or its Principals and Affiliates pursuant to the Department's debarment rule. In addition, a record of transfer involving Principals in new proposed awards will be reported and may be taken into consideration by the Executive Award and Review Committee, in accordance with §1.5 of this title (relating to Previous Participation Reviews), prior to recommending any new financing or allocation of credits.

(b) Requirement. Department approval must be requested for any new member to join in the ownership of a Development. Exceptions include changes to the investment limited partner, non-controlling limited partner, or other partners affiliated with the investment limited partner, or changes resulting from foreclosure wherein the lender or financial institution involved in the transaction is the resulting owner. Any subsequent transfer of the Development will be required to adhere to the process in this section. Furthermore, a Development Owner may not transfer an allocation of tax credits or ownership of a Development supported with an allocation of tax credits to any Person or entity unless the Development Owner obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer requested in compliance with this section. Notwithstanding the foregoing, a Development Owner shall be required to notify the Department but shall not be required to obtain Executive Director approval when the transferee is an Affiliate of the Development Owner with no new members or the transferee is a Related Party who does not Control the Development and the transfer is being made for estate planning purposes.

(c) Transfers Prior to 8609 Issuance or Construction Completion. Transfers (other than those that do not require Executive Director approval, as set forth in subsection (b) of this section) will not be approved prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or the completion of construction (for all Developments funded through other Department programs) unless the Development Owner can provide evidence that the need for the transfer is due to a hardship (ex. potential bankruptcy, removal by a partner, etc.). The Development Owner must provide the Department with a written expla-

nation describing the hardship and a copy of any applicable agreement between the parties to the transfer, including any Third-Party agreement.

(d) Non-Profit Organizations. If the ownership transfer request is to replace a non-profit organization within the Development ownership entity, the replacement non-profit entity must adhere to the requirements in paragraph (1) or (2) of this subsection.

(1) If the LURA requires ownership or material participation in ownership by a Qualified Non-Profit Organization, and the Development received Tax Credits pursuant to §42(h)(5) of the Code, the transferee must be a Qualified Non-Profit Organization that meets the requirements of §42(h)(5) of the Code and Texas Government Code §2306.6706.

(2) If the LURA requires ownership or material participation in ownership by a qualified non-profit organization, but the Development did not receive Tax Credits pursuant to §42(h)(5) of the Code, the Development Owner must show that the transferee is a non-profit organization that complies with the LURA.

(e) Historically Underutilized Business ("HUB") Organizations. If a HUB is the general partner of a Development Owner and it (i) is being removed as the result of a default under the organizational documents of the Development Owner or (ii) determines to sell its ownership interest, in either case, after the issuance of 8609s, the purchaser of that general partnership interest is not required to be a HUB as long as the LURA does not require such continual ownership or a material LURA amendment is approved. Such approval can be obtained concurrent with Board approval described herein. All such transfers must be approved by the Board and require that the Board find that:

(1) the selling HUB is acting of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(2) the participation by the HUB has been substantive and meaningful, or would have been substantial and meaningful had the HUB not defaulted under the organizational documents of the Development Owner, enabling it to realize not only financial benefit but to acquire skills relating to the ownership and operation of affordable housing; and

(3) the proposed purchaser meets the Department's standards for ownership transfers

(f) Documentation Required. A Development Owner must submit documentation requested by the Department to enable the Department to understand fully the facts and circumstances that gave rise to the need for the transfer and the effects of approval or denial. Documentation includes but is not limited to:

(1) a written explanation outlining the reason for the request;

(2) a list of the names of transferees and Related Parties;

(3) detailed information describing the experience and financial capacity of transferees and related parties holding an ownership interest of 10 percent or greater in any Principal or Controlling entity;

(4) evidence and certification that the tenants in the Development have been notified in writing of the proposed transfer at least thirty (30) calendar days prior to the date the transfer is approved by the Department. The ownership transfer approval letter will not be issued until this 30 day period has expired.

(g) Within five (5) business days after the date the Department receives all necessary information under this section, staff shall initiate a qualifications review of a transferee, in accordance with §1.5 of this title, to determine the transferee's past compliance with all aspects of the Department's programs, LURAs and eligibility under this chapter.

(h) Credit Limitation. As it relates to the Housing Tax Credit amount further described in §11.4(a) of this title (relating to Tax Credit Request and Award Limits), the credit amount will not be applied in circumstances described in paragraphs (1) and (2) of this subsection:

(1) in cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(2) in cases where the general partner is being replaced if the award of credits was made at least five (5) years prior to the transfer request date.

(i) Penalties. The Development Owner must comply with any additional documentation requirements as stated in Subchapter F of this chapter (relating to Compliance Monitoring). The Development Owner, as on record with the Department, will be liable for any penalties imposed by the Department even if such penalty can be attributable to the new Development Owner unless such ownership transfer is approved by the Department.

(j) Ownership Transfer Processing Fee. The ownership transfer request must be accompanied by corresponding ownership transfer fee as outlined in §10.901 of this chapter (relating to Fee Schedule).

§10.407. Right of First Refusal.

(a) General. This section applies to LURAs that provided an incentive for Development Owners to offer a Right of First Refusal (ROFR) to a Qualified ROFR Organization which is defined as a qualified nonprofit organization under §42(h)(5)(c) of the Code or tenant organizations. The Development Owner may market the Property for sale and sell the Property to a Qualified ROFR Organization without going through the ROFR process outlined in this section. The purpose of this section is to provide administrative procedures and guidance on the process and valuation of properties under the LURA. All requests for ROFR submitted to the Department, regardless of existing regulations, must adhere to this process. A ROFR request must be made in accordance with the LURA for the Development. If there is a conflict between the Development's LURA and this subchapter, requirements in the LURA supersede the subchapter. If a LURA includes the ROFR provision, the Development Owner may not request a Preliminary Qualified Contract until the requirements outlined in this section have been satisfied. The Department reviews and approves all ownership transfers, including transfers to a nonprofit or tenant organization through a ROFR. Properties subject to a LURA may not be transferred to an entity that is considered an ineligible entity under the Department's most recent Qualified Allocation Plan. In addition, ownership transfers to a Qualified ROFR Organization during the ROFR period are subject to §1.5 of this title (relating to Previous Participation Reviews). A Qualified ROFR Organization that wishes to pursue the acquisition of a Development through a ROFR but that is not approved for transfer under the Previous Participation Review, pursuant to §1.5 of this title, may appeal the denial to the Board. Satisfying the ROFR requirement does not terminate the LURA or the ongoing application of the ROFR requirement to any subsequent Development Owner.

(b) Right of First Refusal Offer Price. There are two general expectations of the ROFR offer or sale price identified in the outstanding LURAs. The descriptions in paragraphs (1) and (2) of this subsection do not alter the requirements or definitions included in the LURA but provide further clarification as applicable:

(1) Fair Market Value is established using either a current appraisal (completed within three months prior to the ROFR request

and in accordance with §10.304 of this chapter (relating to Appraisal Rules and Guidelines)) of the Property or an executed purchase offer that the Development Owner would like to accept. The purchase offer must contain specific language that the offer is conditioned upon satisfaction of the ROFR requirement. If a subsequent ROFR request is made within six months of the previously approved ROFR posting, the lesser of the prior ROFR posted value or new appraisal/purchase contract amount must be used in establishing Fair Market Value;

(2) Minimum Purchase Price, pursuant to §42(i)(7)(B) of the Code, is the sum of:

(A) the principal amount of outstanding indebtedness secured by the project (other than indebtedness incurred within the five (5)-year period immediately preceding the date of said notice); and

(B) all federal, state, and local taxes incurred or payable by the Development Owner as a consequence of such sale. If the Property has a minimum Applicable Fraction of less than 1, the offer must take this into account by multiplying the purchase price by the applicable fraction and the fair market value of the non-Low-Income Units.

(c) Required Documentation. Upon establishing the value of the Property, the ROFR process is the same for all types of LURAs. To proceed with the ROFR request, submit all documents listed in paragraphs (1) - (12) of this subsection:

(1) upon the Development Owner's determination to sell the Development to an entity other than a Qualified ROFR Organization, the Development Owner shall provide a notice of intent to the Department and to such other parties as the Department may direct at that time. If the LURA identifies a Qualified ROFR Organization that has a limited priority in exercising a ROFR to purchase the Development, the Development Owner must first offer the Property to this entity. If the nonprofit entity does not purchase the Property, this denial of offer must be in writing and submitted to the Department along with the notice of intent to sell the Property and the ROFR Fee. The Department will determine from this documentation whether the ROFR requirement has been met. In the event that the organization is not operating or in existence when the ROFR is to be made, the ROFR must be provided to another Qualified ROFR Organization that is not related to or affiliated with the current Development Owner. Upon review and approval of the notice of intent and denial of offer letter, the Department will notify the Development Owner in writing whether the ROFR requirement has been satisfied or not. Upon receipt of written notice, the Development Owner may pursue the Qualified Contract process or proceed with the sale to another buyer at or above the posted price;

(2) documentation verifying the ROFR offer price of the property:

(A) if the Development Owner receives an offer to purchase the Property from any buyer other than a Qualified ROFR Organization that the Development Owner would like to accept, the Development Owner may execute a sales contract, conditioned upon satisfaction of the ROFR requirement, and submit the executed sales contract to establish fair market value; or

(B) if the Development Owner of the Property chooses to establish fair market value using an appraisal, the Development Owner must submit an appraisal of the Property completed during the last three (3) months prior to the date of submission of the ROFR request, establishing a value for the Property in compliance with Subchapter D of this chapter (relating to Underwriting and Loan Policy) in effect at the time of the request. The appraisal should take into account the existing and continuing requirements to operate the Property under the LURA and any other restrictions that may exist. Department staff will review all materials within thirty (30) calendar days of receipt. If, after the review, the Department does not agree with the fair market value proposed in the Development Owner's appraisal, the Department may order another appraisal at the Development Owner's expense; or

(C) if the LURA requires valuation through the Minimum Purchase Price calculation, submit documentation verifying the calculation of the Minimum Purchase Price as described in subsection (b)(2) of this section regardless of any existing offer or appraised value;

(3) description of the Property, including all amenities and current zoning requirements;

(4) copies of all documents imposing income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Property;

(5) copy of the most current title report, commitment or policy in the Development Owner's possession;

(6) the most recent Physical Needs Assessment, pursuant to Texas Government Code, §2306.186(e), conducted by a Third-Party and in the Development Owner's possession;

(7) copy of the monthly operating statements, including income statements and balance sheets for the Property for the most recent twelve (12) consecutive months (financial statements should identify amounts held in reserves);

(8) the three (3) most recent consecutive audited annual operating statements, if available;

(9) detailed set of photographs of the Property, including interior and exterior of representative units and buildings, and the Property's grounds (including digital photographs that may be easily displayed on the Department's website);

(10) current and complete rent roll for the entire Property;

(11) if any portion of the land or improvements is leased for other than residential purposes, copies of the commercial leases; and

(12) ROFR fee as identified in §10.901 of this chapter (relating to Fee Schedule).

(d) Process. Within ten (10) business days of receipt of all required documentation, the Department will review the submitted documents and notify the Development Owner of any deficiencies. Once the deficiencies are resolved and the Development Owner and Department come to an agreement on the ROFR offer price of the Property, the Department will list the Property for sale on the Department's website and contact entities on the nonprofit buyer list maintained by the Department to inform them of the availability of the Property at the agreed upon ROFR offer price as determined under this section. The Department will notify the Development Owner when the Property has been listed and of any inquiries or offers generated by such listing. If the Department or Development Owner receives offers to purchase the Property from more than one Qualified ROFR Organization, the Development Owner may accept back up offers. To satisfy the ROFR requirement, the Development Owner may sell the Property to the Qualified ROFR Organization selected by the Development Owner on such basis as it shall determine appropriate and approved by the Department. The period of time required for offering the property at the ROFR offer price is based upon the period identified in the LURA and clarified in paragraphs (1) - (3) of this subsection:

(1) if the LURA requires a ninety (90) day ROFR posting period, within ninety (90) days from the date listed on the website, the process as identified in subparagraphs (A) - (D) of this paragraph shall be followed:

(A) if a bona fide offer from a qualified ROFR organization is received at or above the posted ROFR offer price, and the Development Owner does not accept the offer, the ROFR requirement will not be satisfied;

(B) if a bona fide offer from a qualified ROFR organization is received at or above the posted ROFR offer price and the Development Owner accepts the offer, and the nonprofit fails to close the purchase, if the failure is determined to not be the fault of the Development Owner, the ROFR requirement will be deemed met so long as no other acceptable offers have been timely received. If the proposed Development Owner is subsequently not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to §1.5 of this title, the ROFR requirement will be deemed met so long as no other acceptable offers have been timely received;

(C) if an offer from a nonprofit is received at a price below the posted ROFR offer price, the Development Owner is not required to accept the offer, and the ROFR requirement will be deemed met if no other offers at or above the price are received during the ninety (90) day period;

(D) if no bona fide offers are received during the ninety (90) day period, the Department will notify the Development Owner in writing that the ROFR requirement has been met. Upon receipt of written notice, the Development Owner may pursue the Qualified Contract process or proceed with the sale to a for-profit buyer at or above the posted price;

(2) if the LURA requires a two year ROFR posting period, and the Development Owner intends to sell the Property upon expiration of the Compliance Period, the notice of intent described in this section may be submitted within two (2) years before the expiration of the Compliance Period, as required by Texas Government Code, §2306.6726. If the Development Owner determines that it will sell the Development at some point later than the end of the Compliance Period, the notice of intent shall be given within two (2) years before the date upon which the Development Owner intends to sell the Development in order for the two year ROFR posting period to be completed prior to intended sale. The two (2) year period referenced in this paragraph begins when the Department has received and approved all documentation required under subsection (c)(1) - (12) of this section. During the two (2) years following the notice of intent and in order to satisfy the ROFR requirement of the LURA, the Development Owner may enter into an agreement to sell the Development only with the parties listed, and in order of priority:

(A) during the first six (6) month period after notice of intent, only with a Qualified Nonprofit Organization that is also a Community Housing Development Organization, as defined in the HOME Final Rule and is approved by the Department;

(B) during the second six (6) month period after notice of intent, only with a Qualified Nonprofit Organization or a tenant organization;

(C) during the second year after notice of intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a tenant organization approved by the Department;

(D) if, during the two (2) year period, the Development Owner shall receive an offer to purchase the Development at or above the Minimum Purchase Price from one of the organizations designated in subparagraphs (A) - (C) of this paragraph (within the period(s) appropriate to such organization), the Development Owner may sell the Development to such organization. If, during such period, the Development Owner shall receive more than one offer to purchase the Development at or above the Minimum Purchase Price from one or more of the organizations designated in subparagraphs (A) - (C) of this paragraph (within the period(s) appropriate to such organizations), the Development Owner may sell the Development at or above the Minimum Purchase Price to the organization selected by the Development Owner on such basis as it shall determine appropriate and approved by the Department; and

(E) upon expiration of the two (2) year period, if no Minimum Purchase Price offers were received from a Qualified ROFR Organization or by the Department, the Department will notify the Development Owner in writing that the ROFR requirement has been met. Upon receipt of written notice, the Development Owner may pursue the Qualified Contract process or proceed with the sale to a for-profit buyer at or above the minimum purchase price.

(3) If the LURA does not specify a required ROFR posting timeframe, or, is unclear on the required ROFR posting timeframe, and the required ROFR value is determined by the Minimum Purchase Price method, any Development that received a tax credit allocation prior to September 1, 1997 is required to post for a 90-day ROFR period and any Development that received a tax credit allocation on or after September 1, 1997 is required to post for a 2-year ROFR as described in Texas Government Code, §2306.6726.

(e) Closing the Transaction. The Department shall have the right to enforce the Development Owner's obligation to sell the Development as herein contemplated by obtaining a power-of-attorney from the Development Owner to execute such a sale or by obtaining an order for specific performance of such obligation or by such other means or remedy as shall be, in the Department's discretion, appropriate.

(1) Prior to closing a sale of the Property, the Development Owner must obtain Department approval of the transfer through the ownership transfer process in accordance with §10.406 of this chapter (relating to Ownership Transfers (§2306.6713)). The request should include, among other required transfer documents outlined in the Post Carryover Activities Manual, the final settlement statement and final sales contract with all amendments. If there is no material change in the sales price or terms and conditions of the sale, as approved at the conclusion of the ROFR process, and there are no issues identified during the Ownership Transfer review process, the Department will notify the Development Owner in writing that the transfer is approved.

(2) If the closing price is materially less than the amount identified in the sales contract or appraisal that was submitted in accordance with subsection (c)(2)(A) - (C) of this section or the terms and conditions of the sale change materially, in the Department's sole determination, the Development Owner must go through the ROFR process again.

(3) Following notice that the ROFR requirement has been met, if the Development Owner fails to proceed with a request for a Qualified Contract or sell the Property to a for-profit entity within twenty-four (24) months of the Department's written approval, the Development Owner must again offer the Property to nonprofits in accordance with the applicable section prior to any transfer. If the Department determines that the ROFR requirement has not been met during the ROFR posting period, the Owner may not re-post under this provision at a ROFR price that is higher than the originally posted ROFR price until twenty-four (24) months has expired from the Department's written denial. The Development Owner may market the Property for sale and sell the Property to a Qualified ROFR Organization during this twenty-four month period.

(f) Appeals. A Development Owner may appeal a staff decision in accordance with §10.902 of this chapter (relating to the Appeals Process (§2306.0321; §2306.6715)). The appeal may include:

(1) the best interests of the residents of the Development;

(2) the impact the decision would have on other Developments in the Department's portfolio;

(3) the source of the data used as the basis for the Development Owner's appeal;

(4) the rights of nonprofits under the ROFR;

(5) any offers from an eligible nonprofit to purchase the Development; and

(6) other factors as deemed relevant by the Executive Director.

§10.408. Qualified Contract Requirements.

(a) General. Pursuant to §42(h)(6) of the Code, after the end of the 14th year of the Compliance Period, the Development Owner of a Development utilizing Housing Tax Credits can request that the allocating agency find a buyer at the Qualified Contract Price. If a buyer cannot be located within one (1) year, the Extended Use Period will expire. This section provides the procedures for the submittal and review of Qualified Contract Request.

(b) Eligibility. Development Owners who received an award of credits on or after January 1, 2002 are not eligible to request a Qualified Contract prior to the thirty (30) year anniversary of the date the property was placed in service. (§2306.185) Unless otherwise stated in the LURA, Development Owners awarded credits prior to 2002 may submit a Qualified Contract Request at any time after the end of the year proceeding the last year of the Initial Affordability Period, following the Department's determination that the Development Owner is eligible. The Initial Affordability Period starts concurrently with the credit period, which begins at placement-in-service or is deferred until the beginning of the next tax year, if there is an election. Unless the Development Owner has elected an Initial Affordability Period longer than the Compliance Period, as described in the LURA, this can commence at any time after the end of the 14th year of the Compliance Period. References in this section to actions which can occur after the 14th year of the Compliance Period shall refer, as applicable, to the year preceding the last year of the Initial Affordability Period, if the Development Owner elected an Initial Affordability Period longer than the Compliance Period.

(1) If there are multiple buildings placed in service in different years, the end of the Initial Affordability Period will be based upon the date the last building placed in service. For example, if five buildings in the Development began their credit periods in 1990 and one began in 1991, the 15th year would be 2005.

(2) If a Development received an allocation in multiple years, the end of the Initial Affordability Period will be based upon the last year of a multiple allocation. For example, if a Development received its first allocation in 1990 and a subsequent allocation and began the credit period in 1992, the 15th year would be 2006.

(c) Preliminary Qualified Contract Request. All eligible Development Owners must file a Preliminary Qualified Contract Request.

(1) In addition to determining the basic eligibility described in subsection (b) of this section, the pre-request will be used to determine that:

(A) the Property does not have any uncorrected issues of noncompliance outside the Corrective Action Period;

(B) there is a Right of First Refusal (ROFR) connected to the Property that has been satisfied; (C) the Compliance Period has not been extended in the LURA and, if it has, the Development Owner is eligible to file a pre-request as described in paragraph (2) of this subsection; and

(2) In order to assess the validity of the pre-request, the Development Owner must submit:

(A) Preliminary Request Form;

(B) Qualified Contract Pre-Request fee as outlined in §10.901 of this chapter (relating to Fee Schedule);

(C) copy of all regulatory agreements or LURAs associated with the property (non-TDHCA);

(D) local code compliance report, TDHCA UPCS Inspection Report, or HUD-certified REAC or UPCS inspection within the last twelve (12) months.

(3) The pre-request will not bind the Development Owner to submit a Request and does not start the One (1) Year Period (1YP). A review of the pre-request will be conducted by the Department within ninety (90) days of receipt of all documents and fees described in paragraph (2) of this subsection. If the Department determines that this stage is satisfied, a letter will be sent to the Development Owner stating that they are eligible to submit a Qualified Contract (QC) Request.

(d) Qualified Contract Request. A Development Owner may file a QC Request anytime after written approval is received from the Department verifying that the Development Owner is eligible to submit the Request.

(1) Documentation that must be submitted with a Request is outlined in subparagraphs (A) - (P) of this paragraph:

(A) a completed application and certification;

(B) the Qualified Contract price calculation worksheets completed by a Third-Party certified public accountant (CPA). The CPA shall certify that they have reviewed annual partnership tax returns for all years of operation, loan documents for all secured debt, and partnership agreements. They shall also certify that they are not being compensated for the assignment based upon a predetermined outcome;

(C) a thorough description of the Development, including all amenities;

(D) a description of all income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Development;

(E) a current title report;

(F) a current appraisal with the effective date within three months prior to the date of the QC Request and consistent with Subchapter D of this chapter (relating to Underwriting and Loan Policy);

(G) a current Phase I Environmental Site Assessment (Phase II if necessary) with the effective date within six months of the date of the QC Request and consistent with Subchapter D of this chapter;

(H) a copy of the most recent property condition assessment of the property, if different from the assessment submitted during the preliminary qualified contract request, consistent with Subchapter D of this chapter and in accordance with the requirement described in Texas Government Code, §2306.186(e);

(I) a copy of the monthly operating statements for the Development for the most recent twelve (12) consecutive months;

(J) the three most recent consecutive annual operating statements;

(K) a detailed set of photographs of the development, including interior and exterior of representative units and buildings, and the property's grounds (including digital photographs that may be easily displayed on the Department's website);

(L) a current and complete rent roll for the entire Development;

(M) a certification that all tenants in the Development have been notified in writing of the request for a Qualified Contract. A copy of the letter used for the notification must also be included;

(N) if any portion of the land or improvements is leased, copies of the leases;

(O) the Qualified Contract Fee as identified in §10.901 of this chapter; and

(P) additional information deemed necessary by the Department.

(2) Unless otherwise directed by the Department pursuant to subsection (g) of this section, the Development Owner shall contract with a broker to market and sell the Property. The Department may, at its sole discretion, notify the Owner that the selected Broker is not approved by the Department. The fee for this service will be paid by the seller, not to exceed 6 percent of the QC Price.

(3) Within ninety (90) days of the submission of a complete Request, the Department will notify the Development Owner in writing of the acceptance or rejection of the Development Owner's QC Price calculation. The Department will have one (1) year from the date of the acceptance letter to find a Qualified Purchaser and present a QC. The Department's rejection of the Development Owner's QC Price calculation will be processed in accordance with subsection (e) of this section and the 1YP will commence as provided therein.

(e) Determination of Qualified Contract Price. The QC Price calculation is not the same as the Minimum Purchase Price calculation for the ROFR. The CPA contracted by the Development Owner will determine the QC Price in accordance with §42(h)(6)(F) of the Code taking the following into account:

(1) distributions to the Development Owner of any and all cash flow, including incentive management fees and reserve balance distributions or future anticipated distributions, but excluding payments of any eligible deferred developer fee. These distributions can only be confirmed by a review of all prior year tax returns for the Development;

(2) all equity contributions will be adjusted based upon the lesser of the consumer price index or 5 percent for each year, from the end of the year of the contribution to the end of year fourteen or the end of the year of the request for a QC Price if requested at the end of the year or the year prior if the request is made earlier than the last year of the month; and

(3) these guidelines are subject to change based upon future IRS Rulings and/or guidance on the determination of Development Owner distributions, equity contributions and/or any other element of the QC Price.

(f) Appeal of Qualified Contract Price. The Department reserves the right, at any time, to request additional information to document the QC Price calculation or other information submitted. If the documentation does not support the price indicated by the CPA hired by the Development Owner, the Department may engage its own CPA to perform a QC Price calculation and the cost of such service will be paid for by the Development Owner. If a Development Owner disagrees with the QC Price calculated by the Department, a Development Owner may appeal in writing. A meeting will be arranged with representatives of the Development Owner, the Department and the CPA contracted by the Department to attempt to resolve the discrepancy. The 1YP will not begin until the Department and Development Owner have agreed to the QC Price in writing. Further appeals can be submitted in accordance with §10.902 of this title (relating to Appeals Process (§2306.0321; §2306.6715)).

(g) Marketing of Property. By submitting a Request, the Development Owner grants the Department the authority to market the Development and provide Development information to interested parties. Development information will consist of pictures of the Development, location, amenities, number of Units, age of building, etc. Development Owner contact information will also be provided to interested parties. The Development Owner is responsible for providing staff to assist with site visits and inspections. Marketing of the Development will continue until such time that a Qualified Contract is presented or the 1YP has expired. Notwithstanding subsection (d)(2) of this section, the Department reserves the right to contract directly with a Third Party in marketing the Development. Cost of such service, including a broker's fee not to exceed 6 percent, will be paid for by the existing Development Owner. The Department must have continuous cooperation from the Development Owner. Lack of cooperation will cause the process to cease and the Development Owner will be required to comply with requirements of the LURA for the remainder of the Extended Use Period. A prospective purchaser must complete all requirements of an ownership transfer request and be approved by the Department prior to closing on the purchase. The Department will assess if the prospective purchaser is a Qualified Purchaser during the Ownership Transfer review process. Responsibilities of the Development Owner include but are not limited to the items described in paragraphs (1) - (3) of this subsection. The Development Owner must:

(1) allow access to the Property and tenant files;

(2) keep the Department informed of potential purchasers; and

(3) notify the Department of any offers to purchase.

(h) Presentation of a Qualified Contract. If the Department finds a Qualified Purchaser willing to present an offer to purchase the property for an amount at or above the QC Price, the Development Owner may accept the offer and enter into a commercially reasonable form of earnest money agreement or other contract of sale for the property and provide a reasonable time for necessary due diligence and closing of the purchase. If the Development Owner chooses not to accept the QC offer that the Department presents, the QC request will be closed and the possibility of terminating the Extended Use Period through the Qualified Contract process is eliminated; the Property remains bound by the provisions of the LURA. If the Development Owner decides to sell the development for the QC Price pursuant to a QC, the consummation of such a sale is not required for the LURA to continue to bind the Development for the remainder of the Extended Use Period.

(1) The Department will attempt to procure a QC only once during the Extended Use Period. If the transaction closes under the contract, the new Development Owner will be required to fulfill the requirements of the LURA for the remainder of the Extended Use Period.

(2) If the Department fails to present a QC before the end of the 1YP, the Department will file a release of the LURA and the Development will no longer be restricted to low-income requirements and compliance. However, in accordance with §42(h)(6)(E)(ii) of the Code, for a three (3) year period commencing on the termination of the

Extended Use Period, the Development Owner may not evict or displace tenants of Low-Income Units for reasons other than good cause and will not be permitted to increase rents beyond the maximum tax credit rents. Additionally, the Development Owner should submit to the Department a request to terminate the LURA and evidence, in the form of a signed certification and a copy of the letter, to be approved by the Department, that the tenants in the Development have been notified in writing that the LURA will be terminated and have been informed of their protections during the three (3) year time frame.

(3) Prior to the Department filing a release of the LURA, the Development Owner must correct all instances of noncompliance at the Property.

(i) Compliance Monitoring during Extended Use Period. For Developments that continue to be bound by the LURA and remain affordable after the end of the Compliance Period, the Department will monitor in accordance with the Extended Use Period Compliance Policy in Subchapter F of this chapter (relating to Compliance Monitoring).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2014.

TRD-201405505
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 9, 2014
Proposal publication date: September 19, 2014
For further information, please call: (512) 475-3959

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TITLE 22. EXAMINING BOARDS

PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 537. PROFESSIONAL AGREEMENTS AND STANDARD CONTRACTS

The Texas Real Estate Commission (TREC) adopts amendments to 22 TAC Chapter 537, §§537.11, 537.20 - 537.23, 537.26 - 537.28, 537.30 - 537.33, 537.35, 537.37, 537.39 - 537.41, 537.43 - 537.48, 537.51, 537.52, and 537.54, concerning Professional Agreements and Standard Contracts. Section 537.11 and §537.51 are adopted with changes to the proposed text as published in the September 5, 2014, issue of the *Texas Register* (39 TexReg 7033). Sections 537.20 - 537.23, 537.26 - 537.28, 537.30 - 537.33, 537.35, 537.37, 537.39 - 537.41, 537.44 - 537.48, 537.52, and 537.54 are adopted without changes and will not be republished. The proposed amendments to §537.43 were published in the September 26, 2014, issue of the *Texas Register* (39 TexReg 7712) and are adopted without changes.

The Texas Real Estate Commission (TREC) adopts amendments to §537.11(o)(4) with changes to the text as proposed and one change to the form adopted by reference in §537.51.

The amendments to Chapter 537 are made following a comprehensive quadrennial rule review of Chapter 537 to better reflect current TREC procedures and to simplify and clarify where needed. Throughout the chapter, the amendments capitalize the term "Commission" and replace the term "licensee" with "license holder."

§537.11, Use of Standard Contract Forms, was proposed to be revised to prohibit a computer file or program version of the Standard Contract forms to allow an end user to strike through the text of the promulgated form and to clarify that the blanks may be scalable to the text.

One comment was received from a trade association that requested that strike through capabilities be retained but be limited to verified use only by the client of the license holder. The Commission agreed with this change, provided that a program allowing this activity was pre-approved by the Commission to ensure it could provide such limitations and verifications. The text of the amendment in §537.11(o)(4)(A) was changed to reflect this. The text in §537.11(o)(4)(C) and (D) was combined and revised to reflect that with the addition of scalable blanks, the number of pages and placement of the text on the page does not have to be identical to the promulgated forms.

The revised Addendum for Reservation of Oil, Gas and Other Minerals, which is adopted by reference in §537.51. Standard Contract Form TREC No. 44-1, revises the definitions of "mineral estate" and "surface rights", allows the portion reserved by a seller to be reflected as a percentage or fractional interest, adds an "Important Notice" paragraph alerting the parties about the complex nature of reserving mineral rights, and changes the language regarding "Consult an Attorney" to be consistent with that provision in other TREC contract forms.

One comment was received regarding the form stating there was an error substituting the words "surface minerals" for "surface materials" as the last word of line two and first word of line three in Section C. This was a typographical error made by staff when preparing the form and a change was made returning the word to "materials" as was the original intent.

A comment was also received from a trade association in support of adoption of the revised addendum.

The reasoned justification for the amendments is consistency and greater clarity in the contract forms.

22 TAC §§537.11, 537.20 - 537.23, 537.26 - 537.28, 537.30 - 537.33, 537.35, 537.37, 537.39 - 537.41, 537.44 - 537.48, 537.51, 537.52, 537.54

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its licensees to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statutes affected by these amendments are Texas Occupations Code, Chapter 1101 and 1102. No other statute, code or article is affected by the amendments.

§537.11. Use of Standard Contract Forms

(a) When negotiating contracts binding the sale, exchange, option, lease or rental of any interest in real property, a real estate licensee shall use only those contract forms promulgated by the Texas Real Estate Commission (the Commission) for that kind of transaction with the following exceptions:

(1) transactions in which the license holder is functioning solely as a principal, not as an agent;

(2) transactions in which an agency of the United States government requires a different form to be used;

(3) transactions for which a contract form has been prepared by a principal to the transaction or prepared by an attorney and required by a principal to the transaction; or

(4) transactions for which no standard contract form has been promulgated by the Commission, and the license holder uses a form prepared by an attorney at law licensed by this state and approved by the attorney for the particular kind of transactions involved or prepared by the Texas Real Estate Broker-Lawyer Committee (the committee) and made available for trial use by license holders with the consent of the Commission.

(b) A license holder may not:

(1) practice law;

(2) offer, give or attempt to give legal advice, directly or indirectly;

(3) give advice or opinions as to the legal effect of any contracts or other such instruments which may affect the title to real estate;

(4) give opinions concerning the status or validity of title to real estate; or

(5) attempt to prevent or in any manner whatsoever discourage any principal to a real estate transaction from employing a lawyer.

(c) This section does not limit a license holder's fiduciary obligation to disclose to the license holder's principals all pertinent facts which are within the knowledge of the license holder, including such facts which might affect the status of or title to real estate.

(d) A license holder may not undertake to draw or prepare documents fixing and defining the legal rights of the principals to a real estate transaction.

(e) In negotiating real estate transactions, a license holder may prepare forms using only forms that have been approved and promulgated by the Commission or such forms as are otherwise permitted by these rules.

(f) When filling in a form authorized for use by this section, the license holder may only fill in the blanks provided and may not add to or strike matter from such form, except that a license holder shall add factual statements and business details desired by the principals and shall strike only such matter as is desired by the principals and as is necessary to conform the instrument to the intent of the parties.

(g) A license holder may not add to a promulgated contract form factual statements or business details for which a contract addendum, lease or other form has been promulgated by the commission for mandatory use.

(h) This section does not prevent the license holder from explaining to the principals the meaning of the factual statements and business details contained in an instrument so long as the license holder does not offer or give legal advice.

(i) It is not the practice of law as defined in this Act for a real estate license holder to complete a contract form which is either promulgated by the Commission or prepared by the committee and made available for trial use by license holder with the consent of the Commission.

(j) Contract forms prepared by the committee for trial use may be used on a voluntary basis after being approved by the Commission.

(k) A contract form prepared by the committee and approved by the Commission to replace a previously promulgated form may be used by license holders on a voluntary basis before the effective date of rules requiring use of the replacement form.

(l) When a transaction involves unusual matters that should be reviewed by legal counsel before an instrument is executed, or if the instrument must be acknowledged and filed of record, the license holder shall advise the principals that each should consult a lawyer of the principal's choice before executing the instrument.

(m) A license holder may not employ, directly or indirectly, a lawyer nor pay for the services of a lawyer to represent any principal to a real estate transaction in which the license holder is acting as an agent. The license holder may employ and pay for the services of a lawyer to represent only the license holder in a real estate transaction, including preparation of the contract, agreement, or other legal instruments to be executed by the principals to the transactions.

(n) A license holder shall advise the principals that the instrument they are about to execute is binding on them.

(o) Forms approved or promulgated by the Commission may be reproduced only from the following sources:

(1) numbered copies obtained from the Commission, whether in a printed format or electronically reproduced from the files available on the Commission's website;

(2) printed copies made from copies obtained from the commission;

(3) legible photocopies made from such copies; or

(4) computer-driven printers following these guidelines:

(A) The computer file or program containing the form text must not allow the end user direct access to the text of the form and may only permit the user to insert language in blanks in the forms. Blanks may be scalable to accommodate the inserted language. The Commission may approve the use of a computer file or program that permits a principal of a license holder to strike through language of the form text. The program must be:

(i) limited to use only by a principal of a transaction; and

(ii) in a format and authenticated in manner acceptable to the Commission.

(B) Typefaces or fonts must appear to be identical to those used by the Commission in printed copies of the particular form.

(C) The text and order of the text must be identical to that used by the Commission in printed copies of the particular form.

(D) The name and address of the person or firm responsible for developing the software program must be legibly printed below the border at the bottom of each page in no less than six point type and in no larger than 10 point type.

(p) Forms approved or promulgated by the Commission must be reproduced on the same size of paper used by the commission with the following changes or additions only:

(1) The business name or logo of a broker, organization or printer may appear at the top of a form outside the border.

(2) The broker's name may be inserted in any blank provided for that purpose.

(q) Standard Contract Forms adopted by the Commission are published by and available from the Commission at P.O. Box 12188, Austin, Texas 78711-2188 or www.trec.texas.gov.

§537.51. Standard Contract Form TREC No. 44-2.

The Texas Real Estate Commission (Commission) adopts by reference standard contract form TREC No. 44-2 approved by the Commission in 2014 for use as an addendum to be added to promulgated forms of contacts for the reservation of oil, gas, and other minerals.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TRD-201405523
Kerri Lewis
General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 936-3092

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22 TAC §537.43

The statutes affected by this amendment is Texas Occupations Code, Chapter 1101 and 1102. No other statute, code or article is affected by the amendment.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Kerri Lewis
General Counsel
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For further information, please call: (512) 936-3092

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CHAPTER 539. RULES RELATING TO THE RESIDENTIAL SERVICE COMPANY ACT

The Texas Real Estate Commission (TREC) adopts amendments to 22 TAC Chapter 539, §§539.31, 539.51, 539.61 - 539.66, 539.71, 539.82, 539.91, 539.121, 539.137, 539.140, 539.150, 539.160 - 539.162, and 539.231, concerning Rules Relating to the Residential Service Company Act. Section 539.160 is adopted with changes to the text as published in the September 12, 2014, issue of the *Texas Register* (39 TexReg 7272). Section 539.81, regarding funded reserves, was not adopted and will be republished with additional changes regarding the use of admitted insurers.

The amendments to Chapter 539 are made following a comprehensive quadrennial rule review of Chapter 539 to better reflect current TREC procedures and to simplify and clarify where needed to improve readability. Section 539.140, Schedule of Administrative Penalties, was also revised to insert statutory provisions that were previously inadvertently omitted. Revised forms for the annual and mid-year reports, which are adopted by reference in §539.91 and §539.137 respectively, are also being adopted.

No comments were received on this proposal and no changes were made to the amendments as published except in §539.160, which was revised to correct an impractical standard for delivery of evidence of coverage to consumers.

The revisions to the rules as adopted do not change the nature or scope so much that they could be deemed different rules. The rules as adopted do not affect individuals other than those contemplated by the rules as proposed. The rules as adopted do not impose more onerous requirements than the proposed rules.

The reasoned justification for the rules is to better reflect and clarify current TREC procedures and to simplify and clarify text for greater comprehension.

The reasoned justification for the rules is to better reflect current TREC procedures and to simplify and clarify where needed.

SUBCHAPTER D. DEFINITIONS

22 TAC §539.31

The amendments are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

The statutes affected by these amendments are Texas Occupations Code, Chapter 1303. No other statute, code or article is affected by the amendments.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Kerri Lewis
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SUBCHAPTER F. AUTHORIZED PERSONNEL

22 TAC §539.51

The amendments are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

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Kerri Lewis
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SUBCHAPTER G. APPLICATIONS AND MAINTENANCE OF LICENSE

22 TAC §§539.61 - 539.66

The amendments are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Kerri Lewis
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SUBCHAPTER H. MISCELLANEOUS FORMS

22 TAC §539.71

The amendments are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

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Kerri Lewis
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SUBCHAPTER I. FINANCIAL ASSURANCES

22 TAC §539.82

The amendments are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

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Kerri Lewis
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SUBCHAPTER J. ANNUAL REPORT

22 TAC §539.91

The amendments are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Kerri Lewis
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SUBCHAPTER M. EXAMINATIONS

22 TAC §539.121

The amendments are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

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Kerri Lewis
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SUBCHAPTER N. MID-YEAR REPORT

22 TAC §539.137

The amendments are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

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Kerri Lewis
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SUBCHAPTER O. ADMINISTRATIVE PENALTIES

22 TAC §539.140

The amendments are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

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Kerri Lewis
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SUBCHAPTER P. COMPLAINTS

22 TAC §539.150

The amendments are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER Q. ISSUES AFFECTING CONSUMERS

22 TAC §§539.160 - 539.162

The amendments are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

§539.160. Copy of Residential Service Company Contract.

A residential service company shall provide a contract holder a complete copy of each new or revised evidence of coverage not later than the 15th day after the date payment is made or the date the residential service contract is effective, whichever is later. Failure to provide the copy violates §1303.352(a)(7) of the Act. The residential service company may provide the copy of the evidence of coverage by U.S. mail, email, or other means of delivery acceptable to the Commission.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Kerri Lewis
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SUBCHAPTER X. FEES

22 TAC §539.231

The amendments are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

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Kerri Lewis
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CHAPTER 543. RULES RELATING TO THE PROVISIONS OF THE TEXAS TIMESHARE ACT

22 TAC §§543.1 - 543.7, 543.10 - 543.13

The Texas Real Estate Commission (TREC) adopts amendments to 22 TAC Chapter 543, §§543.1 - 543.7 and §§543.10 - 543.13, concerning Rules Relating to the Provisions of the Texas Timeshare Act, without changes to the proposed text as published in the September 5, 2014, issue of the *Texas Register* (39 TexReg 7037).

The amendments to Chapter 543 are made following a comprehensive quadrennial rule review of Chapter 543 to better reflect current TREC procedures and to simplify and clarify where needed to improve readability.

The reasoned justification for the rules is to better reflect and clarify current TREC procedures and to simplify and clarify text for greater comprehension.

No comments were received on this proposal and no changes were made to the amendments as published.

The amendments are adopted under the Texas Property Code, §221.024, which authorizes the Texas Real Estate Commission to prescribe and publish forms and adopt rules necessary to carry out the provisions of The Texas Timeshare Act.

The statute affected by these amendments is Texas Property Code, Chapter 221. No other statute, code or article is affected by the amendments.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Kerri Lewis
General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 936-3092

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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 850. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

Texas Board of Professional Geoscientists (TBPG or Appointed Board) adopts amendments to 22 TAC §§850.10, 850.60 - 850.63, 850.65, 850.82, and 850.100 - 850.105, concerning the licensure and regulation of Professional Geoscientists. TBPG adopts these amendments with changes to the proposed text as published in the July 4, 2014, issue of the *Texas Register* (39 TexReg 5042). The Appointed Board also adopts the repeal of §850.80 without changes to the proposal.

The changes to the rules as proposed were made in §850.10, in the definition of the Executive Director, to replace the word "agency" with the phrase "board, in accordance with the Act."

Texas Board of Professional Geoscientists adopts these amendments to clarify common definitions and terms for consistency throughout the rules; to clarify language and remove unnecessary or redundant language; and to make minor clarifications to the way that advisory opinion requests are handled by the Appointed Board.

Adopted amendments to §850.10 improve language, clarify definitions and to make other minor wording changes for consistency for "Advisory Opinion", "Appointed Board", "Contested case or proceeding", "Executive Director", "License", "Licensee" and "Rule or Board Rule"; add new definitions for "Board staff" and "TBPG"; remove unnecessary definitions of "Party", "Person" and "Final decision maker"; and renumber the paragraphs accordingly.

Adopted amendments to §§850.60 - 850.63 improve language, clarify wording, make minor wording changes for consistency, and renumber the provisions accordingly. Adopted amendments to §850.60 change the title of the section to "Responsibilities of the Appointed Board - General Provisions." In addition, because the role of the Board is stated in statute, the amendment to §850.60 removes as unnecessary the sentence in current subsection (b) which states, "The Board governs the Texas Board of Professional Geoscientists, which is the state agency responsible for oversight of the public practice of geoscience." Adopted amendments to §850.61 change the title of the section to "Responsibilities of the Appointed Board - Meetings." Adopted amendments to §850.62 change the title of the section to "General Powers and Duties of the TBPG." Adopted amendments to §850.62 delete part of subsection (a) regarding the requirement of licensure to use of the term "licensed Professional Geoscientist" or the initials "P.G." that represent to the public that the person is qualified to practice as a geoscientist, or to engage in the public practice of geoscience because the requirement of licensure is included in §851.151 of the Board's rules. Adopted §850.62 also removes a sentence from current subsection (e) stating that "An individual meeting certain criteria who expresses an intent to become a licensed Professional Geoscientist may register with the Board as a Geoscientist-in-Training (GIT)" because the GIT certification requirements are included in §851.41 of the Board's rules.

Adopted amendment to §850.63 changes the title of the section to "Responsibilities of the Appointed Board." Amendments to §850.63 improve language and make minor wording changes for consistency; remove as unnecessary subsection (h), elim-

inating the requirement of license holders to notify consumers and service recipients of the name, mailing address, and telephone numbers of the Board. The amendment also removes subsection (i) which states that the Board by rule may provide for prorating fees for the issuance of a license, registration, certificate, permit or title, so that a person regulated by the Board pays only that portion of the applicable fee that is allocable to the number of months during which the license, registration, certificate, permit or title is valid because §851.28(b) provides for the proration of fees when a license is renewed for a period of less than one year.

Adopted amendments to §850.65 improve language and make minor administrative changes for consistency.

The Appointed Board adopts amendments to §850.82 to update and clarify TBPG's processes regarding dishonored payments.

The Appointed Board adopts the repeal of §850.80 because the language is unnecessary.

The Appointed Board adopts amendments to §§850.100 - 850.105 to improve language, make minor administrative changes for consistency, and add a requirement that Committee recommendations for draft advisory opinions be reviewed and approved by the full Board before being submitted to the *Texas Register.*

Comments on the amendments as proposed were received from two organizations and seven individuals. Regarding definitions in §850.10, Austin Geological Society (AGS) commented that the definition of "Appointed Board" limits the authority of the Board and does not conform to the statutory definition of "Board" in the enabling statute. The Board disagrees with the comment; the change in definition as published clarifies which entity performs which action from among the Appointed Board members, Board staff, or both. The definition does not limit the Board's authority. AGS also commented that the definition of "Executive Director" expands the technical role of the Executive Director to include managing the affairs of the "agency," and that the Executive Director's functions are expanded by the change; also that the minimum requirement for the Executive Director should be a formal geoscience degree or be licensed as a P.G. The Board adopted a clarification of the definition of "Executive Director," replacing the word "agency" with the phrase "board, in accordance with the Act." The Board disagrees with the comment regarding the "Executive Director" definition and scope of his authority; this specific definition is taken directly from statute. The statute does not require that the Executive Director be a P.G., and the Board has determined the ED is not required to have the technical knowledge of a formal geoscience degree.

The Railroad Commission of Texas (RRC) commented regarding §850.10(7) and §851.10(4) that there is a concern with the definition of Appointed Board: the word "appointed" is superfluous. Also, the definition could be construed to limit the authority of the actual Board when read in conjunction with the proposed expanded definition of "executive director" at §851.10(19). The changes would allow the responsibilities of the Board to be performed by Board staff. The Board disagrees with the comment; the proposed terms and definitions do not limit the authority of the Board or delegate Board responsibilities to Board staff. Delegation of Board duties to staff is addressed in statute, including §1002.057(b) and §§1002.101 - 1002.103 of the Act. The Board adopted a clarified definition of "Executive Director" as noted previously.

Seven individuals commented that the rules should require specific approval by the Appointed Board of the LAR and that a copy be provided to every licensee. This comment concerns a matter that is not within the rules currently under review. Further, the comment concerns internal agency processes and procedures. The Board will take this comment under advisement for further review.

Seven individuals commented that the Board should create rules to govern its oversight of TBPG staff. This comment concerns a matter that is not within the rules currently under review. Further, the comment concerns internal agency processes and procedures. The board will take this comment under advisement for further review.

SUBCHAPTER A. AUTHORITY AND DEFINITIONS

22 TAC §850.10

These amendments are adopted under the authority of 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); and by Occupations Code §1002.154, which provides that Board shall enforce the Act.

§850.10. Definitions.

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

(1) Advisory opinion--An interpretation of the Act or an application of the Act to a person with respect to a specified existing or hypothetical factual situation prepared by the Appointed Board on its own initiative or at the request of any interested person.

(2) The Act--Texas Occupations Code, Chapter 1002, cited as the Texas Geoscience Practice Act.

(3) APA--The Administrative Procedure Act (TEX. GOV'T. CODE, Chapter 2001).

(4) Appointed Board--Those persons who are appointed by the Governor and confirmed by the Senate and qualify for office who may deliberate, vote, and be counted as a member in attendance of the Texas Board of Professional Geoscientists.

(5) Board staff--The Executive Director and all other staff employed by the Texas Board of Professional Geoscientists (administrative, investigative, and other support staff, etc.).

(6) Contested case or proceeding--A proceeding in which the legal rights, duties, or privileges of a party are to be determined by the Appointed Board after an opportunity for adjudicative hearing.

(7) Executive Director--The individual appointed by the Appointed Board who shall be responsible for managing the day to day affairs of the board, in accordance with the Act.

(8) License--The whole or part of any TBPG registration, license, certificate of authority, approval, permit, endorsement, title or similar form of permission required or permitted by the Act.

(9) Licensee--An individual holding a current Professional Geoscientist license, GIT certificate, or firm registration.

(10) Rule or Board Rule--State agency rules adopted by the Appointed Board and as published in the Texas Administrative Code Title 22; Part 39; Chapters 850 and 851.

(11) Sanction--A penalty imposed in a disciplinary process. An imposed disciplinary action is a sanction.

(12) TBPG--The Texas Board of Professional Geoscientists, as used in this Chapter, is a reference to the whole or any part of the entity that is the Texas Board of Professional Geoscientists.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Executive Director
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SUBCHAPTER B. ORGANIZATION AND RESPONSIBILITIES

22 TAC §§850.60 - 850.63, 850.65

These amendments are adopted under 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); and by Occupations Code §1002.154, which provides that Board shall enforce the Act.

§850.60. Responsibilities of the Appointed Board - General Provisions.

(a) The purpose of this chapter is to implement the provisions in the Act concerning the licensure of Professional Geoscientists and regulation of the public practice of geoscience.

(b) It is the intent of the Appointed Board that the Rules of the TBPG be interpreted in the best interest of the public and the state.

(c) Through this chapter, the Appointed Board intends to establish procedures to receive petitions and complaints from the general public and the TBPG licensees, assure that access to TBPG programs is made available to all citizens, to set appropriate fees, and administer the TBPG's programs effectively.

§850.61. Responsibilities of the Appointed Board - Meetings.

(a) Meetings will be conducted under Robert's Rules of Order.

(b) Unless the Act provides another standard, when a quorum (a majority of the members) is present, a motion before the Appointed Board is carried by an affirmative vote of the majority of the members of the Appointed Board present.

(c) Meetings will be conducted as public meetings under the Government Code, Chapter 551, Subchapter A, Open Meetings.

(d) The Appointed Board will determine on a case by case basis, the number of and the location of cameras and recording devices in order to maintain order during Appointed Board meetings.

(e) The Appointed Board shall provide the public a reasonable opportunity to appear before the Appointed Board at its meetings and to speak on any issue under the jurisdiction of the TBPG. Subject to the statutory requirement of a "reasonable opportunity," the Appointed Board may limit the amount of time that each speaker may speak on a given subject under the jurisdiction of the TBPG.

§850.62. General Powers and Duties of the TBPG.

(a) Unless exempted by the Act, the TBPG ensures that a person may not engage in the public practice of geoscience unless the person holds a license issued by the TBPG.

(b) The TBPG ensures that a person does not take responsible charge of a geoscientific report or a geoscientific portion of a report required by municipal or county ordinance, state or federal law, state agency rule, or federal regulation that incorporates or is based on a geoscientific study or geoscientific data unless the person is licensed under the authority provided to the TBPG under the Act.

(c) The Act and Rules adopted by the Appointed Board under the authority of the Act apply to every licensee, registered firm, Geoscientist-in-Training, and unlicensed individual or unregistered firm providing or offering to provide public geoscience services.

(d) Unless an exemption in the Act applies, the TBPG ensures that all firms offering to engage or engaging in the public practice of professional geoscience in Texas are registered as a Geoscience Firm.

(e) Citizens who do not speak English or who have a physical, mental, or developmental disability will be provided reasonable access to the TBPG meetings and programs.

(f) The TBPG welcomes appropriate citizen input and communications at TBPG meetings and upon prior reasonable notice to the TBPG, the TBPG will provide interpreters and/or sign language specialists to assist the public in presenting their input to the TBPG.

(g) The TBPG works with each state agency that uses the services of a person licensed by the TBPG and other state agencies as determined by the Appointed Board, including a state agency with which the Appointed Board has entered into a Memorandum of Understanding that addresses the coordination of activities or complaints, to educate the agencies' employees regarding the procedures by which complaints are filed with and resolved by the TBPG.

§850.63. Responsibilities of the Appointed Board.

(a) The Appointed Board may take the disciplinary actions described in and set forth in the Act on the grounds described and set forth in the Act, and may issue orders accordingly.

(b) The Appointed Board may deny a license on the grounds described in and set forth in the Act.

(c) The Appointed Board may reinstate a license by the procedures and on the conditions set forth in the Act.

(d) The Appointed Board may impose an administrative penalty based on the factors and subject to the limitations set forth in the Act.

(e) The Appointed Board, through its Executive Director, shall give notice of its order imposing a sanction or penalty to all parties. The notice must include:

(1) separate statements of the findings of fact and conclusions of law;

(2) the specific disciplinary action to be taken and the amount of any penalty assessed, if applicable;

(3) whether or not a motion for rehearing is required as a prerequisite for appeal; and

(4) the motion for rehearing time table.

(f) Licensees will be notified at least 60 days in advance of impending expiration of the license and what the fee will be.

(g) Special accommodation exams will be made available as required by the Americans with Disabilities Act of 1990, Public Law 101-336.

§850.65. Petition for Adoption of Rules.

Any interested party may request adoption of a rule(s) by submitting a letter of request to the TBPG with a draft of the rule(s) attached. As a minimum the request should contain:

(1) items to be deleted should be bracketed or lined through;

(2) items added should be underlined; and

(3) the rationale for the requested rule change.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. FEES

22 TAC §850.80

The adopted repeal is 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); and by Occupations Code §1002.152, which provides that Board may set reasonable and necessary fees.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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22 TAC §850.82

The adopted amendment is 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); and by Occupations Code §1002.152, which provides that Board may set reasonable and necessary fees.

§850.82. Dishonored Payment.

(a) If a payment drawn to the TBPG for an initial license, certification or registration or the renewal of a license, certification, or registration is dishonored by a payor, the TBPG shall take the following actions:

(1) Notify the applicant or license, certification or registration holder of the issue and request resolution of the payment, plus the insufficient funds fee in §851.80 of this title within 30 days;

(2) Invalidate any new or renewed license, certification, or registration that was processed based on the payment that was dishonored, if the payment has not been resolved within 30 days of the sending or receipt of the notice, as applicable.

(b) If any other payment to the TBPG is dishonored by a payor, the TBPG will take appropriate steps as determined by the Executive Director.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. ADVISORY OPINIONS

22 TAC §§850.100 - 850.105

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 §1002.154, which provides that Board shall enforce the Act; and by Occupations Code §1002.353, which provides the Board's authority to prepare written advisory opinions.

§850.100. Subject of an Advisory Opinion.

On its own initiative or at the request of any interested person, the Appointed Board shall prepare a written advisory opinion about:

(1) an interpretation of the Act; or

(2) the application of the Act to a person in regard to a specified existing or hypothetical factual situation.

§850.101. Request for an Advisory Opinion.

(a) A request for an advisory opinion shall include, at a minimum, sufficient information in order for the Appointed Board to provide a complete response to the request. The requestor must provide the following, as applicable:

(1) requestor contact information;

(2) affected section(s) of the Act and/or Rules;

(3) description of the situation;

(4) reason advisory opinion is requested;

(5) parties or stakeholders that will be affected by the opinion, if known; and

(6) any known, pending litigation involving the situation.

(b) A request for an advisory opinion shall be in writing. A written request may be mailed, sent via electronic mail, hand-delivered, or faxed to the TBPG.

§850.102. Appointed Board Initiated Opinion.

When a majority of the Appointed Board determines that an opinion would be in the public interest or in the interest of any person or persons within the jurisdiction of the TBPG, the Appointed Board may on its own motion issue an advisory opinion.

§850.103. Receipt, Review, and Processing of a Request.

(a) The Appointed Board, through the appropriate committee, shall review all requests for advisory opinions.

(b) Upon receipt of a request for an advisory opinion, the Executive Director will date stamp the request, issue an Advisory Opinion Request (AOR) tracking number, and make a preliminary determination on the TBPG's jurisdiction regarding the request.

(c) The Executive Director will review the request to determine if the request can be answered by reference to the plain language of a statute or a TBPG rule, or if the request has already been answered by the Appointed Board.

(d) If the Executive Director determines the TBPG has no jurisdiction or the request can be answered by reference to a statute, TBPG rule, or previous opinion, the Executive Director shall prepare a written response for the appropriate committee addressed to the person making the request that cites the jurisdictional authority, the language of the statute or rule, or the prior determination.

(e) The appropriate committee shall review all requests for advisory opinions and may:

(1) approve jurisdiction and reference responses, as applicable, and report a summary of these actions to the Appointed Board for ratification; or

(2) determine the request warrants an advisory opinion and proceed with developing an advisory opinion.

(f) If a request warrants an advisory opinion, the appropriate committee shall determine if further information is needed to draft an advisory opinion. If additional information is needed, the committee shall determine what information is needed and instruct the Executive Director to obtain expert resources, hold stakeholder meetings, or perform other research and investigation as necessary to provide the information required to draft an advisory opinion and report back to the committee.

(g) If during the process, the committee determines that the request is one the Appointed Board cannot answer, then the committee shall have the Executive Director provide written notification to the person making the request of the reason the request will not be answered and this response shall be ratified by the Appointed Board.

(h) When sufficient information exists, the appropriate committee shall draft an advisory opinion and schedule the draft advisory opinion for review by the Appointed Board for approval for posting on the agency website and in the *Texas Register* for comments.

(i) Draft opinions shall be posted for at least 30 days and any interested person may submit written comments concerning an advisory opinion request. Comments submitted should reference the AOR number.

(j) Upon completion of the comment period, the appropriate committee shall consider any comments made and draft a final opinion recommendation to be presented for review and adoption by the Appointed Board.

(k) The Appointed Board shall review and adopt the advisory opinion or determine if further revisions are required and refer the request back to the appropriate committee with guidance on proceeding with completing the request.

(l) Each final advisory opinion adopted by the Appointed Board shall be published in summary form in the *Texas Register*.

(m) To reconsider or revise an issued advisory opinion, the Appointed Board shall process the reconsideration or revision as a new request and follow the process as set forth in this section.

§850.104. Compilation of Advisory Opinions.

The TBPG shall number and classify each final advisory opinion issued and shall make them available on the Internet.

§850.105. Time Period

The Appointed Board shall respond to requests for an advisory opinion within 180 days after the date the TBPG receives the written request unless the Appointed Board affirmatively states the Appointed Board's reason for not responding to the request within 180 days or for not responding to the request at all.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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

The Texas Board of Professional Geoscientists (TBPG or Appointed Board) adopts amendments to 22 TAC §§851.10, 851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40, 851.41, 851.43, 851.44, 851.80, 851.101 - 851.112, 851.151 - 851.153, 851.156 - 851.158, 851.201, and 851.202, concerning the licensure and regulation of Professional Geoscientists, with changes to the proposed text as published in the July 4, 2014, issue of the *Texas Register* (39 TexReg 5047). The Appointed Board also adopts the repeal of §§851.42, 851.45, 851.46, 851.113, 851.114, and 851.203 - 851.243.

The changes the Appointed Board has adopted that differ from what was published in the July 4, 2014, issue of the *Texas Register* are as follows: §851.10 in the definition of the term, "Executive Director," removing the term "agency" and replacing it with "board, in accordance with the Act;" §851.32, deleting the words in (j)(1) "on a form provided by Board staff"; §851.103, keeping the words "the safety, health, or welfare of"; §851.104, deleting subsections (h) and (i); §851.151, removing the first sentence of subsection (b); and §851.157, remove the words in subsection (b) "within the jurisdiction of" and replace them with "acted upon by," and also removing the first sentence of subsection (i).

The Texas Board of Professional Geoscientists adopts amendments to clarify common definitions and terms for consistency throughout the rules; to reduce and eliminate unnecessary wording; to relocate rules to different sections for clarity; and to make minor edits for consistency and clarity. Section 851.20 and §851.21, regarding requirements for obtaining a license as a Professional Geoscientist (P.G.), and §§851.40, 851.41, and 851.43, regarding the Geoscientist-in-Training program, are reorganized and clarified. Subchapters D and E are reorganized regarding compliance and enforcement and contested cases for ease of understanding and clarity.

Adopted amendments to §851.10 improve language and clarify definitions and to make other minor word usage changes for consistency among the rules and with statute for "Accredited institutions or programs", "Address of record", "Applicant", "Authorized Official of a Firm (AOF)", "complainant", "complaint", "default", "Direct supervision", "Discipline", "Executive Director", "Filed date", "Geology", "Geophysics", "Geoscience", "Geoscience Firm", "License certificate", "License status", "Licensee", "Person", "Professional Geoscientist or P.G.", "Registered firm", "Registrant", "Respondent", and "Soil Science"; add definitions of the words "Appointed Board", "ASBOG", "Board staff", "CSSE", "Rule or Board Rule", and "TBPG"; and remove unnecessary definitions of "Agency or Board", "Professional Geoscience", "Professional Geoscience services" (also "geoscientific services"), and "Protestant". Adopted amendments to §851.10 renumber the paragraphs accordingly.

Adopted amendments to §851.20 add a phrase that specifies that qualifying work experience is verified through professional references. This provision ensures that a third party individual can confirm the information provided by the applicant and can provide a source for the agency to determine the nature of the applicant's work experience. Adopted §851.20 also adds a provision relocated from §851.23 which specifies that qualifying work experience credit may be granted for each full-time year of graduate study in a discipline of geoscience, and that the Appointed Board may accept qualifying work experience in lieu of the education requirement as provided in Texas Occupations Code (TOC) §1002.255. Adopted amendments rearrange the location of provisions within the section for better organization and clarity, including provisions regarding requests for waiver of licensing requirements and the provision that applications for licensure are active for one year. Adopted amendments remove current §851.20(c), regarding examination requirements and procedures, and relocate the provisions to §851.21 for better organization and clarity. Adopted amendments clarify the application procedure and specify that TBPG adheres to provisions in TOC Chapter 55, regarding "License While on Military Duty and for Military Spouse," when considering applications for licensure and examination requests. Amendments in §851.20 and §851.21 reorganize the two sections such that provisions relating to licensing requirements and the licensure application procedure are placed in §851.20 and that the provisions relating to the examination requirements and examination request procedures are placed in §851.21. Adopted amendments to §851.21 also make minor wording and renumbering edits for clarity and consistency. Adopted amendments to §851.21 clarify the examination and licensing requirements, rearrange the section, add language that had been removed from §851.20, regarding examination requirements and procedures, and make minor edits for consistency.

Adopted amendments to §851.23 clarify what type of experience qualifies toward the experience requirements for licensure and the type of documentation that is required to demonstrate having met the experience requirement on the "Qualifying Experience Record", including adding a provision that that experience is considered qualifying if the applicant's duties and responsibilities include the performance of geoscience tasks or are otherwise acceptable to TBPG. This added provision clarifies what is acceptable as qualifying experience. The provision regarding a year of qualifying work experience credit granted for each full-time year of graduate study up to two years is removed from §851.23 and relocated to §851.20. Adopted amendments make minor clarifying edits to the section.

Adopted amendments to §851.24 clarify that applicants for licensure shall provide for the submission of five reference statements, including three from P.G.s or other professionals acceptable to the TBPG who have knowledge of the applicant's moral and ethical character, reputation, general suitability for holding a license and relevant work experience; provide that additional references may be required when the Executive Director finds it necessary to adequately verify the applicant's work experience; and provide that the Appointed Board and/or Board staff may, at their discretion, communicate with any reference provider or seek additional information. Adopted amendments to §851.24 provide minor edits for consistency.

Adopted amendments to §§851.25, 851.27, and 851.28 provide minor edits to the sections for readability and consistency.

Adopted amendments to §851.29 rearrange the section for clarity, regarding the process of endorsement, and add minor language clarifications for consistency.

Adopted amendments to §851.30 remove redundant language regarding the Board's authority to issue or deny certificates of firm registration and provide minor language clarification for consistency.

Adopted amendments to §851.31 and §851.32 provide minor changes for consistency. Adopted amendments to §851.32 also removes the words in subsection (j)(1) "...on a form provided by Board staff..."

Adopted amendments to §851.40 add provisions relating to the process for a person certified as a Geoscientist-in-Training to apply for licensure as a Professional Geoscientist because those provisions are in current §851.42, which is being repealed.

Adopted amendments to §851.41 provide minor wording adjustments and rearrange certain provisions for clarity regarding the Geoscientist-in-Training program.

Adopted amendments to §851.43 and §851.44 provide minor wording adjustments and rearrange certain provisions for clarity regarding the Geoscientist-in-Training program.

Adopted amendments to §851.80 provide minor edits for consistency and readability.

TBPG adopts the repeal of §§851.42, 851.45 and 851.46. The repeals are a result of TBPG's four-year rule review. The provisions of §851.42 are relocated to §§851.40, 851.41 and 851.43. The provisions in §851.45 are relocated to §851.40. Section 851.46 is unnecessary for inclusion in TBPG rules because the grounds for disciplinary action are outlined in §1002.402 of the Act as well as in §851.157 of the rules.

Adopted amendments to §851.101 add language that the Appointed Board may enforce the Code of Professional Conduct found in Subchapter C of TBPG rules by imposing sanctions, as provided in the Texas Geoscience Practice Act (the Act); pro-

vide that the Appointed Board may take disciplinary actions as provided in §1002.402 of the Act; and provide that a Geoscientist-in-Training who is presenting geoscientific testimony must adhere to the provisions of the Act and the rules of the TBPG, whether or not the testimony is for pay. Adopted amendments to §851.101 remove language relating to the Appointed Board's authority to take certain disciplinary actions and the factors that the Board may consider when taking such actions. These and other provisions relating to the disciplinary adjudication processes are transferred and added to §851.157 for greater clarity and better organization of the rules. Adopted amendments to §851.101 provide minor wording edits for consistency.

Adopted amendments to §851.102 clarify that a Professional Geoscientist shall not engage in conduct or perform professional services characterized by "gross incompetence" and to provide clarification regarding what characterizes "gross incompetence."

Adopted amendments to §851.103 remove the words, "'Recklessness' shall be grounds for disciplinary action by the Board" because the sentence is not necessary because the Board's authority to take disciplinary action is not limited to cases in which there is a finding of "recklessness." In addition, the phrase "the safety, health, or welfare of" will remain in the rule in response to public comment.

Adopted amendments to §851.104 provide clarification and minor edits to rule language, including that a license holder shall not advertise to a client or prospective client in a manner that is "false, deceptive, misleading, inaccurate, incomplete, out of context, or not verifiable." For clarity, adopted amendments to §851.104 replace wording in subsection (f) such that license holders must make "reasonable efforts" instead of "strive to" when referring to their making affected parties aware of the concerns regarding particular actions or projects. The amendment also adds the words "potential economic, environmental and public safety" to better describe the consequences of geoscientific decisions or judgments that are overruled or disregarded. Adopted amendments to §851.104 require that a Geoscience Firm shall maintain a work environment that uses standard operating procedures and quality assurance/quality control standards related to the Geoscience Firm's practice to ensure that the Geoscience Firm protects the health, safety, property, and welfare of the public. Adopted amendments to §851.104 also remove subsections (h) and (i) as unnecessary, in response to public comment.

Adopted amendment to §851.105 removes the definition of "benefit of any substantial nature" from the section because definitions do not belong in this section, and the Board finds that providing a definition of this term is unnecessary. Adopted amendment to §851.106 provides wording edits for clarity and consistency.

Adopted amendment to §851.107 provides wording edits for clarity and consistency, and moves a sentence in subsection (b) to be relocated to §851.157, regarding the provision that the revocation, suspension, or denial of a license or firm registration to practice geoscience in another jurisdiction shall be sufficient cause for the revocation, suspension, or denial of a license or firm registration to practice geoscience in the State of Texas.

Adopted amendment to §851.108 adds language to clarify that TBPG adheres to the provisions in TOC Chapter 53 regarding criminal convictions of licensees and applicants for licensure. Adopted amendments to §851.108 remove current subsections (c) and (d). The provisions removed from subsections (c) and (d) are relocated to §851.157.

Adopted amendment to §851.109 provides minor edits and clarifications to the rule, removes the term "indefinite" as relating to the revocation of a license, and removes the phrase "until such time as he or she is able to demonstrate to the Board's satisfaction that the reasons for suspension no longer exist and that the termination of the suspension would not endanger the public." Adopted amendments to §851.109 add subsection (c), regarding determination of abuse of alcohol or a controlled substance contributed to a violation, "whether the continued professional practice of a licensee is a threat to the public safety," and remove the phrase "has resulted in 'gross incompetency,'" and that an examination by a licensed authorized healthcare provider may be ordered.

Adopted amendment to §851.110 provides that, in accordance with the Act, TBPG may not issue a license pending the disposition of a complaint alleging a violation in Texas or another state if TBPG has notice of the alleged violation. Adopted amendments to §851.110 eliminate current subsections (a) - (d) and add more concise wording consistent with the statute, "In accordance with §1002.401(b) of the Act, the TBPG may not issue a license pending the disposition of a complaint alleging a violation in Texas or another state if the TBPG has notice of the alleged violation." The provisions removed from subsections (a) - (d) are provided for in the amendments to §851.157.

Adopted amendment to §851.111 replaces the term "a third party" with "another person" for clarification.

Adopted amendment to §851.112 removes the requirement that a P.G. shall make written reports to the TBPG within 30 days, as applicable, of changes to certain terms of employment; of a change in full or part-time status; or of a P.G.'s initiation of independent practice as an unincorporated sole-proprietorship registered by the Board to engage in the public practice of geoscience, because the Board has determined that these are unnecessary reporting requirements. Adopted amendments to §851.112 remove the requirement that an Authorized Official of a Firm (AOF) report a criminal conviction within 30 days. The Board has removed this requirement because an AOF is not a registered license holder; the firm is the registered entity. Adopted amendments to §851.112 provide minor edits for clarification and add subsections (d) - (f) regarding geoscience firm reports to the Board, which were relocated from §851.156.

TBPG adopts the repeal of §851.113 and §851.114. These sections are unnecessary for inclusion in TBPG rules. The requirements regarding "assumed names" are addressed in existing §851.30, in the section regarding firm registration; the responsibility of a licensee to protect their license or registration certificate is addressed in existing rules §851.20 and §851.27; and the Board determined that the requirement to display a license certificate is unnecessary.

Adopted amendments to §851.151 include adding language regarding TBPG's authority to enforce the Act, enforce the requirement of licensure and firm registration as specified in the Act, and all other requirements in the Act and TBPG rules under the authority of the Act. Adopted amendments to §851.151 add that unless a person is licensed by TBPG, a person may not use the terms "Licensed Professional Geoscientist," "Professional Geoscientist," or "P.G." as part of a professional, business, or commercial identification or title, or otherwise represent to the public that the person is qualified to practice as a geoscientist or en-

gage in the public practice of geoscience. Adopted amendments to §851.151 add that complaints may be opened by TBPG staff or by a member of the public as provided in TOC §1002.154. Adopted amendments to §851.151 relocate current subsection (a) regarding the reasons the Appointed Board may impose appropriate sanctions to §851.157. The adopted amendment also removes the first sentence new subsection (b), regarding "compliance reviews," to eliminate confusion in the rule, and in response to public comment. Amendments to §851.151 also clarify that before the Appointed Board suspends or revokes a license, TBPG shall provide to the respondent a notice of the proposed action, an opportunity to show compliance, and an opportunity for a hearing. Adopted amendments clarify that contested cases will be conducted as provided in the Administrative Procedure Act, Government Code Chapter 2001.

Adopted amendment to §851.152 adds language that, unless licensed or registered with the TBPG, an individual, firm, or corporation may not represent to the public that the entity is a licensed geoscientist or able to perform geoscience services or prepare a geoscientific report, document, or other record that requires the seal of a Professional Geoscientist. Adopted amendment to §851.152 removes as unnecessary current subsection (b), which states that a business entity or sole proprietor that offers or is engaged in the non-exempt public practice of geoscience in Texas whose firm registration is expired shall be considered to be in violation of Board rules and will be subject to administrative penalties as set forth in the Act; the language is unnecessary because §851.157(g) already describes the reasons the Board may take disciplinary action, and it includes language referring to an entity practicing geoscience without a current registration. Amendments to §851.152 remove subsections (e) and (f) which are relocated in §851.112. Adopted amendment to §851.152 removes subsection (g); which requirement is already existing in §851.157, regarding complaints and disciplinary actions. The requirement in subsection (h) is relocated to §851.112. Adopted amendment to §851.152 deletes subsection (i) because the requirement already exists in §851.156. Adopted amendment to §851.152 deletes subsection (k) because the factors the Appointed Board should consider are included in §851.157. Adopted amendments to §851.152 delete subsection (l) since the requirement is provided for in §851.104.

Adopted amendment to §851.153 removes a sentence that states that under no circumstances shall a Professional Geoscientist work in a part-time arrangement with a firm not otherwise in full compliance with §851.152 in a manner that could enable such firm to offer or perform professional geoscience services and makes other changes in word usage for consistency.

Adopted amendment to §851.156 changes the title of the section to "Professional Geoscientist Seals and Firm Identification." Adopted amendment to §851.156 revises subsection (l) as follows: 1) delete the term "bound" from the first sentence, 2) insert into the first sentence the words "or the signature page when a title sheet is not used" and "carried out under the supervision of the geoscientist" such that the resulting sentence is, "The Professional geoscientist shall sign, seal and date the original title sheet of geoscience reports, *or the signature page when a title sheet is not used,* specifications, details, calculations or estimates, and each sheet of maps drawings, cross sections or other figures representing geoscientific work *carried out under the supervision of the geoscientist,* regardless of size of binding." These changes are to clarify the requirements of P.G. seal usage and to more accurately respond to current practice and procedure in the professional geoscience industry. Adopted amendment to §851.156 adds to the second sentence in subsection (r) the words "or firm" such that the resulting sentence is, "If the Professional Geoscientist is employed by a local, state, or federal government agency or a firm that is exempt from the requirement of registration under TOC Chapter 1002, then only the name of the agency *or firm* shall be required; this change was made for word usage consistency within the subsection. It also adds subsection (s) to further clarify effective use of P.G. seals, which states, "TBPG also considers a work to meet the sealing requirement if a reader or user of the work can determine that the work is complete and unaltered from that which was placed under seal."

Adopted amendment to §851.157 provides minor wording changes in the rule for consistency. Amendments to §851.157(b) change wording to clarify that complaints filed after the two-year period are not "acted upon by" the TBPG, and delete the words "accepted by" to show that complaints will be accepted by TBPG, but may not be acted on due to the timing of the complaint. Adopted amendments to §851.157 add new subsection (f) that states that "Except in the case of a suspension under TOC §1002.403(3), the procedures involved in the investigation and dispensation of complaints usually include the following steps," and then itemizes the steps for clarification. Adopted amendments to §851.157 add new subsection (g), previously located in §851.151(b), which states that the Appointed Board may impose appropriate sanctions against a Professional Geoscientist, GIT, or Geoscience Firm as applicable," and as specified in the statute in TOC §1002.402. Adopted amendments to §851.157 add new subsection (h) which specifies the disciplinary actions that the Appointed Board may take, according to statute in TOC §1002.403. Adopted amendments to §851.157 relocates previous subsection (k) to new subsection (i); this subsection provides factors that the Appointed Board may consider when determining the severity of disciplinary action to impose. Also in subsection (i), the first sentence, which had been proposed new language, is removed in response to public comment, clarifying that only the Appointed Board approves final Orders. Adopted amendments to §851.157 add new subsection (j) which provides the factors which should be considered in determining the amount of an administrative penalty, providing clarity and consistency with Section 1002.452 in the Act. Adopted amendments to §851.157 remove current subsections (g) - (k) as these subsections are re-sequenced in the section. Adopted amendments to §851.157 provide minor word usage changes in the rule for consistency.

Adopted amendment to §851.158 adds the word "Appointed" when referring to the Board, for consistency throughout the rules. Adopted amendment to §851.201 changes the title of the section to "Contested Case Hearings" and adds that the State Office of Administrative Hearings (SOAH) shall conduct all formal hearings and contested cases in accordance with the Administrative Procedure Act, Chapter 2001, Texas Government Code and Texas Administrative Code, Title 1, Chapter 155. It also removes previous subsections (a) - (c) because the requirements are already addressed in the added language.

Adopted amendment to §851.202 changes the title of the section to "Extensions of Time" and adds that the Executive Director may enter into an agreement with parties to a contested case to modify time limits as provided under the Administrative Procedure Act, Texas Government Code §2001.147. It deletes the previous language in §851.202 because it is no longer necessary. With the addition of language in §851.201 and §851.202, the adopted amendments provide for TBPG to participate in hearings with

SOAH in accordance with SOAH's rules and applicable TBPG rules.

TBPG adopts the repeal of §§851.203 - 851.243. These sections are not necessary for inclusion in TBPG rules because they relate to TBPG's handling of contested cases, and the provisions in these rules are relocated and condensed into §851.201 and §851.202. The provisions are reorganized to clarify that TBPG will abide by applicable SOAH rules.

One individual commented that TCEQ assigns non-licensed geoscientists, and scientists and engineers with little or no geologic expertise to review technical reports that require the signature and seal of a PG. She commented that the rules should "close this loophole," and that these reviews should only be conducted by licensed geoscientists or a GIT under the supervision of a PG. The comment concerns a matter that does not appear in the rules under review. The Board will take this comment under advisement for further review and possible action.

One individual commented that he would like to be able to resign his license. This request concerns a matter that does not appear in the rules under review. The Board will take this comment under advisement for further study.

Comments on the proposed amendments were received from Austin Geological Society (AGS) and the Railroad Commission of Texas (RRC) regarding definitions in §851.10. Regarding the definition of "Appointed Board," AGS commented that the definition of "Appointed Board" limits the authority of the Board and does not conform to the statutory definition of "Board" in the enabling statute. The Board disagrees with the comment; the change in definition as published clarifies which entity performs which action as between the Appointed Board members, Board staff, or both. The definition does not limit the Board's authority, which is set forth by statute. AGS commented that the definition of "Executive Director" expands the technical role of the Executive Director to include managing the affairs of the "agency," and that that the Executive Director's functions are expanded by the change; also that the minimum requirement for the Executive Director should be a formal geoscience degree or be licensed as a P.G. The Board adopted a clarification of the definition of "Executive Director," replacing the word "agency" with language that refers to the "affairs of the Board, in accordance with the Act." The Board disagrees with the comment regarding the "Executive Director" definition and scope of his authority; this specific definition is based on the statute. The statute does not require that the Executive Director be a P.G., and the Board has found it is not necessary for the ED to have the technical knowledge of a formal geoscience degree to perform the duties authorized by statute or by the board.

RRC commented regarding §850.10(7) and §851.10(4) that there is a concern with the definition of Appointed Board--the word "appointed" is superfluous. Also, the definition could be construed to limit the authority of the actual Board when read in conjunction with the proposed expanded definition of "executive director" at §851.10(19). The changes would allow the responsibilities of the Board to be performed by Board staff. The Board disagrees with the comment; the proposed terms and definitions do not address the limit of Board authority and do not contain a grant or delegation of Board authority. Instead, the terms and definitions are intended to identify the various entities and not to limit the authority of the Board or delegate Board responsibilities to Board staff. Delegation of Board duties to staff is addressed in statute, including §§1002.101 - 1002.103 and §1002.057(b) of the Act. The Board adopted a clarified definition of "Executive Director" as noted previously.

AGS, RRC, Texas Association of Professional Geoscientists (TAPG), and the Texas Section of the American Institute of Professional Geologists (AIPG-TX) submitted comments that definitions of "professional geoscience" and professional geoscience services" should not be stricken. The definitions should be kept and clarified. The Board agrees with this comment, and will keep the definitions at this time; however, the Board will review these definitions further.

Seven individuals submitted comments regarding §851.20(i) suggesting that TBPG insert the words, "TBPG staff shall immediately notify applicants" before the words "of any deficiencies..." and insert the words, "and in any event" before the words, "within approximately thirty (30) days...." The Board disagrees with the comment because the word "immediately" is vague or ambiguous. A time period of 30 days within which to notify the applicant of deficiencies is reasonable and necessary to allow for application materials, especially academic transcripts, to be received and reviewed by TBPG.

Seven individuals submitted comments regarding §851.20(q)(3), suggesting that TBPG insert the word "non-exempted" before "practice of geoscience" in the first sentence. Another commenter similarly requested regarding §851.20(q)(3) that only employment in the public practice of geoscience by a Geoscience Firm should need to be reported. The Board's disagrees with the comments. If these words are added to the rule, the rule section becomes superfluous. However, because the applicant already provides the information (q)(3) requires upon submission of their initial application for licensure, and because other rules require a licensee to keep the Board informed of changes in employment, the board decided to delete all of (q)(3). However, because this would be a substantive change from what was originally proposed, the Board will propose language to remove item (3) under subsection (q) in the proposed rules section of a future issue of the *Texas Register.*

Seven individuals submitted comments regarding Firm registration - individual entities, requesting that TBPG insert the language: "Requirements for firm registration, including fees, are exempted for an assumed name, a sole-proprietorship, or a Texas recognized legal entity (corporation, registered foreign corporation, LLC, etc.) comprising only one individual Texas licensed Professional Geoscientist and having no other employees and no contracted employees, provided that the legal entity or assumed name is reported to the TBPG at the time of each license renewal for that individual Texas licensed Professional Geoscientist or upon inquiry by the TBPG." The Board disagrees with the comment; legal entities which are separate from the individual should be registered by TBPG. However, the Board will propose rule changes related to firm registration and sole proprietorship in the proposed rules section of a future issue of the *Texas Register.*

One commenter requested the Board delete §851.30(a)(2)(A), §851.30(c)(5), and §851.80(m) - (n) because a sole proprietorship is not a legal entity, and requests that the Board make other conforming changes to indicated sections. The Board disagrees with the comment that rules related to sole proprietorships should be deleted. However, amendments to these sections generally, and addressing sole proprietorships specifically, will be addressed in the proposed rules section of a future issue of the *Texas Register.*

Seven individuals submitted comments regarding §851.30(a)(2), disagreeing with the clause that says that this section does not apply to an engineering firm. TBPG disagrees with this comment; TBPG is statutorily required to have this section in its rules per §1002.351(b) of the Act.

One commenter suggested that §851.32(i)(2) is contradictory. The Board disagrees with this comment. Board staff does not pre-approve or endorse continuing education offerings, but may offer an opinion regarding a course.

One commenter requested that §851.32(j)(1) be revised to remove the words "on a form provided by Board staff." The Board agrees with this comment and has removed the phrase "on a form provided by Board staff" from that subsection to provide flexibility to those submitting the information. The remainder of the rule already specifies the information that must be submitted to TBPG.

The RRC requested regarding §851.101(a) that TBPG add the words "substantially" and "non-exempt" in the last sentence of the subsection. AGS also suggests that TBPG make changes to the last sentence in subsection (a). The Board disagrees with these comments; the term "substantially" is not relevant or appropriate because the Code of Professional Conduct applies to all licensees, regardless of whether the licensee's practice is exempt (see also §1002.153 of the Act).

TAPG and AIPG-TX submitted comments regarding §851.103, stating that the phrase, "the safety, health, or welfare of" should be kept. TBPG agrees with this comment; the statute makes clear reference to these words. The Board revised the adoption to keep the phrase "the safety, health, or welfare of" in §851.103.

Two individuals submitted comments regarding §851.104(h), disagreeing with the proposed requirement that a person who is licensed must (vs. may) use the license title, even when performing exempt geoscience work. The Board agrees with this comment, and will delete subsections (h) and (i) because mandatory usage of the license title on exempt work is unnecessary. The Board has further determined that because usage is optional under the current rule, that provision allowing optional usage is unnecessary; subsections (h) and (i) are deleted in their entirety.

RRC commented regarding §851.151 that modification of this section is unnecessary. There is a concern with the inclusion of "compliance reviews." The term is not defined and could be interpreted broadly. RRC recommends that TBPG delete the sentence "The TBPG may conduct compliance reviews into situations to determine whether evidence exists that indicates a violation." There is a concern that Board staff will make policy. AGS also submitted a comment regarding §851.151, stating that the inclusion of "compliance reviews" presumes that the ED is qualified to understand and make determinations of the professional performance standards for geoscience. The Board disagrees with these comments. Compliance reviews concern the unlicensed practice of professional geoscience, and are conducted on licenses and registrations that have been expired over 90 days. Compliance reviews do not affect current licenses or registrants. To eliminate confusion in the section language, the TBPG removed the first sentence in §851.151(b).

One individual commented regarding §851.152(d) that the terms itemized in (1)-(5) should be deleted. The Board agrees with this comment; an entity's usage of those terms does not imply or require that the entity be licensed or registered in the State of Texas. However, because this change would be substantially different from what was originally proposed, the Board will propose an amendment to §851.152 in an upcoming issue of the *Texas Register* proposing to remove terms (1) - (5) under subsection (d).

AGS commented that proposed amendment to §851.157(i) appears to cede Board authority to the Executive Director by authorizing the ED to participate and represent the Board in disciplinary deliberations. The ED should be a PG. The Board disagrees with this comment because only the Appointed Board is authorized to take disciplinary actions. However, for clarification, TBPG will remove the first sentence in §851.157(i).

TAPG and AIPG-TX submitted comments regarding §851.157(b) that the changes would affect the ability of the TBPG to carry out its intended function. The concern is with statute of limitations. The Board can determine whether to dismiss a complaint or take action. Also, if there is to be a statute of limitations, then two years is not long enough. A licensee is constrained from revealing information that comes to light because it would jeopardize a project/the client. They suggest a 10-year window following the time of discovery. Also, they object to the phrasing "not be within the jurisdiction of the TBPG." The Board disagrees with this comment; two years is a reasonable amount of time within which to file a complaint once the event leading to the complaint is discovered. The rule allows for extenuating circumstances that may lengthen the time period beyond two years. Also, regarding the phrasing "not be within the jurisdiction of the TBPG," the Board removed the phrase "within the jurisdiction of" and replaced it with the phrase "acted upon by" which should clarify the section.

TAPG and AIPG-TX submit a comment related to §851.157(h)(9) requesting additional language to establish or clarify the meaning or scope of restitution. The Board disagrees with this comment: 1) because the rule quotes directly from the statute in reference to "restitution," and 2) as worded it adequately explains the concept of restitution.

RRC suggests that changes to §851.157 appear to establish a disciplinary procedure without sufficient checks and balances. RRC urges the TBPG to ensure that any rule that establishes a disciplinary process that evaluates or might affect a person's practice of geosciences have provisions to assure that persons responsible for evaluating the practice of geosciences have the knowledge and experience practicing geosciences. The Board disagrees with this comment because only the Appointed Board is authorized to take disciplinary actions. However, to clarify this rule, the Board removed the first sentence in §851.157(i).

AGS commented regarding §851.201 that no case should be considered a contested case by the Board prior to accurate presentation of the subject matter of the case, in accordance with TAC, Title 1, Part 7, Chapter 155, Subchapter B, Rule §155.51. Seven individuals commented regarding §851.201 that only the Appointed Board should determine that a complaint case is a contested case. RRC mentioned that the amendments to §851.201 appear to allow the TBPG staff to make a direct referral to SOAH without Board oversight. There needs to be rule making prior to any case being referred to SOAH. The Board disagrees with these comments. The TBPG has a complaint process in place that allows cases to be reviewed by 1-2 PG Board members and 1 PG staff member who develop a recommended finding of violation(s) and recommended disciplinary action. A case is considered contested upon referral to the State Office of Administrative Hearings (SOAH) if the Respondent requests a hearing, or does not respond to a notice sent to the Respondent by TBPG. The entire Board cannot be

involved in the case until the case is presented to the Board for a final decision.

One individual commented that firm registration rules are confusing and that because his firm is in an exempt field, he let his registration expire. Now, in the online license search, it looks like his firm is out of business because it no longer has a current registration. The Board has adopted language to clarify certain rules and will propose rules related to firm registration in a future issue of the *Texas Register.* The Board will take this comment under advisement for further review.

SUBCHAPTER A. DEFINITIONS

22 TAC §851.10

These 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) and by §1002.154 which provides that Board shall enforce the Act.

§851.10. Definitions.

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

(1) Act--Texas Occupations Code, Chapter 1002, cited as the Texas Geoscience Practice Act.

(2) Accredited institutions or programs--An institution or program which holds accreditation or candidacy status from an accreditation organization recognized by the Council for Higher Education Accreditation (CHEA) or other appropriate accrediting entity accepted by the Appointed Board.

(3) Address of record--In the case of an individual or firm licensed, certified, or registered by the TBPG, the address which is filed by the licensee or registrant with the TBPG.

(4) Advertising or Advertisement--Any non-commercial or commercial message, including, but not limited to verbal statements, bids, web pages, signage, provider listings, and paid advertisement which promotes the services of a licensee.

(5) Applicant--An individual making application for a geoscience license or Geoscientist-in-Training (GIT) certification; a firm and/or the Authorized Official of a Firm making application for a Geoscience Firm registration.

(6) Application--The forms, information, attachments, and fees necessary to obtain a license as a Professional Geoscientist, the registration of a firm, or a certification as a Geoscientist-in-Training (GIT).

(7) Appointed Board--Those persons who are appointed by the Governor and confirmed by the Senate and qualify for office who may deliberate, vote, and be counted as a member in attendance of the Texas Board of Professional Geoscientists.

(8) ASBOG®--National Association of State Boards for Geology. ASBOG® serves as a connective link among the individual state geologic registration licensing boards for the planning and preparation of uniform procedures and the coordination of geologic protective measures for the general public. One of ASBOG®'s principal services is to develop standardized written examinations for determining qualifications of applicants seeking licensure as professional geologists. State boards of registration are provided with uniform examinations that are valid measures of competency related to the practice of the profession.

(9) Authorized Official of a Firm (AOF)--The individual designated by a Geoscience Firm to be responsible for the process of submitting the application for the initial registration of the firm with the TBPG; ensuring that the firm maintains compliance with the requirements of registration with the TBPG; 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 TBPG regarding any matter.

(10) Board staff--The Executive Director and all other staff employed by the Texas Board of Professional Geoscientists (administrative, investigative, and other support staff, etc.).

(11) Certificant--An individual holding a certificate as a Geoscientist-in-Training.

(12) Cheating--Attempting to obtain, obtaining, providing, or using answers to examination questions by deceit, fraud, dishonesty, or deception.

(13) Complainant--Any individual who has submitted a complaint to the TBPG, as provided in this chapter.

(14) Complaint--An allegation or allegations of wrongful activity related to the practice or offering of geoscience services in Texas. A complaint is within the TBPG's jurisdiction if the complaint alleges a violation of statutes or rules applicable to the public practice of geoscience or the requirements of licensure of a Professional Geoscientist (P.G.) or registration by an individual, firm, or other legal entity.

(15) Council of Soil Scientist Examiners (CSSE)--The purpose of the Council of Soil Science Examiners is to create, score and maintain examinations for State Soil Scientists licensing programs. CSSE develops professional criteria to confirm that individuals meet and exceed minimum qualifications to practice the profession.

(16) Default--The failure of the Respondent to respond in writing to a notice or appear in person or by legal representative on the day and at the time set for hearing in a contested case or informal conference, or the failure to appear by telephone, e-mail, fax or other electronic media in accordance with the notice of hearing or notice of informal conference. Default results in the actions being taken that were described in the notice of the hearing for a contested case or informal conference in the event of a failure to appear.

(17) Direct supervision--Critical watching, evaluating, and directing of geoscience activities with the authority to review, enforce, and control compliance with all geoscience criteria, specifications, and procedures as the work progresses. Direct supervision will consist of an acceptable combination of: exertion of significant control over the geoscience work, regular personal presence, reasonable geographic proximity to the location of the performance of the work, and an acceptable employment relationship with the supervised individual(s).

(18) Discipline--One of three recognized courses of study under which an individual may qualify for a license as a Professional Geoscientist. Geoscience is comprised of the following disciplines: geology, geophysics, and soil science.

(19) Executive Director--The individual appointed by the Appointed Board who shall be responsible for managing the day to day affairs of the board, in accordance with the Act.

(20) Filed date--The date that the document has been received by the TBPG or, if the document has been mailed to the TBPG, the postmark date of the document.

(21) Geology--The discipline of geoscience that addresses the science of the origin, composition, structure, and history of the

Earth and its constituent soils, rocks, minerals, fossil fuels, solids, fluids and gasses, and the study of the natural and introduced agents, forces, and processes that cause changes in and on the Earth, and is applied with judgment to develop ways to utilize, economically, those natural and introduced agents, forces, and processes for the benefit of mankind. There are many subdivisions of geology, which include, but are not limited to the following: historical geology, physical geology, economic geology, mineralogy, paleontology, structural geology, mining geology, petroleum geology, physiography, geomorphology, geochemistry, hydrogeology, petrography, petrology, volcanology, stratigraphy, engineering geology, and environmental geology.

(22) Geophysics--Refers to that science which involves the study of the physical Earth by means of measuring its natural and induced fields of force, and its responses to natural and induced energy or forces, the interpretation of these measurements, applied with judgment to benefit or protect the public.

(23) Geoscience--The science of the Earth and its origin and history, the investigation of the Earth's environment and its constituent soils, rocks, minerals, fossil fuels, solids, and fluids, and the study of the natural and introduced agents, forces, and processes that cause changes in and on the Earth as applied with professional judgment to develop ways to utilize, economically, those natural and introduced agents, forces, and processes for the benefit of the public.

(24) Geoscience Firm--A firm, corporation, or other business entity registered by the TBPG to engage in the public practice of geoscience.

(25) License--The legal authority granted the holder to actively practice geoscience upon meeting the requirements as set out in the Act and this chapter.

(26) License certificate--Any certificate issued by the TBPG showing that a license, registration, or certificate has been granted by the TBPG. A certificate is not valid unless it is accompanied by a card issued by the TBPG which shows the expiration date of the license, registration or certification.

(27) License status--The status of a Professional Geoscientist license, Geoscience Firm registration, or GIT certification is one of the following:

(A) Current license--A license, registration, or certification that has not expired.

(B) Expired license--A Professional Geoscientist license that has been expired for less than three years and is therefore renewable or a Geoscience Firm registration or GIT certification that has been expired for less than one year and is therefore renewable.

(C) Permanently expired license--A license, registration, or certification that is no longer renewable.

(28) Licensee--An individual holding a current Professional Geoscientist license, GIT certificate, or firm registration.

(29) Person--Any individual, firm, partnership, corporation, association, or other legal public or private entity, including a state agency or governmental subdivision.

(30) Professional geoscience--Professional service which may include consultation, investigation, evaluation, planning, designing, or direct supervision of construction, in connection with any public or private projects wherein the public welfare, or the safeguarding of life, health, and property is concerned or involved, when such professional service requires the application of geoscience principles and the interpretation of geoscience data.

(31) Professional geoscience services (also geoscientific services)--Services which must be performed by or under the direct supervision of a Professional Geoscientist and which meet the definition of the practice of geoscience as defined in the Texas Occupations Code, §1002.002(3). A service shall be conclusively considered a professional geoscience service if it is delineated in that section; other services requiring a Professional Geoscientist by contract, or services where the adequate performance of that service requires a geoscience education, training, or experience in the application of special knowledge or judgment of the geological, geophysical or soil sciences to that service shall also be conclusively considered a professional geoscience service.

(32) Professional Geoscientist or P.G.--An individual who holds a license as a Professional Geoscientist issued by the TBPG.

(33) Practice for the public--

(A) Providing professional geoscience services:

(i) For a governmental entity in Texas;

(ii) To comply with a rule established by the State of Texas or a political subdivision of the State of Texas; or

(iii) For the public or a firm or corporation in the State of Texas if the practitioner accepts ultimate liability for the work product; and

(B) Does not include services provided for the express use of a firm or corporation by an employee or consultant if the firm or corporation assumes the ultimate liability for the work product.

(34) The Public--Any individual(s), client(s), business or public entities, or any member of the general population whose normal course of life might reasonably include an interaction of any sort with or be impacted by geoscientific work.

(35) Registered firm--A firm that is currently registered with the TBPG.

(36) Registrant--An individual whose sole-proprietorship is currently registered with the TBPG or a firm or the Authorized Official of a Firm that is currently registered with the TBPG.

(37) Respondent--Any individual or firm, licensed or unlicensed, who has been charged with violating any provision of the Act or a rule or order issued by the Appointed Board.

(38) Responsible charge--The independent control and direction of geoscientific work or the supervision of geoscientific work by the use of initiative, skill, and independent judgment.

(39) Rule or Board Rule--State agency rules adopted by the Appointed Board and as published in the Texas Administrative Code, Title 22, Part 39, Chapters 850 and 851.

(40) Soil Science--Soil science means the science of soils, their classification, origin and history, the investigation and interpretation of physical, chemical, morphological, and biological characteristics of the soil including among other things, their ability to produce vegetation and the fate and movement of physical, chemical, and biological contaminants.

(41) Sole-proprietorship--A single owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner.

(42) TBPG--The Texas Board of Professional Geoscientists, as used in this chapter, is a reference to the whole or any part of the entity that is the Texas Board of Professional Geoscientists.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2014.

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Charles Horton
Executive Director
Texas Board of Professional Geoscientists
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For further information, please call: (512) 936-4405

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

22 TAC §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40, 851.41, 851.43, 851.44, 851.80

These 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 §1002.154 which provides that Board shall enforce the Act; by §1002.257 which allows the Board to issue a license to an applicant who provides proof of licensure or registration under requirements that the board determines to be substantially similar to TBPG and who pays the required fees; by §1002.351 which allows the TBPG to adopt rules related to the public practice of geoscience by a firm or corporation; and by §1002.352 regarding the Board's authority to establish criteria and rules for a geoscientist-in-training program.

§851.20. Professional Geoscientist Licensing Requirements and Application Procedure.

(a) Requirements for licensure:

(1) Passing score on an examination or examinations required by the TBPG covering the fundamentals and practice of the appropriate discipline of geoscience documented as specified in §851.21 of this chapter;

(2) A minimum of five years of qualifying work experience during which the applicant has demonstrated being qualified to assume responsible charge of geoscientific work documented and verified through professional references as specified in §851.23 of this chapter and TOC §1002.256;

(A) A total of one year of qualifying work experience credit may be granted for each full-time year of graduate study in a discipline of geoscience, not to exceed two years;

(B) The Appointed Board may accept qualifying work experience in lieu of the education requirement as provided in TOC §1002.255;

(3) Good moral character as demonstrated by the submission of a minimum of five reference statements submitted on behalf of the applicant attesting to the good moral and ethical character of the applicant as specified in §851.24 of this chapter or as otherwise determined by the Appointed Board;

(4) Academic requirements for licensure as specified in TOC §1002.255 and §851.25 of this chapter; and

(5) Supporting documentation of any license requirement, as determined by Board staff or the Appointed Board, relating to criminal convictions as specified in §851.108 of this chapter; relating to substance abuse issues as specified in §851.109 of this chapter; and relating to issues surrounding reasons the Appointed Board may deny a license as specified in the Geoscience Practice Act at TOC §1002.401 and §1002.402.

(b) An applicant may request a waiver of any licensure requirement by submitting a Waiver Request (Form V) and any additional information needed to substantiate the request for waiver with the application. If the Appointed Board determines that the applicant meets all the other requirements, the Appointed Board may waive any licensure requirement except for the payment of required fees.

(c) An application is active for one year including the date that it is filed with the Appointed Board.

(d) Professional Geoscientist application procedure. To be eligible for a Professional Geoscientist license under this chapter, an applicant must submit or ensure the transmission (as applicable) of the following to the TBPG:

(1) A completed, signed, notarized application for licensure as a Professional Geoscientist;

(2) Documentation of having passed an examination as specified in §851.21 of this chapter;

(3) Documentation of having met the experience requirements as specified in §851.23 of this chapter;

(4) A minimum of five (5) reference statements as specified in §851.24 of this chapter;

(5) Official transcript(s), as specified in §851.25 of this chapter;

(6) The application/first year licensing fee as specified in §851.80(b) of this chapter;

(7) Verification of every license, current or expired, in any regulated profession related to the public practice of geoscience in any jurisdiction; and

(8) Any written explanation and other documentation as required by instructions on the application or as communicated by Board staff, if applicable.

(e) Any transcripts, evaluations, experience records or other similar documents submitted to the TBPG in previous applications may be included in a current application provided the applicant requests its use in writing at the time the application is filed and the Executive Director authorizes its use.

(f) An application may be forwarded to the Appointed Board at the Executive Director's discretion.

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

(h) An applicant who is a citizen of another country and is physically present in this country shall show sufficient documentation to the TBPG to verify the immigration status for the determination of their eligibility for a professional license in accordance with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(i) 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 within approximately thirty (30) days after the receipt of the application and fee.

(j) An applicant 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.

(k) Upon receipt of all required materials and fees and satisfying all requirements in this section, the applicant shall be licensed and a unique Professional Geoscientist license number shall be assigned to the license. A new license shall be set to expire at the end of the calendar month occurring one year after the license is issued. Board staff shall send a new license certificate, initial license expiration card, and an initial wallet license expiration card as provided in subsection (o) of this section.

(l) An original license is valid for a period of one year from the date it is issued. Upon the first timely renewal of a license, the renewal period shall be from the date the license is renewed until the last day of the next birth month for the licensee. A license that is renewed late (one day after the expiration date of the license through the end of the 36th month past the expiration date of the license) is renewed in accordance to the rules set forth in §851.28 of this chapter.

(m) A license number is not transferable.

(n) Any violation of the law or the rules and regulations resulting in disciplinary action for one license may result in disciplinary action for any other license.

(o) Altering a license wall certificate, certificate expiration card, or wallet expiration card in any way is prohibited and is grounds for a sanction and/or penalty.

(p) The Professional Geoscientist license is the legal authority granted the holder to actively practice geoscience upon meeting the requirements as set out in the Act and this chapter. When a license is issued, a license wall certificate, the first license certificate expiration card, and the first wallet license card are provided to the new licensee.

(1) The license wall certificate shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, the discipline in which the individual is licensed, and the date the license was originally issued.

(2) The license wall certificate is not valid proof of licensure unless the license certificate expiration card is accompanying the license certificate and the date on the license certificate card is not expired.

(3) The license certificate expiration card shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, and the date the license will expire, unless it is renewed.

(4) The wallet license card shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, the discipline in which the individual is licensed, and the date the license will expire, unless it is renewed.

(q) Once the requirements for licensure have been satisfied and the new license and license certificate have been issued, within sixty (60) days of notification the new licensee must then:

(1) Obtain a seal and submit TBPG Seal Submission (Form X) to the TBPG;

(2) Register as a Geoscience Firm, if appropriate, as described in §851.30 of this chapter; and

(3) Provide to the TBPG the following information: the name of every firm, governmental agency, or other organization with which the licensee is employed on a full-time or part-time basis, if the employment includes the practice of geoscience. If the practice of geoscience includes the public practice of geoscience, the licensee shall report the employer's Geoscience Firm registration number, unless the employer is a governmental agency or otherwise exempt from the requirement of registration with the TBPG.

(r) The TBPG shall adhere to the provisions of TOC Chapter 55 "License While on Military Duty and for Military Spouse" when considering applications for licensure and examination requests submitted by individuals for which those provisions apply.

§851.21. Licensing Requirements - Examinations.

(a) Qualifying examinations:

(1) An applicant for the Geology discipline must pass both parts of the National Association of State Boards of Geology (ASBOG®) examination. Applicants taking the ASBOG® examinations must also abide by the rules and regulations of ASBOG®.

(2) An applicant for the Soil Science discipline must pass both parts of the Council of Soil Science Examiners (CSSE) examination. Applicants taking the CSSE examinations must also abide by the rules and regulations of CSSE.

(3) An applicant for the Geophysics discipline must pass the Texas Geophysics Examination (TGE).

(b) An applicant may request an accommodation in accordance with the Americans with Disabilities Act. Proof of disability may be required.

(c) An applicant who does not timely arrive at and complete a scheduled examination will forfeit the examination fee.

(d) Cheating on an examination is grounds for denial, suspension, or revocation of a license and/or an administrative penalty.

(e) An applicant who has passed an examination may not retake that type of examination.

(f) Applicants requesting a waiver from any examination(s) shall complete a Waiver Request (Form V) and any additional information needed to substantiate the eligibility for the waiver with the application.

(g) Examination requirements and examination procedure: A qualified individual who has not passed qualifying licensing examination(s) may access and abide by all relevant components of one of the following procedures to sit for a qualifying examination(s) in the appropriate discipline:

(1) Licensure in the discipline of geology (part I)/ASBOG® Fundamentals of Geology examination:

(A) Requirements: Completion of the education qualifications for licensure as specified in Texas Occupations Code §1002.255 and §851.25 of this chapter or currently enrolled in a course of study that meets the education requirements for licensure and within two regular semesters of completion of the qualifying course of study.

(B) Procedure:

(i) The applicant shall complete and submit an Exam Request (Form E) and any required documents to the TBPG, along with the appropriate fee by the deadline posted on the TBPG website for the examination date desired by the applicant.

(ii) The Board staff will review the application and inform the applicant of any deficiencies in the application. Upon determination that the requirements have been met, the Board staff will mail an ASBOG® Examination Candidate Request Form to the applicant.

(iii) The applicant shall submit the ASBOG® Examination Candidate Request Form and send the form, along with the examination fee to ASBOG®. A courtesy copy of the ASBOG® Candidate Request Form shall be provided to the TBPG.

(iv) The applicant shall follow all examination administration procedures and take the examination.

(v) The Board staff shall notify the applicant of the results of the examination after receiving the results from ASBOG®.

(2) Licensure in the discipline of geology (part II)/ASBOG® Practice of Geology examination:

(A) Requirements:

(i) Under application for licensure as a Professional Geoscientist with the TBPG.

(ii) Meet all other qualifications for licensure in subsection (a) of this section, and be within six months of meeting the qualifying experience requirement.

(B) Procedure:

(i) The applicant shall complete and submit both the Initial Application for P.G. Licensure (Form A), in accordance with the application procedures specified in subsection (d) of this section, along with the appropriate fee and an Exam Request (Form E) along with the appropriate fee and any required documents to the TBPG, by the deadline posted on the TBPG website for the examination date desired by the applicant.

(ii) The Board staff will review the application and inform the applicant of any deficiencies in the application. Upon determination that the requirements have been met, the Board staff will mail an ASBOG® Examination Candidate Request Form to the applicant.

(iii) The applicant shall submit the ASBOG® Examination Candidate Request Form and send the form, along with the examination fee to ASBOG®. A courtesy copy of the ASBOG® Examination Candidate Request Form shall be provided to the TBPG.

(iv) The applicant shall follow all examination administration procedures and take the examination.

(v) The Board staff shall notify the applicant of the results of the examination after receiving the results from ASBOG®.

(3) Licensure in the discipline of geophysics/TGE:

(A) Requirements:

(i) Under application for licensure as a Professional Geoscientist with the TBPG and meet all qualifications for licensure in subsection (a) of this section, with the exception of the examination requirement; or

(ii) Under application for certification as a Geoscientist-in-Training with the TBPG and meet all qualifications for certification as a Geoscientist-in-Training in §851.41 of this chapter with the exception of having passed the TGE.

(B) Procedure:

(i) The applicant shall complete and submit both Application for Professional Geoscientist (Form A), in accordance with the application procedures specified in subsection (d) of this section, along with the appropriate fee and Examination Request Form (Form E) along with the appropriate fee and any required documents to the TBPG.

(ii) The Board staff will review the application and inform the applicant of any deficiencies in the application. Upon determination that the requirements have been met, the Board staff will provide TGE scheduling and examination payment information to the applicant.

(iii) The applicant shall submit the required information, along with the examination fee to the TBPG.

(iv) The applicant shall follow all examination administration procedures and take the examination.

(v) The Board staff shall notify the applicant of the results of the examination.

(4) Licensure in the discipline of soil science/Council of Soil Science Examiners (CSSE) Fundamentals of Soil Science and Practice of Soil Science Examinations: An applicant must meet the examination requirements of the CSSE; apply to take the required examinations directly with the CSSE and submit the required fees; follow all examination procedures of the CSSE; take and pass both parts of the examination; and follow CSSE procedures to ensure that the passing scores are forwarded to the TBPG.

§851.23. Qualifying Experience Record.

Applicants shall submit a Qualifying Experience Record (Form IV) to the TBPG as a part of the P.G. Professional Reference Statement (Form I).

(1) The experience record shall be written by the applicant, shall clearly describe the geoscience work that the applicant personally performed, and shall delineate the role of the applicant in any group geoscience activity.

(2) The experience record should provide an overall description of the nature and scope of the work with emphasis on detailed descriptions of the geoscience work personally performed by the applicant.

(3) Professional geoscience references must be provided to verify enough of the experience record to cover at least the minimum amount of time needed by the applicant for issuance of a license.

(4) Parts of the experience record that are to be verified by references shall be written in sufficient detail to allow the Board staff to document the minimum amount of experience required and to allow the reference provider to recognize and verify the quality and quantity of the experience claimed.

(5) The experience record must demonstrate evidence of the applicant's competency to be placed in responsible charge of geoscience work of a similar character.

(6) Experience is qualifying if the applicant's duties and responsibilities included the performance of geoscience tasks or is acceptable to the TBPG.

§851.24. References.

(a) Applicants for a license shall provide at least five reference statements to the TBPG, of which not fewer than three are from Professional Geoscientists or other professionals acceptable to the Appointed Board who have knowledge of the applicant's moral and ethical character, reputation, general suitability for holding a license, and relevant work experience, unless more references are required to meet the requirements in this chapter.

(1) One or more of the reference statements shall verify geoscience experience claimed to meet the minimum years of experience required. Professional Geoscientists who have not worked with or directly supervised an applicant may review and judge the applicant's experience; such review shall be noted in the reference statement.

(2) References should include one or more individuals who have directly supervised or maintained responsible charge of the applicant.

(b) Professional Geoscientists who provide reference statements and who are licensed in a jurisdiction other than Texas shall include a copy of their pocket card or other verification to indicate that their license is current and valid.

(c) The Appointed Board members and/or Board staff may, at their discretion, consider any, all or none of the responses from reference providers. Additional references may be required of the applicant when the Executive Director finds it necessary to adequately verify the applicant's experience or character. The Appointed Board and/or Board staff may at their discretion communicate with any reference provider or seek additional information.

(d) The applicant shall provide the reference statement form and a complete copy of the applicable portion(s) of the experience record to each reference provider.

(e) For a reference statement to be considered complete, the reference provider shall:

(1) Accurately complete the reference statement in detail;

(2) Review and evaluate all applicable portions of the supplementary experience record;

(3) Signify agreement or disagreement with the information written by the applicant and add any comments or concerns on the reference statement; and

(4) Place the completed reference statement and signed qualifying experience record in an envelope. After sealing the envelope, the reference provider's signature shall be placed across the sealed flap of the envelope and covered with transparent tape. The reference provider shall return the sealed envelope to the applicant.

(f) Applicants shall enclose all of the sealed reference envelopes with the Initial Application for P.G. Licensure (Form A) when submitted to the TBPG.

§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 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 Appointed 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 TBPG. Official transcripts shall be forwarded directly to the TBPG 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 TBPG at the request of the Executive Director.

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

(d) Degrees and coursework earned at foreign universities shall be acceptable if the degree conferred and coursework have 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 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 staff 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 staff shall consider a quarter hour of academic credit as two-thirds of a semester hour.

§851.27. Replacement License Certificate or License Expiration Cards.

A new or duplicate license certificate, a new or duplicate license certificate expiration card, or a new wallet license expiration card to post in a secondary work location or to replace one lost, destroyed, or mutilated, may be issued, subject to the rules of the TBPG, on payment of the established fee. A licensee need not destroy his or her current license certificate, but shall remain responsible for its care and custody, including any misuse of the certificate.

§851.28. Professional Geoscientist License Renewal and Reinstatement.

(a) The Board staff will mail a renewal notice to the last recorded address of each licensee, at least sixty (60) days prior to the date the license is about to expire. Regardless of whether the renewal notice is received, it is the sole responsibility of the licensee to pay the required renewal fee together with any applicable penalty at the time of payment. A licensee may renew a current license up to sixty (60) days in advance of its expiration. An expired license may be renewed within three years of the license expiration date.

(b) Upon the first renewal of a license, the licensure period will be prorated so that the new expiration date will be the last day of the licensee's birth month. The prorated renewal period will be for a minimum of four months and a maximum of fifteen months. Every subsequent expiration date shall be set for one year past the previous renewal date.

(c) A late penalty fee of $50 will be charged for a complete renewal application and fee received or postmarked sixty-one (61) days after the licensee's expiration date.

(d) The Appointed Board may refuse to renew a license if the licensee is the subject of a lawsuit regarding his/her practice of geoscience or is found censurable for a violation of TBPG laws or rules that would warrant such disciplinary action under §851.157 of this chapter.

(e) A license that has been expired for sixty (60) days or less may be renewed by submitting a P.G. Renewal Application (Form B) and the annual renewal fee to the TBPG. The renewal fee for a license that is renewed within sixty (60) days of expiration is the fee that was in place at the time the license expired. The licensee must also submit a signed Statement of Affirmation (Form VII) indicating whether the licensee practiced as a P.G. when their license was expired. Information regarding unlicensed non-exempt public 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 staff.

(f) A license that has been expired for more than sixty (60) days and less than ten months from the license expiration date may be renewed by submitting to the TBPG a P.G. Renewal Application (Form B), the annual renewal fee, and the late penalty fee. The renewal fee for a license that is renewed for more than sixty (60) days and less than ten months of expiration is the fee that was in place at the time the license expired. The licensee must also submit a signed Statement of Affirmation (Form VII) indicating whether the licensee practiced as a P.G. when their license was expired. Information regarding unlicensed non-exempt public 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 staff.

(g) A license that has expired for ten months or more but less than three years after the license expiration date may be renewed by submitting to the TBPG a P.G. Renewal Application (Form B), the annual renewal fee for each year missed plus the current year's renewal fee, and the late penalty fee. The licensee must also submit a signed Statement of Affirmation (Form VII indicating whether the licensee practiced as a P.G. when the license was expired. If an applicant for renewal who has met the requirements for renewal has practiced as a P.G. with the license expired, the license shall be renewed. Information regarding unlicensed 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 staff.

(h) A license that is allowed to expire for a period of three years after the license expiration date is permanently expired and may not be renewed. The former licensee may re-apply for a new license as provided by the Act and applicable TBPG rules and will have to meet all licensure requirements in said Act and rules at the time of re-application.

(i) As per §1002.403 of the Act, the Appointed Board may suspend or revoke a license as disciplinary action against a licensee who is found censurable for a violation of the Act or rules.

(1) A license that has been suspended can be reinstated by the Board staff only if the suspended licensee complies with all conditions of the suspension, which may include payment of fines, continuing education requirements, participation in a peer review program or any other disciplinary action outlined in the Board Order that suspended the license.

(2) A license that has been revoked can be re-instated only if, by a majority vote, the Appointed Board approves reinstatement, given the applicant:

(A) Re-applies and submits all required application materials and fees;

(B) Successfully completes an examination in the required discipline of geoscience being sought for reinstatement if the applicant has not previously passed said examination; and

(C) Provides evidence to demonstrate competency and that future non-compliance with the statute and rules of the TBPG will not occur.

(j) Pursuant to Texas Occupations Code §55.002, a licensee is exempt from any increased fee or other penalty imposed in this section for failing to renew the license in a timely manner if the licensee provides adequate documentation, including copies of orders, to establish to the satisfaction of the Executive Director that the licensee failed to renew in a timely manner because the licensee was serving on active duty in the United States armed forces outside of Texas.

(k) The application fee is non-refundable.

§851.29. Endorsement and Reciprocal Licensure.

(a) Endorsement.

(1) Endorsement is the process whereby TBPG, based on review of evidence of having completed a requirement for licensure for an equivalent license in another jurisdiction, determines that the applicant has met a requirement for licensure as a Professional Geoscientist.

(2) An applicant for a Professional Geoscientist license who is currently or has been licensed or registered to practice a discipline of geoscience in another United States jurisdiction (state, commonwealth, or territory, including the District of Columbia) or another country may be eligible to demonstrate having met all or some of the qualifications for licensure through endorsement.

(3) The Board staff will only consider documentation provided to the TBPG directly from a licensing authority that has issued a license to the applicant. It is the responsibility of the applicant to ensure that the licensing authority provides information to the TBPG and pays any associated costs.

(4) In order for the Board staff to consider evidence, the applicant must ensure that his or her licensing authority provides:

(A) Verification that the license is current; and

(B) Verification of the specific requirements that were met in order to become licensed.

(5) Verification may be in the form of:

(A) A document signed by an authorized agent of the jurisdiction indicating the specific qualifications that were met in order to become licensed; and/or

(B) Copies of specific documents that were submitted to the licensing authority to document having met a specific requirement.

(6) The TBPG may accept, deny or grant partial credit for requirements completed in a different jurisdiction.

(b) Reciprocal Licensure.

(1) Licensure by reciprocity agreement.

(A) Licensure by reciprocity agreement is the process whereby an applicant for licensure as a Professional Geoscientist in Texas who is currently licensed as a Professional Geoscientist (or equivalent license) in another United States jurisdiction (state, commonwealth or territory, including the District of Columbia) or another country becomes licensed in Texas and the process whereby an applicant currently licensed as a Professional Geoscientist in Texas applying for licensure as a Professional Geoscientist (or equivalent license) in the other jurisdiction becomes licensed in the other juris-

diction under the terms of a formal reciprocity agreement between the two jurisdictions.

(B) An applicant who holds a current license in a jurisdiction with which the TBPG has a reciprocity agreement may apply for licensure under the terms of the specific reciprocity agreement between the two jurisdictions.

(C) The TBPG shall maintain a list of each jurisdiction in which the requirements and qualifications for licensure or registration are comparable to those established in this state and with which a reciprocity agreement exists.

(2) Licensure by similar examination. An individual who is licensed or registered to practice a discipline of geoscience in another United States jurisdiction (state, commonwealth, or territory, including the District of Columbia) or another country applying for licensure under this subsection must submit proof of passage of examination(s) that is/are substantially similar to the applicable examination(s) as specified in §851.21 of this chapter.

(3) Licensure by recognition of licensed experience in another jurisdiction. An applicant for a Professional Geoscientist license who is currently licensed or registered to practice a discipline of geoscience in another United States jurisdiction (state, commonwealth, or territory, including the District of Columbia) or another country who was licensed without examination, i.e. "grandfathered", with regard to a licensing examination or who was licensed based on a licensing examination that is not recognized as substantially similar to the current licensing examination required for licensure under paragraph (2) of this subsection shall be deemed to have met the examination requirement upon verification of the following:

(A) Verification of a valid licensure in the other jurisdiction. The applicant requesting licensure under this subsection must be in good standing with the jurisdiction in which that individual holds their current license as a professional geologist or geoscientist;

(B) Verification of at least five (5) years of responsible professional geoscience work experience since the date of their initial licensure;

(C) Verification that licensure was maintained continuously (including sequential licensure, if a license was held in more than one jurisdiction) during the five (5) years prior to application with the TBPG; and

(D) Verification that no complaint is pending against the applicant, that no complaint against the applicant has been substantiated, and no disciplinary action has ever been taken against the applicant.

(E) The applicant seeking licensure under this subsection shall be responsible for contacting the jurisdiction(s) in which the applicant is currently licensed and all jurisdictions in which the applicant has ever been licensed and cause to have verification of information in subparagraphs (A) - (D) of this paragraph submitted to TBPG.

§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 TBPG; 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 TBPG 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(24) 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. 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 TBPG 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 TBPG to engage in the public practice of geoscience.

(b) Unless registered by the TBPG 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, 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 submitting the application for the initial registration of the firm with the TBPG; ensuring that the firm maintains compliance with the requirements of registration; 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 TBPG regarding any other necessary 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 TBPG 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, a firm seeking registration with the TBPG 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 TBPG 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 Initial Firm Registration Application (Form C), in accordance to the procedures outlined in subsection (d) of this section;

(7) Upon initial application, a firm shall affirm that the licensed Professional Geoscientist performing or supervising the geoscientific work for a Geoscience Firm is an employee. A Geoscience Firm shall provide evidence of employment status upon request of the Board staff or an Appointed Board Member.

(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 TBPG which includes but is not limited to the following information listed in subparagraphs (A) - (E) of this paragraph:

(A) The name, address, and phone 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 phone numbers of each officer or director;

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

(D) The name, location, and phone 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 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 TBPG. 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 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.

(f) 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 TBPG Rules. When a firm registration is issued, a firm registration wall 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 wall 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 wall certificate is not valid proof of current registration as a firm, unless it is accompanied by the firm registration certificate expiration card 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, and the date the registration will expire, unless it is renewed.

(g) At least sixty (60) days in advance of the date of the expiration, the Board staff shall notify each registered firm of the date of the expiration and the amount of the fee that shall be required for its annual renewal. The registration may be renewed by completing the renewal application and paying the annual registration renewal fee set by the Appointed Board. It is the sole responsibility of the firm to pay the required renewal fee prior to the expiration date, regardless of whether the renewal notice is received.

(h) A certificate of registration which has been expired for less than one (1) year may be renewed by completing a Firm Registration Renewal Application (Form D); an affirmation signed by the Authorized Official of a 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 staff. 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.

§851.31. Temporary License.

(a) The TBPG may issue a temporary license to an applicant as described in §1002.258(a) of the Act.

(b) A temporary licensee is subject to all rules and legal requirements to which a standard license is subject. The TBPG may issue a temporary license to an applicant currently licensed in another jurisdiction who:

(1) Has held such a license in good standing as a geoscientist for at least two years in another jurisdiction, including a foreign country, that has licensing requirements substantially equivalent to the requirements of the TBPG and has passed a national or other examination recognized by the Appointed Board relating to the discipline of geoscience for which licensure is being sought;

(2) Submits all required forms and fees; and

(3) Complies with and meets the requirements set forth in §1002.258 of the Act.

(c) Pursuant to §1002.258(c) of the Act, a temporary license expires either on the 90th day after the date of issuance or on the date a reciprocal license is issued or denied, whichever event occurs first.

(d) The application fee is non-refundable.

§851.32. Continuing Education Program.

(a) Each licensee shall meet the Continuing Education Program (CEP) requirements for professional development as a condition for license renewal.

(b) Terms used in this section are defined as follows:

(1) Professional Development Hour (PDH)--A contact hour (clock hour) of CEP activity. PDH is the basic unit for CEP reporting.

(2) Continuing Education Unit (CEU)--Unit of credit customarily used for continuing education courses. One continuing education unit equals 10 hours of class in an approved continuing education course.

(3) College/Unit Semester/Quarter Hour--Credit for course in a discipline of geoscience or other related technical elective of the discipline.

(4) Course/Activity--Any qualifying course or activity with a clear purpose and objective which will maintain, improve, or expand the skills and knowledge relevant to the licensee's field of practice.

(c) Every P.G. licensee is required to obtain 15 continuing education hours (PDH units) during a standard renewal period year (one year). The continuing education requirement for a license that is renewed for a period less than one year per §851.28(b) of this chapter shall be prorated.

(d) A minimum of 1 PDH per renewal period must be in the area of professional ethics, roles and responsibilities of Professional Geoscientists, or review on-line of the Texas Geoscientist Practice Act and TBPG rules.

(e) If a licensee exceeds the annual requirement in any renewal period, a maximum of 30 PDH units may be carried forward into the subsequent renewal periods.

(f) PDH units may be earned as follows:

(1) Successful completion or auditing of college credit courses.

(2) Successful completion of continuing education courses, either offered by a professional or trade organization, university or college, or offered in-house by a corporation, other business entity, professional or technical societies, associations, agencies, or organizations, or other group.

(3) Successful completion of correspondence, on-line, televised, videotaped, and other short courses/tutorials.

(4) Presenting or attending qualifying seminars, in-house courses, workshops, or professional or technical presentations made at meetings, conventions, or conferences sponsored by a corporation, other business entity, professional or technical societies, associations, agencies, or organizations, or other group.

(5) Teaching or instructing as listed in paragraphs (1) - (4) of this subsection.

(6) Authoring published papers, articles, books, or accepted licensing examination items.

(7) Active participation in professional or technical societies, associations, agencies, or organizations, including:

(A) Serving as an elected or appointed official;

(B) Serving on a committee of the organization; or

(C) Serving in other official positions.

(8) Patents issued.

(9) Engaging in self-directed course work.

(10) Software programs published.

(g) All activities described in subsection (f) of this section shall be relevant to the practice of a discipline of geoscience and may include technical, ethical, or managerial content.

(h) The conversion of other units of credit to PDH units is as follows and subject to subsection (g) of this section:

(1) 1 College or unit semester hour--15 PDH.

(2) 1 College or unit quarter hour--10 PDH.

(3) 1 Continuing Education Unit (CEU)--10 PDH.

(4) 1 Hour of professional development in course work, seminars, or professional or technical presentations made at meetings, conventions, or conferences--1 PDH.

(5) 1 Hour of professional development through self-directed course study (Not to exceed 5 PDH)--1 PDH.

(6) Each published paper or article--10 PDH and book--45 PDH.

(7) Active participation, as defined in subsection (f)(7) of this section, in professional or technical society, association, agency, or organization (Not to exceed 5 PDH per year)--1 PDH.

(8) Each patent issued--15 PDH.

(9) Each software program published--15 PDH.

(10) Teaching or instructing as described in subsection (f)(5) of this section--3 times the PDH credit earned.

(i) Determination of Credit:

(1) The Appointed Board shall be the final authority with respect to whether a course or activity meets the requirements of this chapter.

(2) The Board staff shall not pre-approve or endorse any CEP activities. It is the responsibility of each licensee to use his/her best professional judgment by reading and utilizing the rules and regulations to determine whether all PDH credits claimed and activities being considered meet the continuing education requirement. However, a course provider may contact the Board staff for an opinion for whether or not a course or technical presentation would meet the CEP requirements.

(3) Credit for college or community college approved courses will be based upon course credit established by the college.

(4) Credit for qualifying seminars and workshops will be based on one PDH unit for each hour of attendance. Attendance at qualifying programs presented at professional and/or technical society meetings will earn PDH units for the actual time of each program.

(5) Credit for self-directed course work will be based on one PDH unit for each hour of study and is not to exceed 5 PDH per renewal period. Credit determination for self-directed course work is the responsibility of the licensee.

(6) Credit determination for activities described in subsection (h)(6) of this section is the responsibility of the licensee.

(7) Credit for activity described in subsection (h)(7) of this section requires that a licensee serve as an officer of the organization, actively participate in a committee of the organization, or perform other activities such as making or attending a presentation at a meeting or writing a paper presented at a meeting. PDH credits are not earned until the end of each year of service is completed.

(8) Teaching credit, as defined in subsection (f)(5) of this section, is valid for teaching a course or seminar for the first time only.

(j) The licensee is responsible for maintaining records to be used to support credits claimed. Records required include, but are not limited to:

(1) A log, showing the type of activity claimed, sponsoring organization, location, duration, instructor's or speaker's name, and PDH credits earned; and

(2) Attendance verification records in the form of completion certificates, receipts, attendance roster, or other documents supporting evidence of attendance.

(k) The licensee must submit CEP certification on the log and a list of each activity, date, and hours claimed that satisfy the CEP requirement for that renewal year when audited. A percentage of the licenses will be randomly audited each year.
Figure: 22 TAC §851.32(k) (No change.)

(l) CEP records for each licensee must be maintained for a period of three years by the licensee.

(m) CEP records for each licensee are subject to audit by the Board staff.

(1) Copies must be furnished, if requested, to the Board staff for audit verification purposes.

(2) If upon auditing a licensee, the Board staff finds that the activities cited do not fall within the bounds of educational, technical, ethical, or professional management activities related to the practice of geoscience; the Board staff may require the licensee to acquire additional PDH as needed to fulfill the minimum CEP requirements.

(n) A licensee may be exempt from the professional development educational requirements for one of the following reasons listed in paragraphs (1) - (4) of this subsection:

(1) New licensees that were licensed by passage of any part of the required licensing examinations shall be exempt for their first renewal period.

(2) A licensee serving on active duty and deployed outside the United States, its possessions and territories, in or for the military service of the United States for a period of time exceeding one hundred twenty (120) consecutive days in a year shall be exempt from obtaining the professional development hours required during that year.

(3) A licensee employed outside the United States, its possessions and territories, actively engaged in the practice of geoscience for a period of time exceeding three hundred (300) consecutive days in a year shall be exempt from obtaining the professional development hours required during that year except for five (5) hours of self-directed course work.

(4) Licensees experiencing long term physical disability or illness may be exempt. Supporting documentation must be furnished to the TBPG.

(o) A licensee may bring an expired license to active status by obtaining all delinquent PDH units. However, if the total number required to become current exceeds 30 units, including 2 hours of professional ethics, roles and responsibilities of Professional Geoscientists, then 30 units (including 2 hours of ethics) shall be the maximum number required.

(p) Noncompliance:

(1) If a licensee does not certify that CEP requirements have been met for a renewal period, the license shall be considered expired and subject to late fees and penalties.

(2) A determination by audit that CEP requirements have been falsely reported shall be considered to be misconduct and will subject the licensee to disciplinary action.

§851.40. Geoscientist-in-Training (GIT).

(a) The GIT certification is intended for individuals who wish to express the intent to become a Professional Geoscientist while they are gaining qualifying geoscience work experience. Individuals who meet the educational requirements of §1002.255(a)(2)(A) of the Act and have successfully passed an examination as specified in §851.21 of this chapter are eligible to apply for GIT certification. This certification does not entitle an individual to practice as a licensed Professional Geoscientist.

(b) Upon accruing 5 years of post graduate geoscience work experience, individuals who are GIT certified and in good standing with the TBPG may apply for licensure as a Professional Geoscientist by submitting the following:

(1) TBPG Initial Application for P.G Licensure (Form A);

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

(3) The required reference statements as detailed in §851.24 of this chapter;

(4) The required evidence of qualifying work experience as described in §851.23 of this chapter; and

(5) Proof of having passed one of the following discipline specific examinations:

(A) National Association of State Boards of Geology (ASBOG®) Practice of Geology;

(B) Council of Soil Science Examiners (CSSE) Soil Science Practice Examination; or

(C) Texas Geophysics Examination.

§851.41. Geoscientist-in-Training Certification Requirements and Application Procedure.

(a) To qualify for certification, an applicant must meet the following requirements:

(1) Educational requirements for licensure as a P.G. as established in §851.25(a) of this chapter.

(2) Passed one of the following examinations:

(A) Geology discipline: National Association of State Boards of Geology (ASBOG®) Fundamentals of Geology Examination;

(B) Soil Science discipline: Council of Soil Science Examiners (CSSE) Soil Science Fundamentals Examination; or

(C) Geophysics discipline: The Texas Geophysics Examination.

(3) One Reference Statement addressing the applicant's moral and ethical character.

(4) Application fee published in §851.80 of this chapter.

(b) Application Procedure:

(1) Submit a GIT Certification Initial Application (Form H);

(2) Submit an official academic transcript in accordance with §851.25(b) of this chapter;

(3) Submit one GIT Personal Reference Statement (Form III); and

(4) Pay the application fee.

§851.43. GIT Certification Period and Renewal.

(a) An initial GIT certification is valid for one year and may be renewed annually for a period of up to eight years. Renewals after the eighth year of certification will be granted at the discretion of the Appointed Board.

(b) A GIT certificate expires at the end of the month one year from the date of issuance, and can be renewed annually if the individual:

(1) Submits a GIT Certification Renewal Application (Form J) and pays the fee established by the Appointed Board;

(2) Accumulates eight or more Personal Development Hours (PDH) as described in §851.32 of this chapter throughout the prior certification year to include one hour of ethics training; and

(3) Remains in good standing with the TBPG.

§851.44. Use of the Title "Geoscientist-in-Training".

Individuals who are certified as a Geoscientist-in-Training may use "GIT" or "Geoscientist-in-Training" as a title after their name, providing these designations are not used in conjunction with or preceded by the word "licensed" or any other words that might lead one to believe they are licensed as a Professional Geoscientist.

§851.80. Fees.

(a) All fees are non-refundable.

(b) P.G. Initial application and license fee--$255.

(c) Examination processing fee--$25.

(d) Applicable examination fees:

(1) Geology--Fundamentals and Practice as determined by the National Association of State Boards of Geology (ASBOG®).

(2) Geophysics--$175.

(3) Soil Science--Fundamentals and Practice as determined by the Council of Soil Science Examiners (CSSE).

(e) Issuance of a revised or duplicate license--$25.

(f) P.G. renewal fee--$223 or as prorated under §851.28(b) of this chapter. The fee for annual renewal of licensure for any individual sixty-five (65) years of age or older as of the renewal date shall be half the current renewal fee.

(g) Late renewal penalty--$50.

(h) Fee for affidavit of licensure--$15.

(i) Verification of licensure--$15.

(j) Temporary license--$200.

(k) Firm registration initial application--$300.

(l) Firm registration renewal--$300.

(m) Sole-proprietorship registration--$50.

(n) Sole-proprietorship renewal--$50.

(o) Insufficient funds fee--$25.

(p) Initial application for Geoscientist-in-Training certification--$25.

(q) Annual renewal of Geoscientist-in-Training certification--$25.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2014.

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Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Effective date: December 11, 2014
Proposal publication date: July 4, 2014
For further information, please call: (512) 936-4405

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22 TAC §§851.42, 851.45, 851.46

These adopted repeals 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 §1002.154 which provides that Board shall enforce the Act; and by §1002.352 which provides that the Board shall establish criteria for a Geoscientist-in-Training program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Effective date: December 11, 2014
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SUBCHAPTER C. CODE OF PROFESSIONAL CONDUCT

22 TAC §§851.101 - 851.112

These 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 §1002.154 which provides that Board shall enforce the Act; and by §1002.153 which allows the Board

to adopt a code of professional conduct that is binding on all license holders.

§851.101. General.

(a) This subchapter is promulgated pursuant to the Act, Texas Occupations Code, §1002.153, which directs the Appointed Board to adopt a code of professional conduct that is binding on all license holders under the Act and provides that the Appointed Board may enforce the code by imposing sanctions, as provided by the Act or this chapter. Except as otherwise noted, this subchapter applies only to situations which are related to the practice of geoscience.

(b) Any person who holds a Professional Geoscientist license, is the Authorized Official of a Firm (AOF), is a Geoscience Firm, or who holds a certificate as a Geoscientist-in-Training is responsible for understanding and complying with the Act, rules adopted by the Appointed Board and any other law or rule pertaining to the professional practice of geoscience. Any person under application for, currently holding, or eligible to renew a license, registration, or certification issued by the TBPG is bound by the provisions of the Act and this chapter. The TBPG maintains jurisdiction over a license, registration, or certification it issues as long as the license, registration, or certification is current or renewable.

(c) A Professional Geoscientist, an AOF, or a person who holds a certificate as a Geoscientist-in-Training having knowledge of any alleged violation of the Act and/or TBPG rules shall cooperate with the TBPG in furnishing such information as may be required.

(d) A Professional Geoscientist, an AOF, or a person who holds a certificate as a Geoscientist-in-Training shall answer all inquiries concerning matters under the jurisdiction of the TBPG and shall fully comply with final decisions and orders of the Appointed Board. Failure to comply with these matters shall constitute a separate offense of misconduct subject to the penalties provided under the Act or this Chapter.

(e) The Appointed Board may take disciplinary actions as provided in the §1002.403 of the Act for reasons stated in§1002.402 of the Act.

(f) This subchapter is not intended to suggest or define standards of care in civil actions against Professional Geoscientists, Geoscientists-in-Training, or Geoscience Firms involving their professional conduct.

(g) A Professional Geoscientist, a Geoscientist-in-Training, or a Geoscience Firm may donate professional geoscience services to charitable causes but must adhere to all provisions of the Act and the rules of the TBPG in the provision of all geoscientific services rendered, regardless of whether the Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm is paid for the services.

(h) A Professional Geoscientist or a Geoscientist-in-Training who is presenting geoscientific testimony, including geoscientific interpretation, analysis, or conclusions, or recommending geoscientific work before any public body or court of law, whether under sworn oath or not, must adhere to all provisions of the Act and the rules of the TBPG in the provision of all geoscientific services rendered regardless of whether the Professional Geoscientist is paid for the service or is providing such service on behalf of themselves or some other organization for which their services are provided at no cost.

§851.102. Competence/Negligence.

(a) A Professional Geoscientist or a Geoscience Firm shall undertake to perform a professional service only when the Professional Geoscientist or Geoscience Firm, together with those whom the Professional Geoscientist or Geoscience Firm shall engage as consultants, are qualified by education and/or experience in the specific technical areas involved. During delivery of a professional service, a Professional Geoscientist or Geoscience Firm shall act with reasonable care and competence and shall apply the technical knowledge and skill, which is ordinarily applied by reasonably prudent Professional Geoscientists practicing under similar circumstances and conditions.

(b) A Professional Geoscientist shall not affix his/her signature or seal to any document dealing with subject matter in which he/she is not qualified by education and/or experience to form a reasonable judgment.

(c) A Professional Geoscientist or a Geoscience Firm shall not engage in conduct or perform professional services characterized by Gross Incompetence. Conduct or professional services characterized by Gross Incompetence includes work that evidenced an inability or lack of skill or knowledge necessary to discharge the duty and responsibility required of a Professional Geoscientist or Geoscience Firm or evidenced by an extreme lack of knowledge of, or an inability or unwillingness to apply the principles or skills generally expected of a reasonably prudent Professional Geoscientist or Geoscience Firm.

(d) A Professional Geoscientist who has been adjudicated mentally incompetent by a court may not renew a license or engage in activities requiring a license under the Act.

§851.103. Recklessness.

(a) A Professional Geoscientist or Geoscience Firm shall not practice geoscience in any manner which, when measured by generally accepted geoscience standards or procedures, is reasonably likely to result or does result in the endangerment of the safety, health, or welfare of the public. Such practice is deemed to be "reckless."

(b) "Recklessness" shall include the following practices:

(1) Conduct that indicates that the Professional Geoscientist or Geoscience Firm is aware of yet consciously disregards a substantial risk of such a nature that its disregard constitutes a significant deviation from the standard of care that a reasonably prudent Professional Geoscientist or Geoscience Firm would exercise under the circumstances;

(2) Knowing failure to exercise ordinary care and attention toward the intended result when a procedure, technique, material, or system is employed as a result of a decision made by the Professional Geoscientist or Geoscience Firm and such failure jeopardizes public health, safety, or welfare; or

(3) Action which demonstrates a conscious disregard for compliance with a statute, regulation, code, ordinance, or recognized standard applicable to the design or construction of a particular project when such disregard jeopardizes public health, safety, or welfare.

§851.104. Dishonest Practice.

(a) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not directly or indirectly perform an act, omit an act or allow an omission, make an assertion, or otherwise engage in a practice in such a manner as to:

(1) Defraud;

(2) Deceive; or

(3) Create a misleading impression.

(b) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not advertise publicly or individually to a client or prospective client in a manner that is false, deceptive, misleading, inaccurate, incomplete, out of context, or not verifiable.

(c) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not directly or indirectly solicit, offer, give, or receive anything or any service of significant value as an inducement or reward to secure any specific publicly funded geoscience work.

(d) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not make any false, misleading, deceptive, fraudulent or exaggerated claims or statements about the services of an individual or organization, including, but not limited to, the effectiveness of geoscientific services, qualifications, or products.

(e) If a Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm learns that any false, misleading, deceptive, fraudulent or exaggerated claims or statement about the geoscientific services, qualifications or products have been made, the licensee shall take reasonable steps to correct the inappropriate claims. As appropriate, the Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm may notify the TBPG in writing about these claims.

(f) Professional Geoscientists and Geoscience Firms shall issue statements in an objective and truthful manner. Professional Geoscientists, Geoscientist-in-Training, and Geoscience Firms must make reasonable efforts to make affected parties aware of the concerns regarding particular actions or projects, and of the potential economic, environmental and public safety consequences of geoscientific decisions or judgments that are overruled or disregarded.

(g) A Geoscience Firm which retains or hires others to advertise or promote the firm's practice remains responsible for the statements and representations made.

(h) A Geoscience Firm shall maintain a work environment that uses standard operating procedures and quality assurance/quality control standards related to the Geoscience Firm's practice to ensure that the Geoscience Firm protects the health, safety, property, and welfare of the public.

§851.105. Conflicts of Interest.

(a) If a Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm has any business association or financial interest which might reasonably appear to influence the judgment of the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm in connection with the performance of a professional service and thereby jeopardize an interest of a client or employer of the Professional Geoscientist, the Geoscientist-in-Training, or Geoscience Firm, the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall promptly inform the client or employer in writing of the circumstances of the business association or financial interest. Unless the client or employer provides written consent after full disclosure regarding the circumstances of the business association or financial interest, the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall either terminate the business association or financial interest or forego the project or employment.

(b) A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall not solicit or accept, directly or indirectly, any financial or other valuable consideration, material favor, or other benefit of any substantial nature, financial or otherwise, from more than one party in connection with a single project or assignment unless the circumstances are fully disclosed in writing to all parties.

(c) A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall not solicit or accept, directly or indirectly, any financial or other valuable consideration, material favor, or other benefit of any substantial nature from any supplier of materials or equipment or from any contractor or any consultant in connection with any project on which the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm is performing or has contracted to perform geoscience services.

§851.106. Responsibility to the Regulation of the Geoscience Profession and Public Protection.

(a) Professional Geoscientists, Geoscientists-in-Training, and Geoscience Firms shall be entrusted to protect the public in the practice of their profession.

(b) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not:

(1) Knowingly participate, directly or indirectly, in any plan, scheme, or arrangement having as its purpose the violation of any provision of the Act or the rules of the TBPG;

(2) Aid or abet, directly or indirectly:

(A) Any unlicensed person in connection with the unauthorized practice of geoscience;

(B) Any business entity in the practice of geoscience unless carried on in accordance with the Act and this chapter; or

(C) Any person or any business entity in the use of a professional seal or other professional identification so as to create the opportunity for the unauthorized practice of geoscience by any person or any business entity;

(3) Fail to exercise reasonable care or diligence to prevent his/her partners, associates, shareholders, and employees from engaging in conduct which, if done by a Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm, would violate any provision of the Act or the rules of the TBPG.

(c) A Professional Geoscientist or a Geoscientist-in-Training possessing knowledge of an Applicant's qualifications for licensure shall cooperate with the TBPG by responding in writing to the TBPG regarding those qualifications when requested to do so by the TBPG.

(d) A Professional Geoscientist shall be responsible and accountable for the care, custody, control, and use of his/her Professional Geoscientist seal, professional signature, and other professional identification. A Professional Geoscientist whose seal has been lost, stolen, or otherwise misused shall report the loss, theft, or misuse to the TBPG immediately upon discovery of the loss, theft, or misuse. The Executive Director may invalidate the license number of the lost, stolen, or misused seal upon the request of the Professional Geoscientist if the Executive Director deems it necessary.

(e) A Professional Geoscientist, a Geoscientist-in-Training, or an Authorized Official of a Firm shall remain mindful of his/her obligation to the profession and to protect public health, safety, and welfare and shall report to the TBPG known or suspected violations of the Act or the rules of the TBPG.

(f) A Professional Geoscientist or Geoscience Firm shall keep adequate records of geoscientific services provided to the public for no less than five (5) years following the completion and final delivery of the service. Adequate records shall include, but not be limited to:

(1) Documents that have been signed and sealed or would require a signature and a seal;

(2) Relevant documentation that supports geoscientific interpretations, conclusions, and recommendations;

(3) Descriptions of offered services;

(4) Billing, payment, and financial communications; and

(5) Other relevant records.

(g) Professional Geoscientists, a Geoscientists-in-Training, and Geoscience Firms must adequately examine the environmental impact of their actions and projects, including the prudent use and conservation of resources and energy, in order to make informed recommendations and decisions.

§851.107. Prevention of Unauthorized Practice.

(a) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not practice or offer to practice geoscience in any governmental jurisdiction in which to do so would be in violation of a law regulating the practice of geoscience in that jurisdiction.

(b) A Professional Geoscientist who fails to renew his/her license prior to its annual expiration date shall not use the title, "Professional Geoscientist" or the initials "P.G." and shall not offer to or engage in the public practice of geosciences or otherwise engage in activities that require a license until after the Professional Geoscientist's license has been properly renewed.

(c) A Geoscience Firm that fails to renew its Geoscience Firm registration prior to its annual expiration date shall not use the title "Geoscience Firm" and shall not offer to or engage in the public practice of geoscience as defined by the Texas Occupations Code §1002.002 until after the Geoscience Firm's registration has been properly renewed.

(d) A Geoscientist-in-Training who fails to renew his/her certification prior to its annual expiration date shall not use the title "Geoscientist-in-Training" until after the Geoscientist-in-Training's certification has been properly renewed.

§851.108. Criminal Convictions.

(a) The TBPG will adhere to the provisions of TOC Chapter 53 regarding the review of criminal convictions and certain deferred adjudications in regard to actions taken against an Applicant for a license or a license holder as a consequence of criminal conviction or certain deferred adjudications, as specified in TOC Chapter 53.

(b) Crimes directly related to the duties and responsibilities of a Professional Geoscientist include any crime that reflects a lack of fitness for professional licensure or a disregard of the standards commonly upheld for the professional practice of geoscience, such as the following:

(1) Criminal negligence;

(2) Soliciting, offering, giving, or receiving any form of bribe;

(3) The unauthorized use of property, funds, or proprietary information belonging to a client or employer;

(4) Acts relating to the malicious acquisition, use, or dissemination of confidential information related to geoscience; and

(5) Any intentional violation as an individual or as a consenting person of any provision of the Act.

(c) Any license holder whose license has been revoked under the provisions of TOC 53 due to incarceration may apply for a new license upon release from incarceration.

§851.109. Substance Abuse.

(a) If in the course of a disciplinary proceeding, it is found by the Appointed Board that a Professional Geoscientist's abuse of alcohol or a controlled substance, as defined by the Texas Controlled Substances Act, Chapter 481, Texas Health and Safety Code, contributed to a violation of the Act or the rules of the TBPG, the Appointed Board may condition its disposition of the disciplinary matter on the Professional Geoscientist's completion of a rehabilitation program approved by the Department of State Health Services.

(b) A Professional Geoscientist's abuse of alcohol or a controlled substance that results in the impairment of the Professional Geoscientist's professional skill so as to cause or to have caused a direct threat to the property, safety, health, or welfare of the public may be deemed "Gross Incompetency" and may be grounds for revocation or suspension of a Professional Geoscientist's license or other appropriate disciplinary actions provided by the Act.

(c) In order to determine whether abuse of alcohol or a controlled substance contributed to a violation or whether the continued professional practice of a licensee is a threat to the public safety the Appointed Board may order an examination by one or more licensed health care providers authorized to provide diagnosis or treatment of substance abuse.

§851.110. Effect of Enforcement Proceedings on Application.

In accordance with §1002.401(b) of the Act, the TBPG may not issue a license pending the disposition of a complaint alleging a violation in Texas or another state if the TBPG has notice of the alleged violation.

§851.111. Professional Geoscientists Shall Maintain Confidentiality of Clients.

(a) A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm may reveal confidences and private information only with a fully informed client's or employer's consent, or when required by law, rule or court order; or when those confidences, if left undisclosed, would constitute a threat to the health, safety or welfare of the public.

(b) A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall not use a confidence or private information regarding a client or employer to the disadvantage of such client or employer or for the advantage of another person.

(c) A Professional Geoscientist or Geoscience Firm shall exercise reasonable care to prevent unauthorized disclosure or use of private information or confidences concerning a client or employer by the Professional Geoscientist's or Geoscience Firm's employees and associates.

§851.112. Required Reports to the TBPG.

(a) A Professional Geoscientist, Geoscientist-in-Training, or a Geoscience Firm shall make written reports to the TBPG office within thirty (30) days of the following, as applicable:

(1) Any changes in a firm's name, the Authorized Official of the Firm (AOF), the firm's owners, officers, or directors, Professional Geoscientist(s) employed by the firm, Professional Geoscientist(s) who serve as the P.G. in Responsible Charge for the firm or any branch offices, communication phone number(s) of the Authorized Official of the Firm or P.G.s and any other changes as identified in §851.152 of this chapter;

(2) Any changes in an individual P.G.'s or GIT's mailing address or other contact information and any changes in employment status with a firm (e.g. leaving or starting employment with a current firm, any new additional place(s) of employment;

(3) The initiation of practice as any other type of firm, corporation, partnership (whether or not the partnership is an incorporated entity) or other business entity that requires registration by the TBPG to engage in the public practice of geoscience;

(4) The notification in paragraphs (1) - (3) of this subsection shall include full legal trade or business name of the association or employment, physical location and mailing address of the business, status of business (corporation, assumed name, partnership, or self-employment through use of own name), legal relationship and position of responsibility within the business, telephone number of the business

office, effective date of this change; and reason for this notification (changed employment or retired; firm went out of business or changed its name or location, etc.) and information regarding areas of practice within each employment or independent sole practitioner practice setting;

(5) A change of business phone number, an additional business phone number, or a change in the home phone number;

(6) A criminal conviction, other than a Class C misdemeanor traffic offense, of the licensee or Geoscientist-in-Training;

(7) The settlement of or judgment rendered in a civil lawsuit filed against the licensee or Geoscience Firm relating to the Professional Geoscientist's or Geoscience Firm's professional practice; or

(8) Final disciplinary or enforcement actions against the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm taken by a licensing or certification body related to the practice of geoscience when known by the licensee.

(b) The information received under subsection (a) of this section may be used by the TBPG to determine whether a possible violation may have occurred.

(c) Failure to make a report as required by subsection (a) of this section is grounds for disciplinary action by the Appointed Board.

(d) A Geoscience Firm shall notify the TBPG in writing no later than thirty (30) days after a change in the business entity's:

(1) Physical or mailing address, electronic mail address, telephone or facsimile number or other contact information;

(2) Officers or directors if they are the only Professional Geoscientist of the firm;

(3) Employment status of the Professional Geoscientists of the firm;

(4) Operation including dissolution of the firm or that the firm no longer offers to provide or is not providing geoscientific services to the public in Texas; or

(5) Operation including addition or dissolution of branch and/or subsidiary offices.

(e) Notice as provided in subsection (e) of this section shall include, as applicable, the:

(1) Full legal trade or business name entity;

(2) The firm registration number;

(3) Telephone number of the business office;

(4) Name and license number of the license holder employed by or leaving the entity;

(5) Description of the change; and

(6) Effective date of this change.

(f) A Geoscience Firm that obtains a new certificate of authority from the Office of the Secretary of State or files a new Assumed Name Certificate with the County Clerk or the Office of the Secretary of State must provide the new instrument number to the TBPG within thirty (30) days of the action.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2014.

TRD-201405605
Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Effective date: December 11, 2014
Proposal publication date: July 4, 2014
For further information, please call: (512) 936-4405

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22 TAC §851.113, §851.114

These adopted repeals 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); and by Occupations Code §1002.154 which provides that Board shall enforce the Act.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2014.

TRD-201405606
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SUBCHAPTER D. COMPLIANCE AND ENFORCEMENT

22 TAC §§851.151 - 851.153, 851.156 - 851.158

These 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 §1002.154 which provides that Board shall enforce the Act; by §1002.402 which allows the Board to impose appropriate sanctions; by §1002.403 which allows the Board to take certain disciplinary actions; and by §1002.453 which requires the Board to adopt rules of procedure for the imposition of an administrative penalty.

§851.151. General.

(a) The Appointed Board is charged with the responsibility of enforcing the Act. Through the TBPG, the Appointed Board enforces the requirement of licensure as specified in the Act, the requirement of Geoscience Firm registration as specified in the Act, and all other requirements in the Act, the Code of Professional Conduct and other TBPG rules under the authority of the Act. Unless the person is licensed by the TBPG, a person may not:

(1) Use the term "Licensed Professional Geoscientist", "Professional Geoscientist", or the initials "P.G." as part of a professional, business, or commercial identification or title; or

(2) Otherwise represent to the public that the person is qualified to:

(A) Practice as a geoscientist; or

(B) Engage in the public practice of geoscience.

(b) When the TBPG discovers or is provided information that may indicate a violation of the Act or TBPG rules, the Board staff may initiate a complaint, as provided by TOC §1002.154. A member of the public may also submit a complaint, as provided by TOC §1002.154. In order for a complaint to be initiated by the agency or for information received from the public to be considered a complaint, the information initiated by Board staff or provided by the public must meet the criteria for a complaint provided in TOC §1002.202.

(c) Before the Appointed Board suspends or revokes a license, the TBPG shall provide to the Respondent a notice of the proposed action, an opportunity to show compliance, and an opportunity for a hearing.

(d) When a contested action is taken by the Appointed Board, the Respondent shall be informed of the Respondent's rights in regard to filing for judicial review, as provided in the Administrative Procedure Act (Government Code, Chapter 2001).

§851.152. Firm Compliance.

(a) Unless registered with the TBPG or exempt from firm registration requirements under TOC §1002.351, an individual, firm, or corporation may not represent to the public that the individual, firm, or corporation is a licensed geoscientist or able to perform geoscience services or prepare a geoscientific report, document, or other record that requires the seal of a Professional Geoscientist.

(b) A business entity or sole proprietor that offers or is engaged in the non-exempt public practice of geoscience in Texas must register with the TBPG pursuant to the requirements of §851.30 of this chapter.

(c) The Appointed Board may revoke a certificate of registration that was obtained in violation of the Act and/or TBPG rules including, but not limited to, fraudulent or misleading information submitted in the application.

(d) A business entity or sole proprietor that is not registered with the TBPG may not represent to the public by way of letters, signs, or symbols as a part of any sign, directory, listing, contract, document, pamphlet, stationery, advertisement, signature, or business name that it is engaged in the non-exempt public practice of geoscience by using the terms:

(1) "geoscientist;"

(2) "geoscience;"

(3) "geoscience services;"

(4) "geoscience company;"

(5) "geoscience, inc.;"

(6) "Professional Geoscientists;"

(7) "licensed geoscientists;"

(8) "registered geoscientists;"

(9) "licensed Professional Geoscientists;"

(10) "registered Professional Geoscientist;" or

(11) any abbreviation or variation of those terms listed in paragraphs (1) - (10) of this subsection, or directly or indirectly use or cause to be used any of those terms in combination with other words.

(e) The Appointed Board may revoke or suspend a Geoscience Firm's registration, place on probation a firm whose registration has been suspended, reprimand a Geoscience Firm, or assess an administrative penalty against a Geoscience Firm for a violation of any provision of TBPG rules or the Act by the firm or any employee of the firm. The Appointed Board also may take action against an Applicant pursuant to §851.110 of this chapter.

§851.153. Professional Geoscientist Compliance.

Any Professional Geoscientist who directly or indirectly enters into any contract, arrangement, plan, or scheme with any person, firm, partnership, association, or corporation or other business entity which in any manner results in a violation of §851.152 of this chapter shall be subject to legal and disciplinary actions available to the Appointed Board. Professional Geoscientists shall perform or directly supervise the geoscience work of any subordinates.

§851.156. Professional Geoscientist Seals and Geoscience Firm Identification.

(a) The purpose of the Professional Geoscientist's seal is to show that geoscience work was performed by a qualified licensed Professional Geoscientist and to identify the Professional Geoscientist who performed the work.

(b) The Professional Geoscientist shall utilize titles set forth in the Texas Geoscience Practice Act (Act), §1002.251. Physical seals of two different sizes will be acceptable: a pocket seal (the size commercially designated as 1-5/8-inch seal) or desk seal (commercially designated as a two-inch seal) to be of the design shown in this subsection. Computer-applied seals may be of a reduced size provided that the Professional Geoscientist's name and number are clearly legible.
Figure: 22 TAC §851.156(b) (No change.)

(c) A Professional Geoscientist shall only seal work performed by or under his/her direct supervision. Upon sealing, the Professional Geoscientist takes full professional responsibility for that work.

(d) It shall be misconduct to knowingly sign or seal any geoscience document or work if its use or implementation may endanger the health, safety or welfare of the public.

(e) It shall be unlawful for a license holder whose license has been revoked, suspended, or has expired, to sign or affix a seal on any document or work.

(f) All seals utilized by a license holder shall be capable of leaving a permanent ink or impression on the geoscience work.

(g) Electronically conveyed geoscience work requiring a seal must contain an electronic seal and electronic signature. Such seals should conform to the design requirements set forth in this section.

(1) A Professional Geoscientist must employ reasonable security measures to make the document unalterable. The Professional Geoscientist shall maintain the security of his/her electronic seal and electronic signature. The following methods are allowed:

(A) The Professional Geoscientist may electronically copy the original hard copy of the work that bears his/her seal, original signature, and date and transmit this work in a secure electronic format.

(B) The Professional Geoscientist may create an electronic seal and electronic signature for use in transmitting geoscientific work by making a secure electronic graphic of his/her original seal and signature.

(2) The use of an electronically-generated signature is not allowed by changing the word processing font from a "normal text" to a signature/handwriting font.

(A) Shown below is a sample of an unauthorized electronically-generated signature using the Lucida Handwriting FONT.
Figure: 22 TAC §851.156(g)(2)(A) (No change.)

(B) Shown below is a sample of a digital image of a geoscientist's seal and original signature saved as a digital image (JPEG Format, for example).
Figure: 22 TAC §851.156(g)(2)(B) (No change.)

(h) Preprinting of blank forms with a Professional Geoscientist's seal is prohibited.

(i) Signature reproductions, including but not limited to rubber stamps, decals or other replicas, and electronically-generated signatures shall not be used in lieu of the Professional Geoscientist's actual signature or a true digital graphic copy of the actual signature.

(j) A Professional Geoscientist shall take reasonable steps to insure the security of his/her physical or electronically-generated seals at all times. In the event of loss of a seal, the Professional Geoscientist will immediately give written notification of the facts concerning the loss to the Executive Director.

(k) Professional Geoscientists shall affix an unobscured seal, original signature, and date of signature to the originals of all documents containing the final version of any geoscience work as outlined in subsection (l) of this section before such work is released from their control. Preliminary documents released from their control shall identify the purpose of the document, the Professional Geoscientist(s) of record and the Professional Geoscientist license number(s), and the release date by placing the following text or similar wording instead of a seal: "This document is released for the purpose of (Examples: interim review, mark-up, drafting) under the authority of (Example: Leslie H. Doe, P.G. 0112) on (date). It is not to be used for (Examples: construction, bidding, permit) purposes."

(l) The Professional Geoscientist shall sign, seal and date the original title sheet of geoscience reports, or the signature page when a title sheet is not used, specifications, details, calculations or estimates, and each sheet of maps, drawings, cross sections or other figures representing geoscientific work carried out under the supervision of the geoscientist regardless of size or binding. All other geoscience work, including but not limited to research reports, opinions, recommendations, evaluations, addenda, documents produced for litigation, and geoscience software shall bear the Professional Geoscientist's printed name, date, signature and the designation "P.G." or other terms allowed under §1002.251 of the Act, unless the work is exempt under §1002.252 of the Texas Occupations Code. Electronic correspondence of this type shall include an electronic signature as described in subsection (f) of this section or be followed by a hard copy containing the Professional Geoscientist's printed name, date, signature and the designation "P.G." or other terms allowed under §1002.251 of the Act.

(m) Work performed by more than one Professional Geoscientist shall be sealed in a manner such that all geoscience can be clearly attributed to the responsible Professional Geoscientist or Professional Geoscientists. When sealing plans or documents on which two or more Professional Geoscientists have worked, the seal of each Professional Geoscientist shall be placed on the plan or document with a notation describing the work done under each Professional Geoscientist's responsible charge.

(n) Licensed employees of the state, its political subdivisions, or other public entities are responsible for sealing their original geoscience work; however, such licensed employees engaged in review and evaluation for compliance with applicable law or regulation of geoscience work submitted by others, or in the preparation of general planning documents, a proposal for decision in a contested case or any similar position statement resulting from a compliance review, need not seal the review reports, planning documents, proposals for decision, or position statements.

(o) When a Professional Geoscientist elects to use standards or general guideline specifications, those items shall be clearly labeled as such, shall bear the identity of the publishing entity, and shall be:

(1) Individually sealed by the Professional Geoscientist; or

(2) Specified on an integral design/title/contents sheet that bears the Professional Geoscientist's seal, signature, and date with a statement authorizing its use.

(p) Alteration of a sealed document without proper notification to the responsible Professional Geoscientist is misconduct or an offense under the Act.

(q) A license holder is not required to use a seal for a work product for which the license holder is not required to hold a license under Texas Occupations Code, Chapter 1002.

(r) All geoscience documents released, issued, or submitted by a licensee shall clearly indicate the Geoscience Firm name and registration number by which the Professional Geoscientist is employed. If the Professional Geoscientist is employed by a local, State, or Federal Government agency or a firm that is exempt from the requirement of registration under Texas Occupations Code, Chapter 1002, Subchapter H, then only the name of the agency or firm shall be required.

(s) TBPG also considers a work to meet the sealing requirement if a reader or user of the work can determine that the work is complete and unaltered from that which was placed under seal.

§851.157. Complaints and Disciplinary Actions.

(a) A complaint may be filed with the TBPG by a member of the public, a member of the Appointed Board or by Board staff. Complaints against a person or entity whose activities are regulated by the TBPG must be made in writing, sworn to by the person making the complaint, and filed with the Secretary-Treasurer of the Appointed Board at the office of the TBPG in Austin. A complaint may be filed against any person who: holds a Professional Geoscientist license issued by the TBPG and/or is the Authorized Official of a Firm (AOF) registered by the TBPG, is a registered Geoscience Firm, or holds a certificate as a Geoscientist-in-Training issued by the TBPG. A complaint may also be filed against a person or firm that is not licensed or registered with the TBPG alleging that the person or firm has engaged in the unlicensed or unregistered public practice or offering of geoscientific services in Texas. A state agency that becomes aware of a potential violation of the Act or a rule adopted by the Appointed Board may fulfill the requirements of the Act in Texas Occupations Code, §1002.207, by filing a formal complaint with the TBPG or providing the information relating to the potential violation in writing to Board staff. Information forwarded by a state agency that is privileged or confidential remains privileged or confidential following receipt by the TBPG. The privilege or confidentiality extends to any TBPG communication concerning the information forwarded, regardless of the form, manner, or content of the communication.

(b) A complaint must be filed within two (2) years of the event giving rise to the complaint. The event giving rise to the complaint is an event from which a concern with geoscience work completed becomes apparent. Complaints filed after the above stated period will not be acted upon by the TBPG unless the Complainant can show good cause for the late filing.

(c) Complaints and investigations under this chapter are of two types:

(1) Complaints received from a member of the public; and

(2) Complaints and investigations that are initiated by the Board staff or an Appointed Board Member as a result of information that becomes known to the Board staff or an Appointed Board Member and that may indicate a violation.

(d) The TBPG provides a complaint form which should be used to file a complaint.

(1) A complaint from a member of the public must be:

(A) In writing;

(B) Sworn to by the person making the complaint; and

(C) Submitted to the authorized staff deputy to the Secretary-Treasurer or electronically through the TBPG's internet website.

(D) The Board staff shall accept a complaint regardless of whether the complaint is notarized.

(2) A complaint that is initiated by a member of the Board staff or an Appointed Board Member must be:

(A) Made in writing; and

(B) Signed by the person who became aware of information that may indicate a violation.

(e) The TBPG shall maintain the confidentiality of a complaint from the time of receipt through the conclusion of the investigation of the complaint. Complaint information is not confidential after the date formal charges are filed. Information submitted to the TBPG that has not been filed as a complaint and the identity of the person who submits the information are not confidential. The TBPG maintains confidentiality or privilege of any confidential information submitted by a state agency under Texas Occupations Code, §1002.207. A state agency will inform the TBPG of the confidentiality or privilege provisions applicable to the information in accordance with procedures agreed upon between the agencies. If Board staff opens a complaint based on information it has received, the information becomes a part of the complaint record and is subject to the confidentiality provisions in Texas Occupations Code, §1002.202, in addition to any other confidentiality provisions that may apply.

(f) Except in the case of a suspension under TOC §1002.403(3), the procedures involved in the investigation and dispensation of complaints usually include the following steps, generally in the following order, as appropriate:

(1) Verify that the complaint meets legal requirements;

(2) Verify the identity of the Complainant (if complaint is not notarized);

(3) Open complaint and set up complaint record;

(4) Review complaint for TBPG jurisdiction;

(5) Review for imminent danger to the public health, safety, or welfare;

(6) Prioritize complaint as required by TOC §1002.154;

(7) Provide acknowledgement and notification to Complainant;

(8) Investigate complaint/complete confidential investigation report;

(9) Review of investigation with the possible outcomes of:

(A) Dismissal of complaint (with or without non-disciplinary advisory or warning); or

(B) Proposed finding of violation and proposed disciplinary action;

(10) If proposed finding of violation and proposed disciplinary action, written notices of violation providing opportunity to agree (accept proposed Agreed Board Order) or conference informally or request a hearing, if a hearing is provided for by law;

(11) Informal conference that may result in a modification to the proposed finding of violation and the proposed disciplinary action;

(12) Hearing with State Office of Administrative Hearings, if provided for by law and requested or scheduled by default, resulting in the issuance of a Proposal For Decision (PFD);

(13) Appointed Board review of resulting proposed Agreed Board Order, Board Order, or PFD. Upon the review of any proposed Agreed Board Order or Board Order, the Appointed Board may accept or reject the proposed Order. If a proposed Agreed Order is rejected, the Appointed Board may dismiss the complaint or direct Board staff to modify an order and propose the modified Order to a Respondent for later consideration.

(g) The Appointed Board may impose appropriate sanctions against a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm, as applicable, for:

(1) The practice of fraud or deceit in obtaining a Professional Geoscientist license, Geoscientist-in-Training certification, or Geoscience Firm registration;

(2) Incompetence, misconduct, fraud, gross negligence, or repeated incidents of negligence in the public practice of geoscience;

(3) Conviction of a license holder or GIT of a crime involving moral turpitude or a felony;

(4) The imposition of an administrative or civil penalty or a criminal fine, or imprisonment or probation instead of a fine, for a misdemeanor relating to or arising out of the public practice of geoscience;

(5) The issuance of a cease and desist order or a similar sanction relating to or arising out of the public practice of geoscience;

(6) Using the seal of another license holder or using or allowing the use of the license holder's seal on geoscientific work not performed by or under the supervision of the license holder;

(7) Aiding or abetting a person or firm in a violation of this chapter;

(8) The revocation or suspension of a license or firm registration, the denial of renewal of a license or registration, or other disciplinary action taken by a state agency, Board of registration, or similar licensing agency for Professional Geoscientists, Geoscientists-in-Training, Geoscience Firms, or a profession or occupation related to the public practice of geoscience;

(9) Practicing or offering to practice geoscience or representing to the public that the person or the person's firm or corporation is licensed or registered or qualified to practice geoscience if the person or firm is not licensed or registered under the Act or the person's firm or corporation does not employ a Professional Geoscientist as required under the Act; or

(10) Violating the Act, a rule adopted under the Act, including the Code of Professional Conduct, or a comparable provision of the laws or rules regulating the practice of geoscience in another state or country.

(h) The Appointed Board may take the following disciplinary actions:

(1) Refuse to issue or renew a license;

(2) Permanently revoke a license;

(3) Suspend a license for a specified time, not to exceed three years, to take effect immediately notwithstanding an appeal if the Appointed Board determines that the license holder's continued practice constitutes an imminent danger to the public health, safety, or welfare;

(4) Issue a public or private reprimand to an applicant, a license holder, or an individual, firm, or corporation practicing geoscience under this chapter;

(5) Impose limitations, conditions, or restrictions on the practice of an applicant, a license holder, or an individual, firm, or corporation practicing geoscience under this chapter;

(6) Require that a license holder participate in a peer review program under rules adopted by the Appointed Board;

(7) Require that a license holder obtain remedial education and training prescribed by the Appointed Board;

(8) Impose probation on a license holder requiring regular reporting to the Appointed Board;

(9) Require restitution, in whole or in part, of compensation or fees earned by a license holder, individual, firm, or corporation practicing geoscience under the Act;

(10) Impose an appropriate administrative penalty as provided by TOC Chapter 1002, Subchapter J for a violation of this chapter or a rule adopted under this chapter on a license holder or a person who is not licensed and is not exempt from licensure under the Act; or

(11) Issue a cease and desist order.

(i) Allegations and disciplinary actions will be set forth in the final Order and the severity of the disciplinary action will be based on the factors listed in paragraphs (1) - (9) of this subsection:

(1) The seriousness of the acts or omissions;

(2) The number of prior disciplinary actions taken against the respondent;

(3) The severity of penalty necessary to deter future violations;

(4) Efforts or resistance to correct the violations;

(5) Any hazard to the health, safety, property or welfare of the public;

(6) Any actual damage, physical or otherwise, caused by the violations;

(7) Any economic benefit gained through the violations;

(8) The economic harm to property or the environment caused by the violation; or

(9) Any other matters impacting justice and public welfare.

(j) The Appointed Board shall consider the following factors in determining the amount of an administrative penalty assessed by the Appointed Board:

(1) An administrative penalty shall not exceed the dollar amount specified in the Act for each violation. Each day a violation continues is a separate violation for the purposes of imposing a penalty.

(2) The amount of an administrative penalty shall be based on:

(A) The seriousness of the violation, including:

(i) The nature, circumstances, extent, and gravity of any prohibited acts; and

(ii) The hazard or potential hazard created to the health, safety, or economic welfare of the public;

(B) The economic harm to property or the environment caused by the violation;

(C) The history of previous violations;

(D) The disciplinary action or amount of administrative penalty necessary to deter a future violation;

(E) Efforts or resistance to correct the violation; and

(F) Any other matter that justice may require.

(k) If a complaint is determined to be frivolous or without merit, the complaint and other information related to the complaint are confidential. The information is not subject to discovery, subpoena, or other disclosure. A complaint is considered to be frivolous if the Executive Director and investigator, with Appointed Board approval, determine that the complaint:

(1) Was made for the likely purpose of harassment; and

(2) Does not demonstrate apparent harm to any person.

(l) All disciplinary actions shall be permanently recorded and made available upon request as public information.

§851.158. Actions Against Non-License Holders.

A non-license holder who is assessed an administrative penalty may exercise due process rights under Texas Occupations Code Chapter 1002, Subchapter J. The Appointed Board may also seek an injunction as provided under Texas Occupations Code Chapter 1002, Subchapter K.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2014.

TRD-201405607
Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Effective date: December 11, 2014
Proposal publication date: July 4, 2014
For further information, please call: (512) 936-4405

SUBCHAPTER E. CONTESTED CASES

22 TAC §851.201, §851.202

These 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 §1002.154 which provides that Board shall enforce the Act; by §1002.404, which entitles individuals to a hearing before the Board may suspend or revoke a license; and by §1002.453 which requires the Board to adopt rules of procedure for the imposition of an administrative penalty.

§851.201. Contested Case Hearings.

The State Office of Administrative Hearings shall conduct all formal hearings and contested cases in accordance with the Administrative Procedure Act (APA), Chapter 2001, Texas Government Code and Texas Administrative Code, Title 1, Chapter 155.

§851.202. Extensions of Time.

The Executive Director may enter into an agreement with parties to a contested case to modify time limits as provided under the Administrative Procedure Act (APA), Texas Government Code §2001.147.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2014.

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Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Effective date: December 11, 2014
Proposal publication date: July 4, 2014
For further information, please call: (512) 936-4405

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22 TAC §§851.203 - 851.243

These adopted repeals 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) and by §1002.154 which provides that Board shall enforce the Act.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 21, 2014.

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Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Effective date: December 11, 2014
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For further information, please call: (512) 936-4405

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TITLE 25. HEALTH SERVICES

PART 11. CANCER PREVENTION AND RESEARCH INSTITUTE OF TEXAS

CHAPTER 701. POLICIES AND PROCEDURES

25 TAC §701.35

The Cancer Prevention and Research Institute of Texas (Institute) adopts new §701.35, relating to how the public may petition the Institute for adoption of rules, without changes to the proposed text as published in the September 5, 2014, issue of the *Texas Register* (39 TexReg 7072). The rule will not be republished.

Reasoned Justification

Chapter 2001, Texas Government Code, requires state agencies to prescribe by rule the form and procedure for accepting, considering, and disposing of petitions to adopt rules. The new rule sets forth the procedure an interested party must follow to petition the Institute for consideration of a proposed administrative rule. The new rule describes the Institute's process for considering the petition.

The Institute accepted public comments in writing and by fax through November 3, 2014. No comments were received concerning proposed new §701.35.

The Oversight Committee approved the final order adopting new §701.35 on November 19, 2014.

Statutory Authority

The rule is adopted under the authority of the Texas Health and Safety Code Annotated, §102.108, which provides the Institute with the authority to adopt rules to administer the chapter. There is no other statute, article or code that is affected by this rule.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2014.

TRD-201405529
Heidi McConnell
Chief Operating Officer
Cancer Prevention and Research Institute of Texas
Effective date: December 10, 2014
Proposal publication date: September 5, 2014
For further information, please call: (512) 463-3190

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CHAPTER 703. GRANTS FOR CANCER PREVENTION AND RESEARCH

25 TAC §703.11

The Cancer Prevention and Research Institute of Texas (Institute) adopts amendments to §703.11 and §703.13 without changes to the proposed text as published in the October 3, 2014, issue of the *Texas Register* (39 TexReg 7874). The rules will not be republished.

Reasoned Justification

The Institute permits a grant recipient that is a public or private institution of higher education, as defined by §61.003, Texas Education Code, to credit toward the grant recipient's matching funds obligation the dollar amount equivalent to the difference between the indirect cost rate authorized by the federal government for research grants awarded to the grant recipient and the five percent (5%) indirect cost limit imposed by §102.203(c), Texas Health and Safety Code. The amendment to §703.11(b) provides guidance for calculating the federal indirect cost rate applicable for subcontracted work on the grant project.

The Institute requires grant recipients that expend $500,000 or more in state awards during its fiscal year to obtain an annual au-

dit as a condition of the grant award. The purpose of the amendment to §703.13 is to clarify that an agreed upon procedures engagement, as defined by the American Institute of Certified Public Accountants, fulfills the audit requirement. This amendment is adopted pursuant to and in satisfaction of the provisions Texas Health and Safety Code, Chapter 102, and other relevant statutes.

The Institute accepted public comments in writing and by fax through November 3, 2014. No comments were received concerning the proposed amendments for Chapter 703.

The Oversight Committee approved the final order adopting the amendments to Chapter 703 rules on November 19, 2014.

Statutory Authority

The rules are amended under the authority of the Texas Health and Safety Code Annotated, §102.108, which provides the Institute with broad rulemaking authority to administer the chapter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2014.

TRD-201405533
Heidi McConnell
Chief Operating Officer
Cancer Prevention and Research Institute of Texas
Effective date: December 10, 2014
Proposal publication date: October 3, 2014
For further information, please call: (512) 463-3190

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 22. PRIVACY

SUBCHAPTER A. INSURANCE CONSUMER FINANCIAL INFORMATION PRIVACY

28 TAC §§22.2, 22.3, 22.10, 22.11, 22.22, 22.26, 22.27

The Texas Department of Insurance adopts amendments to 28 TAC §§22.2, 22.3, 22.10, 22.11, 22.22, and 22.26, concerning the treatment of nonpublic personal financial information about individuals who obtain products or services primarily for personal, financial, or household purposes from covered entities. TDI also adopts new 28 TAC §22.27, concerning general instructions for a covered entity to complete the federal model privacy form. The amendments and new sections are adopted with changes to the proposed text published in the August 15, 2014, issue of the *Texas Register* (39 TexReg 6147).

REASONED JUSTIFICATION. The amendments and new section are necessary to provide that a covered entity may use the federal model privacy form, consistent with its instructions in new 28 TAC §22.27, to meet the notice content requirements of 28 TAC §22.10 and §22.11. This adoption replaces the existing sample forms under 28 TAC §22.26(b) with three versions of the optional federal model privacy form and an optional federal mail-in opt out form that conforms with amendments in federal law and regulations concerning notice to consumers about their nonpublic personal financial information.

The amendments and new section are also necessary to remain consistent with federal law and regulations concerning the disclosure of nonpublic personal financial information adopted under the Gramm-Leach-Bliley Act, 15 U.S.C. §6801 et seq., as amended, and in accord with Insurance Code §601.051. This adoption implements Insurance Code §601.002(a), which requires a covered entity to comply with 15 U.S.C. §6802 and §6803, as amended, in the same manner as a financial institution is required to comply under those sections. Title 15 U.S.C. §6802 concerns a financial institution's obligations with respect to disclosures of personal information. Title 15 U.S.C. §6803 concerns the disclosure of a financial institution's privacy policy. Section 601.002(a) does not apply to a covered entity to the extent the entity is acting solely as an insurance agent, employee, or other authorized representative for another covered entity as provided under Insurance Code §601.003.

Insurance Code §601.051(a)(1) and (2) requires the commissioner to adopt rules to implement Chapter 601 and any other rules necessary to carry out Subtitle A, Title V, Gramm-Leach-Bliley Act under 15 U.S.C. §6801 et seq., as amended, to make this state eligible to override federal regulations described by 15 U.S.C. §6805(c), as amended. In adopting rules under Chapter 601, Insurance Code §601.051(b) requires the commissioner to keep state privacy requirements consistent with federal regulations adopted under 15 U.S.C. §6801 et seq., as amended. Insurance Code §601.052 further requires TDI to implement standards as required by 15 U.S.C. §6805(b), as amended. TDI also adopts amendments to update statutory references, amend existing text for clarification and consistency with agency writing style, and update internal references. Additionally, TDI adopts amendments due to SB 951, passed during the 83rd Legislative Session, Regular Session (2013), to clarify that Insurance Code Chapter 981 applies to surplus lines for transactions where Texas is the home state of the insured to the extent the insurer accepts business through a person subject to Insurance Code Chapter 981.

Insurance Code §601.001(3) defines a "covered entity" to mean an individual or entity that receives an authorization from TDI. Insurance Code §82.001 provides that in Chapter 82, "authorization" means a permit, license, certificate of authority, certificate of registration, or other authorization issued or existing under the commissioner's authority of the Insurance Code. The term includes an individual or entity described by Insurance Code §82.002(a), which provides that Chapter 82 applies to each company regulated by the commissioner, including:

(1) a domestic or foreign, stock or mutual, life, health, or accident insurance company;

(2) a domestic or foreign, stock or mutual, fire or casualty insurance company;

(3) a Mexican casualty company;

(4) a domestic or foreign Lloyd's plan insurer;

(5) a domestic or foreign reciprocal or interinsurance exchange;

(6) a domestic or foreign fraternal benefit society;

(7) a domestic or foreign title insurance company;

(8) an attorney's title insurance company;

(9) a stipulated premium insurance company;

(10) a nonprofit legal service corporation;

(11) a health maintenance organization;

(12) a statewide mutual assessment company;

(13) a local mutual aid association;

(14) a local mutual burial association;

(15) an association exempt under Insurance Code §887.102;

(16) a nonprofit hospital, medical, or dental service corporation, including a company subject to Insurance Code Chapter 842;

(17) a county mutual insurance company; and

(18) a farm mutual insurance company.

Insurance Code Chapter 82 applies to an individual or entity that is required to register with TDI or that is otherwise regulated under the commissioner's authority in the Insurance Code as provided by Insurance Code §82.001. Specifically, Insurance Code §82.002(b) provides that Chapter 82 also applies to:

(1) an agent of an entity described by §82.002(a); and

(2) an individual or a corporation, association, partnership, or other artificial person who:

(A) is engaged in the business of insurance;

(B) holds an authorization; or

(C) is regulated by the commissioner.

Additionally, Insurance Code §82.002(c) provides that the commissioner's authority under Chapter 82 applies to each form of authorization and each person or entity holding an authorization.

Under 15 U.S.C. §6803(e)(1), certain federal agencies were required to jointly develop a model form that a financial institution may use, at its option, to comply with the disclosure requirements under the section. The agencies were required to develop a model form that is comprehensible to consumers with a clear format and design, provide for clear and conspicuous disclosures, enable consumers to easily identify the information-sharing practices of a financial institution and compare privacy practices among financial institutions, be succinct, and use an easily readable type font in accord with 15 U.S.C. §6803(e)(2). The Office of the Comptroller of Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; Office of Thrift Supervision, Treasury; National Credit Union Administration; Federal Trade Commission; Commodity Future Trading Commission; and the Securities and Exchange Commission (the Agencies) jointly adopted a model privacy form, which appeared in the December 1, 2009, publication of the *Federal Register* at 74 FR 62890, that a financial institution may use, at its option, to meet the requirements for disclosure to consumers.

The Agencies explained that a financial institution may use the model privacy form to notify consumers about its information-sharing practices and to inform consumers of the right to opt out of certain sharing practices. The Agencies adopted a model form with no opt out; a model form with an opt out by telephone, online, or both; a model form with a mail-in opt out form; and an optional mail-in opt out form. Use of the model privacy form is voluntary. However, the Agencies explained that a financial institution that chooses to provide the model privacy form to its consumers complies with the disclosure requirements for privacy notices in accord with 15 U.S.C. §6803(e)(4).

Prior to the adoption of the model privacy form, a financial institution could choose to use sample clauses in its privacy notices to comply with the disclosure requirements. The Agencies, other than the SEC, eliminated the safe harbor permitted for notices based on the sample clauses contained in the federal privacy rules for notices provided after December 31, 2010. Similarly, the SEC eliminated the guidance associated with the use of notices based on the sample clauses in its privacy rule for notices provided after December 31, 2010. The Agencies explained that while the model privacy form provides the legal safe harbor of compliance with the disclosure requirements, financial institutions may continue to use other types of notices that vary from the model privacy form, including notices that use the sample clauses, so long as the notices comply with the requirements of the privacy rule.

The Agencies eliminated the sample clauses and related safe harbor, or guidance, from the privacy rule, following a one-year transition period. The initial public and media complaints about the privacy notices; the plain-language experts' guidance; and a consumer research project, known as the Notice Project, all examined the problems with the financial institutions' privacy notices, including their extensive use of the sample clauses, and found the need to develop a usable consumer notice.

For those institutions that had privacy notices based on the sample clauses, the Agencies implemented a transition period that started 30 days after the date of publication of the adoption of the model privacy form and ended on December 31, 2010. The Agencies stated that financial institutions would not be able to rely on the safe harbor by using the sample clauses in notices delivered or posted on or after January 1, 2011. Institutions relying on the sample clauses appended to the SEC's privacy rule would not be able to rely on them for guidance in notices delivered or posted on or after January 1, 2011. The Agencies stated that the sample clauses would be removed from codification on January 1, 2012, one year after the transition period ends. The SEC, whose privacy rule provides only guidance and not a safe harbor for financial institutions that use the sample clauses, stated that the sample clauses would also be removed from codification on January 1, 2012.

To remain consistent with federal law and regulations, this adoption permits a covered entity to use the model privacy form, consistent with its instructions in 28 TAC §22.27, to meet the notice content requirements of 28 TAC §22.10 and §22.11. Additionally, this adoption deletes the sample forms under §22.26(b) and, as a replacement, the commissioner adopts by reference the three versions of the optional federal model privacy form and the federal mail-in opt out form that appears at 74 *Federal Register* 62890 (December 1, 2009). While the optional model privacy form would provide a legal safe harbor, a covered entity may continue to use other types of notices that vary from the model privacy form, including notices that use the sample forms and clauses, so long as the notices comply with Insurance Code Chapter 601, 28 TAC Chapter 22 Subchapter A, and the notice content requirements of 28 TAC §22.10 and §22.11. This adoption will become effective 20 days after the date on which the adoption order is filed in the office of the Secretary of State in accord with Government Code §2001.036(a).

TDI has made nonsubstantive changes to some of the proposed language in the text of the rule as adopted. The changes, however, do not introduce new subject matter or affect persons in

addition to those subject to the proposal as published. TDI has replaced *forth* with *out* in 28 TAC §22.2(2) and (3). In 28 TAC §22.2(4), TDI has deleted *that is.* In 28 TAC §22.2(13), TDI has deleted *that are.* In 28 TAC §22.2(14), TDI has inserted a comma after *institution* and deleted *such.* TDI has deleted *such* in 28 TAC §22.2(15). TDI has deleted *that is* in 28 TAC §22.2(19) and (21)(A)(ii) and (iii). In 28 TAC §22.2(21)(B)(ii), TDI has deleted *it is.* In 28 TAC §22.2(21)(B)(iii), TDI has deleted *that is.* TDI has deleted *if it is* in 28 TAC §22.2(23)(A)(vi) and *that* in 28 TAC §22.2(23)(A)(vii). In TDI 28 TAC §22.2(24), TDI has deleted *that a.* TDI inserted a comma after *state* in 28 TAC §22.2(24)(A) and deleted *that are* in 28 TAC §22.2(24)(C).

TDI has replaced *forth* with *out* in 28 TAC §22.3(a) and (c). TDI has deleted *a* in 28 TAC §22.3(c)(1).

TDI has deleted *that* in 28 TAC §22.10(b), (b)(1), (b)(2), (b)(2)(B), (b)(2)(C), (b)(7), (b)(9), (e), (g)(1). TDI has deleted *of* in 28 TAC §22.10(b)(2)(C). TDI has deleted *such* in §22.10(d)(2).

TDI has deleted *that* in 28 TAC §21.11(b)(1) and (2), (c)(4), and (m). TDI has replaced *accordance* with *accord* in 28 TAC §22.11(f) for consistency with the agency writing style. TDI has replaced *forth* with *out* in 28 TAC §22.11(h). TDI has deleted of in 28 TAC §22.11(h)(3).

TDI has replaced *forth* with *out* in 28 TAC §22.27(a). TDI has replaced *the* with *legal* in 28 TAC §22.27(b). TDI has inserted a comma after *(FCRA)* in 28 TAC §22.27(c) and after *example* in 28 TAC §22.27(f)(4). In response to a comment, TDI has revised 28 TAC §22.27(d) to provide that a covered entity may replace the term *customer* with another appropriate term as provided under 28 TAC §22.4(c) - (e). TDI has deleted the quotation marks inside the parentheses in new 28 TAC §22.27(e)(1)(D). TDI has deleted *that* in 28 TAC §22.27(g)(2)(B)(i). Additionally, TDI has replaced *appear* with *appears* in new 28 TAC §22.27(g)(2)(F).

HOW THE SECTIONS WILL FUNCTION.

§22.2. Definitions. Section 22.3 provides the definitions for the words and terms used in 28 TAC Chapter 22. Amendments to §22.2 update statutory references in the Insurance Code and update existing text for clarification and consistency with agency writing style.

§22.3. Exceptions to Applicability of Subchapter. Section 22.3 explains the applicable exceptions to the requirements of 28 TAC Chapter 22, Subchapter A. Amendments to §22.3 bring the notice from the former Figure 8 under §22.26(b) into §22.3 because it is not a model privacy form, so, it is necessary to retain the language from former Figure 8 under §22.26(b) and place it as a Figure under 28 TAC §22.3(c)(2). Amendments to §22.3 also update statutory references in the Insurance Code and update existing text for clarification and consistency with agency writing style.

§22.10. Information to be Included in Privacy Notices. Section 22.10 provides the information that a covered entity must disclose in privacy notices.

§22.11. Form of Opt Out Notice to Consumers and Opt Out Methods. Section 22.11 explains the requirements for an opt out notice to consumers and the opt out methods.

Amendments to §22.10 and the addition of subsection (o) to §22.11 are necessary to remain consistent with the federal law and regulations adopted by the Agencies in the December 1, 2009, publication of the *Federal Register* at 74 FR 62890. Amendments to §22.10 and §22.11 update existing text for clarification and consistency with agency writing style. Amendments to add subsection catch lines in §22.11 are necessary to remain consistent with *Texas Register* requirements.

§22.22. Violations. Section 22.22 provides that a violation of any section of 28 TAC Chapter 22 Subchapter A will subject the covered entity to the disciplinary and enforcement sanctions and penalties provided in Insurance Code Chapters 82, 83, and 601. Amendments to §22.22 update statutory references in the Insurance Code and update existing text for clarification and consistency with agency writing style.

§22.26. Model Privacy Notice Form and Examples. Section 22.26 provides that use of Version 1, 2, or 3 of the model privacy form in 74 *Federal Register* 62890 (December 1, 2009), or Version 4 for the optional mail-in opt out form, consistent with the instructions in 28 TAC §22.27, complies with the notice content requirements of 28 TAC §22.10 and §22.11, but use of the model privacy form is not required. Although proper use of the optional model privacy form would provide a legal safe harbor, a covered entity may continue to use other types of notices that vary from the model privacy form, including notices that use the sample clauses, so long as the notices comply with Insurance Code Chapter 601, 28 TAC Chapter 22, and the notice content requirements of 28 TAC §22.10 and §22.11. Amendments to §22.26 update existing text for clarification and consistency with agency writing style. Amendments to §22.26 are also consistent with the federal law and regulations adopted by the Agencies.

§22.27. General Instructions. Section 22.27 provides general instructions to complete the model privacy form.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment. A commenter appreciates that the proposed amendments, particularly the amendments to 28 TAC §22.26, clarify that use of the model privacy form is not required, permitting insurers to continue to use notices with sample clauses, so long as the notices comply with the notice content requirements in 28 TAC §22.10 and §22.11. Permitting continued use of forms other than the model privacy form is important, particularly since insurers may wish to use the same privacy notice across the country and only a few other states currently permit use of the model privacy form to meet their Gramm-Leach-Bliley Act notice requirements.

Agency Response: TDI appreciates the supportive comment. A covered entity is not required to use the model privacy form. Instead, new 28 TAC §22.26 permits a covered entity to use the model privacy form, consistent with its instructions in 28 TAC §22.27, to meet the notice content requirements of 28 TAC §22.10 and §22.11. While the optional model privacy form would provide a legal safe harbor, a covered entity may continue to 22.10 use other types of notices that vary from the model privacy form, including notices that use the sample clauses, so long as the notices comply with Insurance Code Chapter 601 and 28 TAC Chapter 22, Subchapter A, specifically, the notice content requirements of 28 TAC §22.10 and §22.11.

Comment: A commenter states that proposed new §22.27(d) allows the word "customer" to be replaced with the word "member," but a similar substitution does not appear to cover communications or transactions between a workers' compensation insurance carrier and an injured employee or claimant.

Agency Response: TDI agrees that new 28 TAC §22.27(d) allows a covered entity to replace "customer" with "member." Because of the special requirements for employee benefit plans,

group insurance policies, blanket insurance policies, group annuity contracts, and workers' compensation policies, TDI has changed 28 TAC §22.27(d) to permit a covered entity to replace the term "customer" with another appropriate term as provided under 28 TAC §22.4(c) - (e).

Comment: A commenter states that there are several references to "affiliate" in the model notice, but the instructions do not appear to allow a company that does not have an affiliate to remove all references to the term "affiliate."

Agency Response: TDI disagrees that the instructions do not appear to allow a company that does not have an affiliate to remove all references to the term "affiliate." When applicable, the general instructions under 28 TAC §§22.27(g)(2)(C)(iii), 22.27(g)(2)(D)(vi), and 22.27.27(g)(3)(B)(i)(1) allow omission of references to the term "affiliate."

In relevant part, 28 TAC §22.27(g)(2)(C)(iii) provides that "{o}nly the sixth row, 'For our affiliates to market to you,' may be omitted at the option of the covered entity as described in the instructions in subparagraph (D)(vi) of this paragraph." Title 28 TAC §22.27(g)(2)(D)(vi) provides that the statement "{f}or our affiliates to market to you..." "may be omitted from the disclosure table when the covered entity does not have affiliates..." Additionally, 28 TAC §22.27.27(g)(3)(B)(i)(1) provides that when the covered entity does not have affiliates the notice may state, "{name of covered entity} has no affiliates..."

Comment: A commenter commends TDI for issuing the proposed amendments to 28 TAC §§22.2, 22.3, 22.10, 22.11, 22.22, and 22.26, and proposed new 28 TAC §22.27 to permit insurers to use the model privacy form, which appeared in the December 1, 2009, publication of the *Federal Register,* to meet the notice requirements of 28 TAC §22.10 and §22.11. The clear format and design of the model privacy form will enable Texas consumers to easily identify the sharing practices of an insurer and to compare the insurer's privacy practices with those of other financial institutions. Another commenter states that the federal model privacy form is a valuable choice in meeting privacy notice requirements and appreciates and supports TDI's proposal to provide a safe harbor for the use of the model form.

Agency Response: TDI appreciates the supportive comments.

Comment: A commenter recommends that TDI maintain the existing safe harbor for the sample clauses so that safe harbor status exists for both the privacy form and sample clauses. The commenter explains that a number of states are still operating under regulations similar to the NAIC's "Privacy of Consumer Financial and Health Information Regulation" and have not moved toward formally acknowledging the model privacy form.

The commenter elaborates that the NAIC's "Privacy of Consumer Financial and Health Information Regulation," first adopted in September 2000, created a set of sample clauses to illustrate the privacy notice content required by the regulation. Use of the sample clauses constitutes compliance with the regulation. A majority of states adopted the model regulations and, in so doing, many of them, including Texas, adopted safe harbor status for the sample clauses.

The commenter further explains that in 2009, eight federal agencies adopted a federal model privacy form for guidance with the notice requirements of the Gramm-Leach-Bliley Act. This model privacy form is voluntary and provides entities that choose to use the model form a legal safe harbor. However, state legislatures and insurance regulators have been slow to incorporate this model privacy form into insurance statutes or regulations. The NAIC drafted a model bulletin in 2010 for insurance regulators to establish the model privacy form as a voluntary safe harbor for insurance licensees. The bulletin does not mention elimination of the sample clauses and in fact notes that "{i}nsurers may rely on use of the attached Model Privacy Form, consistent with the attached instructions, as a safe harbor of compliance with the privacy notice content requirements of (insert title and citation for statute or regulation that tracks the NAIC Model Privacy of Consumer Financial and Health Information Regulation)" (emphasis added).

The commenter states that it is only aware of four states that have adopted the NAIC's bulletin: Kentucky, Maine, Nebraska, and Virginia. In addition, the commenter states that New York has not adopted the NAIC model bulletin but has placed a notice on its web page that acknowledges the federal privacy form and its ability to satisfy the notice requirements of New York Insurance Regulation 169. While it does not appear that Maine, Nebraska, or Virginia ever adopted the sample clause provisions, New York Regulation 169 and Kentucky Administrative Regulations §3:210 both allow the sample clauses to serve as a safe harbor, and neither state eliminated this safe harbor with the adoption of the model bulletin or website notification providing safe harbor to the model privacy form.

For these reasons, there is a strong presence of a safe harbor framework for the use of the sample clauses by the insurance industry and, as such, the commenter recommends that Texas provide a safe harbor for both the model form and sample clauses.

Agency Response: TDI declines to maintain a safe harbor for sample forms containing sample clauses that the Agencies and the SEC removed from codification on January 1, 2012. The amendments and new section are necessary to remain consistent with federal law and regulations concerning the disclosure of nonpublic personal financial information adopted under the Gramm-Leach-Bliley Act, 15 U.S.C. §6801 et seq., as amended, and are in accord with Insurance Code §601.051. Insurance Code §601.051(b) requires the commissioner to keep state privacy requirements consistent with federal regulations adopted under 15 U.S.C. §6801 et seq., as amended.

Although proper use of the voluntary model privacy form would provide a legal safe harbor, a covered entity may continue to use other types of notices that vary from the model privacy form, including notices that use the sample forms and clauses, so long as the notices comply with the requirements of Insurance Code Chapter 601, 28 TAC Chapter 22 Subchapter A, and the notice content requirements of 28 TAC §22.10 and §22.11. If a covered entity complies with these provisions, it would provide sufficient notice.

TDI agrees that the NAIC drafted a bulletin on August 3, 2010, that states that "insurance companies that do business in this state may use the new Federal Model Privacy Form or continue to use other types of privacy notices that differ from the Federal Model Privacy Form to meet notice content requirements of..." the applicable statute or regulation. However, for rulemaking, TDI must comply with the Administrative Procedure and Practice Act under Government Code Chapter 2001 and provide notice of proposed rules.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For with changes: American Council of Life Insurers, American Insurance Association, Texas Mutual Insurance Company

STATUTORY AUTHORITY. TDI adopts the amendments and new section under Insurance Code §§82.002(c), 82.003, 601.051, 601.052, and 36.001; 15 U.S.C. §6801(b); 15 U.S.C. §6801(b); 15 U.S.C. §6805(b)(2); and 15 U.S.C. §6805(c). Section 82.002(c) provides that the commissioner's authority under Chapter 82 applies to each form of authorization and each person or entity holding an authorization. Section 82.003 provides that the commissioner's authority under Chapter 82 is in addition to any other authority to enforce a sanction, penalty, fine, forfeiture, denial, suspension, or revocation otherwise authorized by law. Section 601.051(a)(1) and (2) provides that the commissioner must adopt rules to implement Chapter 601 and any other rules necessary to carry out Subtitle A, Title V, Gramm-Leach-Bliley Act, 15 U.S.C. §6801 et seq., as amended, to make this state eligible to override federal regulations as described by 15 U.S.C. §6805(c), as amended. Section 601.051(b) provides that in adopting rules under Chapter 601, the commissioner must attempt to keep state privacy requirements consistent with federal regulations adopted under Subtitle A, Title V, Gramm-Leach-Bliley Act, 15 U.S.C. §6801 et seq., as amended. Section 601.052 provides that TDI must implement standards as required by 15 U.S.C. §6805(b), as amended. Section 36.001 provides that the commissioner 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.

Title 15 U.S.C. §6801(b) provides that, in furtherance of the policy in subsection (a) of Section 6801, each agency or authority described in Section 6805(a) of this title must establish appropriate standards for the financial institutions subject to their jurisdiction relating to administrative, technical, and physical safeguards to insure the security and confidentiality of customer records and information; to protect against any anticipated threats or hazards to the security or integrity of the records; and to protect against unauthorized access to or use of the records or information that could result in substantial harm or inconvenience to any customer. Title 15 U.S.C. §6805(b)(2) provides that the agencies and authorities described in paragraphs (3), (4), (5), (6), and (7) of subsection (a) of §6805 must implement the standards prescribed under §6801(b) of Title 15 by rule with respect to the financial institutions and other persons subject to their respective jurisdictions under subsection (a) of Section 6805. Title 15 U.S.C. §6805(c) provides that if a state insurance agency fails to adopt regulations to carry out this subchapter, that state will not be eligible to override, under 12 USC §1831x(g)(2)(B)(iii), the insurance consumer protection regulations prescribed by a federal banking agency under §1831x(a) of Title 12.

§22.2. Definitions.

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

(1) Affiliate--Any company that controls, is controlled by, or is under common control with another company.

(2) Agent--As set out in Insurance Code §§2651.002 - 2651.011, 2651.051 - 2651.059, 4001.002, 4001.051, and 4001.053.

(3) Authorization--As set out in Insurance Code §82.001.

(4) Clear and conspicuous--A notice reasonably understandable and designed to call attention to the nature and significance of the information in the notice.

(5) Collect--To obtain information that the covered entity organizes or can retrieve by the name of an individual or by identifying number, symbol, or other identifying particular assigned to the individual, irrespective of the source of the underlying information.

(6) Commissioner--The commissioner of insurance.

(7) Company--A corporation, limited liability company, business trust, general or limited partnership, association, sole proprietorship, or other similar organization.

(8) Consumer--An individual or that individual's representative who seeks to obtain, obtains, or has obtained an insurance product or service from a covered entity that is to be used primarily for personal, family, or household purposes, and about whom the covered entity has nonpublic personal financial information.

(9) Consumer reporting agency--As defined in §603(f) of the federal Fair Credit Reporting Act (FCRA) (15 U.S.C. §1681a(f)).

(10) Control--Includes the terms "controls," "controlled by," and "under common control," and has the meaning assigned that term by Insurance Code §823.005 and §823.151.

(11) Covered entity--An individual or entity that receives an authorization from the Texas Department of Insurance. The term includes any individual or entity described by Insurance Code, §82.002.

(12) Customer--A consumer who has a customer relationship with a covered entity.

(13) Customer relationship--A continuing relationship, as described in §22.5 of this subchapter (relating to Determination of Continuing Relationship), between a consumer and a covered entity under which the covered entity provides one or more insurance products or services to the consumer to be used primarily for personal, family, or household purposes.

(14) Financial institution--Any institution, the business of which is engaging in activities that are financial in nature or incidental to financial activities as described in §4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. §1843(k)). Financial institution does not include:

(A) any person or entity with respect to any financial activity that is subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. §1 et seq.);

(B) the Federal Agricultural Mortgage Corporation or any entity charged and operating under the Farm Credit Act of 1971 (12 U.S.C. §2001 et seq.); or

(C) institutions chartered by Congress specifically to engage in securitizations, secondary market sales (including sales of servicing rights), or similar transactions related to a transaction of a consumer, as long as the institutions do not sell or transfer nonpublic personal financial information to a nonaffiliated third party.

(15) Financial product or service--Any product or service that a financial holding company could offer by engaging in an activity that is financial in nature or incidental to a financial activity under §4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. §1843(k)). Financial service includes a financial institution's evaluation or brokerage of information that the financial institution collects in connection with a request or an application from a consumer for a financial product or service.

(16) Health care--

(A) preventive, diagnostic, therapeutic, rehabilitative, maintenance or palliative care, services, procedures, tests, or counseling that:

(i) relates to the physical, mental, or behavioral condition of an individual; or

(ii) affects the structure or function of the human body or any part of the human body, including the banking of blood, sperm, organs, or any other tissue; or

(B) prescribing, dispensing, or furnishing drugs or biologicals, medical devices, or health care equipment and supplies to an individual.

(17) Health care provider--A physician or other health care practitioner licensed, accredited, or certified to perform specified health services consistent with state law, or a health care facility.

(18) Health information--Any information or data, except age or gender, whether oral or recorded, in any form or medium, that is created by or derived from a health care provider or the consumer that relates to:

(A) the past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) the provision of health care to an individual; or

(C) payment for the provision of health care to an individual.

(19) Insurance product or service--Any product or service offered by a covered entity under the Insurance Code and other insurance laws of this state. Insurance service includes a covered entity's evaluation, brokerage, or distribution of information that the covered entity collects in connection with a request or an application from a consumer for an insurance product or service.

(20) Nonaffiliated third party--An entity that is not an affiliate of, related to by common ownership, or affiliated by corporate control with the covered entity. The term does not include a joint employee of the entity.

(21) Nonpublic personal financial information--Information that:

(A) includes:

(i) personally identifiable financial information;

(ii) any list, description, or other grouping of consumers (and publicly available information pertaining to them) derived using any personally identifiable financial information not publicly available; and

(iii) any list of individuals' names and street addresses derived in whole or in part using personally identifiable financial information not publicly available, such as account numbers;

(B) does not include:

(i) health information;

(ii) publicly available information unless derived from a nonpublic source as described in subparagraphs (A)(ii) and (A)(iii) of this paragraph;

(iii) any list, description, or other grouping of consumers (and publicly available information pertaining to them) derived without using any personally identifiable financial information not publicly available; and

(iv) any list of individuals' names and addresses that:

(I) contains only publicly available information;

(II) is wholly derived using personally identifiable financial information that is publicly available; and

(III) does not disclose that any of the individuals on the list is a consumer of a financial institution.

(22) Opt out--A direction by the consumer that the covered entity not disclose nonpublic personal financial information about that consumer to a nonaffiliated third party, other than as permitted by §22.17 of this title, §22.18 of this title (relating to Exceptions to Notice and Opt Out Requirements for Disclosure of Nonpublic Personal Financial Information for Processing and Servicing Transactions), and §22.19 of this title (relating to Other Exceptions to Notice and Opt Out Requirements for Disclosure of Nonpublic Personal Financial Information).

(23) Personally identifiable financial information--

(A) The term includes:

(i) any information a consumer provides to a covered entity to obtain an insurance product or service from the covered entity;

(ii) any information about a consumer resulting from a transaction involving an insurance product or service between a covered entity and a consumer;

(iii) any information the covered entity otherwise obtains about a consumer in connection with providing an insurance product or service to that consumer;

(iv) account balance information and payment history;

(v) the fact that an individual is or has been one of the covered entity's customers or has obtained an insurance product or service from the covered entity;

(vi) any information about the covered entity's consumer disclosed in a manner that indicates that the individual is or has been the covered entity's consumer;

(vii) any information a consumer provides to a covered entity or that the covered entity or its agent otherwise obtains in connection with collecting on a loan or servicing a loan;

(viii) any information the covered entity collects through an information-collecting device from an Internet web server; and

(ix) information from a consumer report.

(B) The term does not include:

(i) health information;

(ii) a list of names and addresses of customers of an entity that is not a financial institution; and

(iii) information that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(24) Publicly available information--Any information a covered entity has a reasonable basis to believe is lawfully made available to the general public from:

(A) federal, state, or local government records;

(B) widely distributed media; or

(C) disclosures to the general public required to be made by federal, state or local law.

§22.3. Exceptions to Applicability of Subchapter.

(a) A covered entity is not subject to the notice and opt out requirements for nonpublic personal financial information set out in this subchapter if the covered entity is an employee, agent, or other representative of another covered entity (a principal) and:

(1) the principal otherwise complies with, and provides the notices required by, the provisions of this subchapter; and

(2) the covered entity does not disclose any nonpublic personal financial information to any person other than the principal or its affiliates in a manner permitted by this subchapter.

(b) Subject to subsection (c) of this section, covered entity includes an eligible surplus lines insurer for transactions where Texas is the home state of the insured to the extent the insurer accepts business placed through a person subject to Insurance Code Chapter 981.

(c) A person transacting surplus lines business will be deemed to be in compliance with the notice and opt out requirements for nonpublic personal financial information set out in this subchapter provided:

(1) the person does not disclose nonpublic personal financial information of a consumer or customer to nonaffiliated third parties for any purpose, including joint servicing or marketing under §22.17 of this title (relating to Exception to Opt Out Requirements for Disclosure of Nonpublic Personal Financial Information for Service Providers and Joint Marketing), except as permitted by §22.18 of this title (relating to Exceptions to Notice and Opt Out Requirements for Disclosure of Nonpublic Personal Financial Information for Processing and Servicing Transactions), and §22.19 of this title (relating to Other Exceptions to Notice and Opt Out Requirements for Disclosure of Nonpublic Personal Financial Information); and

(2) the person delivers a notice to the consumer at the time a customer relationship is established on which the following is printed in at least 16-point type:
Figure: 28 TAC §22.3(c)(2)

§22.10. Information to be Included in Privacy Notices.

(a) Simplified nondisclosure notice requirements. A covered entity that does not disclose, and does not reserve the right to disclose, nonpublic personal financial information about customers or former customers to nonaffiliated third parties except as authorized under §22.18 of this title (relating to Exceptions to Notice and Opt Out Requirements for Disclosure of Nonpublic Personal Financial Information for Processing and Servicing Transactions) and §22.19 of this title (relating to Other Exceptions to Notice and Opt Out Requirements for Disclosure of Nonpublic Personal Financial Information), may comply with this subchapter by providing a simplified notice that expresses:

(1) the nondisclosure policy stated in this subsection, and

(2) the information required by subsections (b)(1), (b)(8), (b)(9), and (c) of this section.

(b) Disclosure notice requirements. The initial, annual, and revised privacy notices a covered entity provides under §22.8 of this title (relating to Initial Privacy Notice), §22.9 of this title (relating to Annual Privacy Notice), and §22.12 of this title (relating to Revised Privacy Notices) must include the following items of information, in addition to any other information the covered entity wishes to provide, that applies to the covered entity and to the consumers to whom the covered entity sends its privacy notice.

(1) The categories of nonpublic personal financial information the covered entity collects. A covered entity satisfies the requirement to categorize the nonpublic personal financial information it collects when the covered entity categorizes it according to the source of the information, as applicable, including:

(A) information from the consumer;

(B) information about the consumer's transactions with the covered entity or its affiliates;

(C) information about the consumer's transactions with nonaffiliated third parties; and

(D) information from a consumer reporting agency.

(2) The categories of nonpublic personal financial information the covered entity discloses.

(A) A covered entity satisfies the requirement to categorize nonpublic personal financial information it discloses when the covered entity categorizes the information according to source, as described in paragraph (1) of this subsection, as applicable, and provides examples to illustrate the types of information in each category, such as:

(i) information from the consumer, including application information (such as assets and income) and identifying information (such as name, address, and social security number);

(ii) transaction information (such as information about balances, payment history, and parties to the transaction); and

(iii) information from consumer reports (such as a consumer's creditworthiness and credit history).

(B) A covered entity does not adequately categorize the information it discloses when the covered entity uses only general terms (such as transaction information about the consumer).

(C) A covered entity that reserves the right to disclose all the nonpublic personal financial information about consumers it collects may state that fact without describing the categories or examples of nonpublic personal financial information the covered entity discloses.

(3) The categories of affiliates and nonaffiliated third parties to whom the covered entity discloses nonpublic personal financial information, other than those parties to whom the covered entity discloses information under §22.18 and §22.19 of this title.

(4) The categories of nonpublic personal financial information about the covered entity's former customers that the covered entity discloses and the categories of affiliates and nonaffiliated third parties to whom the covered entity discloses nonpublic personal financial information about the covered entity's former customers, other than those parties to whom the covered entity discloses information under §22.18 and §22.19 of this title.

(5) A separate description of the categories of information the covered entity discloses and the categories of third parties with whom the covered entity has contracted, if the covered entity discloses nonpublic personal financial information to a nonaffiliated third party under §22.17 of this title (relating to Exception to Opt Out Requirements for Disclosure of Nonpublic Personal Financial Information for Service Providers and Joint Marketing) and no other exception in §22.18 and §22.19 of this title applies to that disclosure.

(6) An explanation of the consumer's right under §22.14(a) of this title (relating to Limits on Disclosure of Nonpublic Personal Financial Information to Nonaffiliated Third Parties) to opt out of the disclosure of nonpublic personal financial information to nonaffiliated

third parties, including the methods by which the consumer may exercise that right at that time.

(7) Any disclosures the covered entity makes under §603(d)(2)(A)(iii) of the federal FCRA (15 U.S.C. §1681a(d)(2)(A)(iii)) (that is, notices regarding the ability to opt out of disclosures of information among affiliates).

(8) The covered entity's policies and practices with respect to protecting the confidentiality and security of nonpublic personal financial information. A covered entity provides an adequate description of its policies and practices with respect to protecting the confidentiality and security of nonpublic personal financial information if it does both of the following:

(A) describes in general terms who is authorized to have access to the information; and

(B) states whether the covered entity has security practices and procedures in place to ensure the confidentiality of the information under the covered entity's policy. The covered entity is not required to describe technical information about the safeguards it uses.

(9) Any disclosure the covered entity makes under subsection (c) of this section.

(c) Description of nonaffiliated third parties subject to exceptions. A covered entity that discloses nonpublic personal financial information to third parties as authorized under §22.18 and §22.19 of this title is not required to list those exceptions in the initial or annual privacy notices required by §22.8 and §22.9 of this title. When describing the categories of parties to whom the covered entity makes disclosures, it is sufficient for the covered entity to state that it makes disclosures to other nonaffiliated companies:

(1) for the covered entity's everyday business purposes, such as (include all that apply) to process account transactions, maintain accounts, respond to court orders and legal investigations, or report to credit bureaus; or

(2) as permitted by law.

(d) Appropriate methods of categorizing affiliates and nonaffiliated third parties.

(1) A covered entity satisfies the requirement to categorize the affiliates and nonaffiliated third parties to which the covered entity discloses nonpublic personal financial information about consumers if the covered entity identifies the types of businesses in which they engage.

(2) Types of businesses may be described by general terms only if the covered entity uses illustrative examples of significant lines of business. For example, a covered entity may use the term "financial products or services" if the notice includes appropriate examples of significant lines of businesses or services, such as life insurer, automobile insurer, consumer banking, or securities brokerage.

(3) A covered entity also may categorize the affiliates and nonaffiliated third parties to which it discloses nonpublic personal financial information about consumers using more detailed categories.

(e) Disclosures under exception for service providers and joint marketers. A covered entity that discloses nonpublic personal financial information under the exception in §22.17 of this title to a nonaffiliated third party to market products or services it offers alone or jointly with another financial institution satisfies the disclosure requirement of subsection (b)(5) of this section if it:

(1) lists the categories of nonpublic personal financial information it discloses, using the same categories and examples the covered entity used to meet the requirements of subsection (a)(2) of this section, as applicable; and

(2) states whether the third party is:

(A) a service provider that performs marketing services on the covered entity's behalf or on behalf of the covered entity and another financial institution; or

(B) a financial institution with whom the covered entity has a joint marketing agreement.

(f) Short-form initial notice with opt out notice for noncustomers.

(1) A covered entity may satisfy the initial notice requirements in §22.8(a)(2) and §22.11(c) of this title (relating to Form of Opt Out Notice to Consumers and Opt Out Methods) for a consumer who is not a customer by providing a short-form initial notice at the same time as the covered entity delivers an opt out notice as required in §22.11 of this title.

(2) A short-form initial notice must:

(A) be clear and conspicuous;

(B) state that the covered entity's privacy notice is available on request; and

(C) explain a reasonable means by which the consumer may obtain that notice.

(3) The covered entity must deliver its short-form initial notice according to §22.13 of this title (relating to Delivery). The covered entity is not required to deliver its privacy notice with its short-form initial notice. The covered entity may instead provide the consumer with a reasonable means to obtain its privacy notice. If a consumer who receives the covered entity's short-form notice requests the covered entity's privacy notice, the covered entity must deliver its privacy notice according to §22.13 of this title.

(4) The covered entity provides a reasonable means by which a consumer may obtain a copy of its privacy notice if the covered entity:

(A) provides a toll-free telephone number that the consumer may call to request the notice; or

(B) for a consumer who conducts business in person at the covered entity's office, maintains copies of the notice on hand that the covered entity provides to the consumer immediately on request.

(g) Reservation of right to disclose. The covered entity's notice may include:

(1) categories of nonpublic personal financial information the covered entity reserves the right to disclose in the future, but does not currently disclose; and

(2) categories of affiliates or nonaffiliated third parties to whom the covered entity reserves the right in the future to disclose, but to whom the covered entity does not currently disclose, nonpublic personal financial information.

(h) Model privacy form. A model privacy form that meets the notice content requirements of this section appears in 74 *Federal Register* 62890 (December 1, 2009). A covered entity may use the applicable model privacy form, consistent with the instructions in §22.27 of this title (relating to General Instructions).

§22.11. Form of Opt Out Notice to Consumers and Opt Out Methods.

(a) Clear and conspicuous notice. If a covered entity is required to provide an opt out notice under §22.14(a) of this title (relating

to Limits on Disclosure of Nonpublic Personal Financial Information to Nonaffiliated Third Parties), it must provide a clear and conspicuous notice to each of its consumers that accurately explains the right to opt out. The notice must state:

(1) that the covered entity discloses or reserves the right to disclose nonpublic personal financial information about its consumer to a nonaffiliated third party;

(2) that the consumer has the right to opt out of that disclosure; and

(3) a reasonable means by which the consumer may opt out.

(b) Adequate opt out notice. A covered entity provides adequate notice that the consumer can opt out of the disclosure of nonpublic personal financial information to a nonaffiliated third party if the covered entity:

(1) identifies all of the categories of nonpublic personal financial information it discloses or reserves the right to disclose, and all of the categories of nonaffiliated third parties to which the covered entity discloses the information, as described in §22.10(a)(2) and (3) of this title (relating to Information to be Included in Privacy Notices), and states that the consumer can opt out of the disclosure of that information; and

(2) identifies the insurance products or services the consumer obtains from the covered entity, either singly or jointly, to which the opt out direction would apply.

(c) Reasonable opt out means. A covered entity provides a reasonable means to exercise an opt out right if it:

(1) designates check-off boxes in a prominent position on the relevant forms with the opt out notice; and

(2) includes the reply form together with the opt out notice; or

(3) provides an electronic means to opt out, such as a form that can be sent by electronic mail or a process on the covered entity's website, if the consumer agrees to the electronic delivery of information; or

(4) provides a toll-free telephone number consumers may call to opt out.

(d) Unreasonable opt out means. A covered entity does not provide a reasonable means of opting out if:

(1) the only means of opting out is for the consumer to write his or her own letter to exercise that opt out right; or

(2) the only means of opting out as described in any notice subsequent to the initial notice is to use a check-off box that the covered entity provided with the initial notice but did not include with the subsequent notice.

(e) Specific opt out means. A covered entity may require each consumer to opt out through a specific means, so long as that means is reasonable for that consumer.

(f) Opt out notice with or on a written or electronic form. A covered entity may provide the opt out notice together with, or on the same written or electronic form as, the initial notice the covered entity provides in accord with §22.8 of this title (relating to Initial Privacy Notice).

(g) Opt out notice later than initial notice. If a covered entity provides the opt out notice later than required for the initial notice in accord with §22.8 of this title, the covered entity must also include a copy of the initial notice with the opt out notice in writing or, if the consumer agrees, electronically.

(h) Joint relationships. A covered entity must use the procedures set out in paragraphs (1) - (4) of this subsection when joint relationships between consumers are involved.

(1) If two or more consumers jointly obtain or seek to obtain an insurance product or service from a covered entity, the covered entity may provide a single opt out notice. The covered entity's opt out notice must explain how the covered entity will treat an opt out direction by a joint consumer (as explained in subsection (i) of this section).

(2) Any of the joint consumers may exercise the right to opt out. The covered entity may either:

(A) treat an opt out direction by a joint consumer as applying to all of the associated joint consumers; or

(B) permit each joint consumer to opt out separately.

(3) If a covered entity permits each joint consumer to opt out separately, the covered entity must permit one of the joint consumers to opt out on behalf of all the joint consumers.

(4) A covered entity may not require all joint consumers to opt out before it implements any opt out direction.

(i) Examples. The following are examples of how a covered entity should treat a joint relationship. If John and Mary are both named policyholders on a homeowner's insurance policy issued by a covered entity and the covered entity sends policy statements to John's address, the covered entity may do any of the following, but it must explain in its opt out notice which opt out policy the covered entity will follow:

(1) Send a single opt out notice to John's address, but the covered entity must accept an opt out direction from either John or Mary.

(2) Treat an opt out direction by either John or Mary as applying to the entire policy. If the covered entity does so and John opts out, the covered entity may not require Mary to opt out as well before implementing John's opt out direction.

(3) Permit John and Mary to make different opt out directions. If the covered entity does so:

(A) it must permit John and Mary to opt out for each other;

(B) if both opt out, the covered entity must permit both of them to notify it in a single response (such as on a form or through a telephone call); and

(C) if John opts out and Mary does not, the covered entity may only disclose nonpublic personal financial information about Mary, but not about John, and not about John and Mary jointly.

(j) Opt out direction. A covered entity must comply with a consumer's opt out direction as soon as reasonably practicable after the covered entity receives it.

(k) Consumer's right to opt out. A consumer may exercise the right to opt out at any time.

(l) A consumer's direction. A consumer's direction to opt out under this section is effective until the consumer revokes it in writing or, if the consumer has agreed to conduct business electronically, electronically.

(m) Customer relationship. When a customer relationship terminates, the customer's opt out direction continues to apply to the nonpublic personal financial information the covered entity collected dur-

ing or related to that relationship. If the individual subsequently establishes a new customer relationship with the covered entity, the opt out direction that applied to the former relationship does not apply to the new relationship.

(n) Opt out delivery. When a covered entity is required to deliver an opt out notice by this section, the covered entity must deliver it according to §22.13 of this title (relating to Delivery).

(o) Notice content requirements. A model privacy form that meets the notice content requirement of this section appears in 74 *Federal Register* 62890 (December 1, 2009). A covered entity may use the applicable model privacy form, consistent with the instructions in §22.27 of this title (relating to General Instructions).

§22.22. Violation.

A violation of any section of this subchapter will subject the covered entity to the disciplinary and enforcement sanctions and penalties provided in Insurance Code, Chapters 82, 83, 84, and 601.

§22.26. Model Privacy Notice Form and Examples.

Use of Version 1, 2, or 3 of the model privacy form in 74 *Federal Register* 62890 (December 1, 2009), or Version 4 for the optional mail-in opt out form, consistent with the instructions in §22.27 of this title (relating to General Instructions), complies with the notice content requirements of §22.10 and §22.11 of this title (relating to Information to be Included in Privacy Notices and Form of Opt Out Notice to Consumers and Opt Out Methods), although use of the model privacy form is not required. The examples are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance. Covered entities, including a group of financial holding company affiliates that use a common privacy notice, may use the model privacy form, if the information in the model privacy form is accurate for each institution that uses the notice. Note that disclosure of certain information, such as assets, income, and information from a consumer reporting agency, may give rise to obligations under the federal FCRA, such as a requirement to permit a consumer to opt out of disclosures to affiliates or designation as a consumer reporting agency if a covered entity makes disclosures to nonaffiliated third parties.

§22.27. General Instructions.

(a) A covered entity, including a group of covered entities or financial institutions that use a common privacy notice, may use the model form, at its option, to meet the content requirements of the privacy notice and opt out notice set out in §22.10 and §22.11 of this title (relating to Information to be Included in Privacy Notices and Form of Opt Out Notice to Consumers and Opt Out Methods).

(b) The model form is a standardized form, including page layout, content, format, style, pagination, and shading. Covered entities seeking to obtain legal safe harbor through use of the model form may modify it only as described in these instructions.

(c) Disclosure of certain information, such as assets, income, and information from a consumer reporting agency, may give rise to obligations under the Fair Credit Reporting Act (15 U.S.C. §§1681 - 1681x) (FCRA), for example, a requirement to permit a consumer to opt out of disclosures to affiliates or designation as a consumer reporting agency if disclosures are made to nonaffiliated third parties.

(d) The word "customer" may be replaced by the word "member" whenever it appears in the model form, as appropriate. A covered entity may replace the term "customer" with another appropriate term as provided under 28 TAC §22.4(c) - (e).

(e) The model form consists of two pages, which may appear on both sides of a single sheet of paper, or may appear on two separate pages. Where a covered entity provides a long list of covered entities or financial institutions at the end of the model form in accord with the instructions in subsection (g)(3)(A)(i) of this section, or provides additional information in accord with the instructions in subsection (g)(3)(C) of this section, and the list or additional information exceeds the space available on page two of the model form, the list or additional information may extend to a third page.

(1) Page one contents. The first page consists of the following components:

(A) date last revised in the upper right-hand corner;

(B) title;

(C) key frame (Why?, What?, How?);

(D) disclosure table (Reasons we can share your personal information);

(E) "To limit our sharing" box, as needed, for the covered entity's opt out information;

(F) "Questions" box, for customer service contact information; and

(G) mail-in opt out form, as needed.

(2) Page two contents. The second page consists of the following components:

(A) heading (page 2);

(B) frequently asked questions("Who we are" and "What we do";

(C) definitions; and

(D) "Other important information" box, as needed.

(f) The format of the model privacy form may be modified only as described in paragraphs (1) - (5) of this subsection.

(1) Easily readable type font. Covered entities that use the model form must use an easily readable type font. While a number of factors together produce easily readable type font, covered entities must use a minimum of 10-point font, unless otherwise expressly permitted in these instructions, and sufficient spacing between the lines of type.

(2) Logo. A covered entity may include a corporate logo on any page of the notice, so long as it does not interfere with the readability of the model form or the space constraints of each page.

(3) Page size and orientation. Each page of the model form must appear on paper in portrait orientation, the size of which must meet the layout and minimum font size requirements.

(4) Color. The model form must appear on white or light color paper, for example, cream, with black or other contrasting ink color. Spot color may be used to achieve visual interest, so long as the color contrast is distinctive and the color does not detract from the readability of the model form. Logos may also appear in color.

(5) Languages. The model form may be translated into languages other than English.

(g) The information required in the model form may be modified only as described in this subsection.

(1) Name of the covered entity or group of affiliated covered entities or institutions providing the notice. Insert the name of the covered entity providing the notice or a common identity of affiliated covered entities or institutions jointly providing the notice on the form wherever name of covered entity appears.

(2) Page one instruction.

(A) Last revised date. The covered entity must insert in the upper right-hand corner the date on which it last revised the notice. The information must appear in minimum 8-point font as "rev. (month/year)" using either the name or number of the month, for example "rev. July 2009" or "rev. 7/09."

(B) General instructions for the "What?" box.

(i) The bulleted list identifies the types of personal information the covered entity collects and shares. All covered entities must use the term "Social Security number" in the first bullet.

(ii) Covered entities must use at least five of the following terms to complete the bulleted list: income, account balances, payment history, transaction history, transaction or loss history, credit history, credit scores, assets, investment experience, credit-based insurance scores, insurance claim history, medical information, overdraft history, purchase history, account transactions, risk tolerance, medical-related debts, credit card or other debt, mortgage rates and payments, retirement assets, checking account information, employment information, and wire transfer instructions.

(C) General instructions for the disclosure table. The left column lists reasons for sharing or using personal information. Each reason correlates to a specific legal provision described in the instructions in subparagraph (D) of this paragraph. In the middle column, each covered entity must provide a "Yes" or "No" response that accurately reflects its information-sharing policies and practices with respect to the reason listed on the left. In the right column, each covered entity must provide in each box one of the following three responses, as applicable, that reflects whether a consumer can limit such sharing:

(i) "Yes" if it is required to or voluntarily provides an opt out;

(ii) "No" if it does not provide an opt out; or

(iii) "We don't share" if it answers "No" in the middle column. Only the sixth row, "For our affiliates to market to you," may be omitted at the option of the covered entity as described in the instructions in subparagraph (D)(vi) of this paragraph.

(D) Specific disclosures and corresponding legal provisions.

(i) For our everyday business purposes. This reason incorporates sharing information under §22.18 and §22.19 of this title (relating to Exceptions to Notice and Opt Out Requirements for Disclosure of Nonpublic Personal Financial information for Processing and Servicing Transactions and Other Exceptions to Notice and Opt Out Requirements for Disclosure of Nonpublic Personal Financial Information) and with service providers under §22.17 of this title (relating to Exception to Opt Out Requirements for Disclosure of Nonpublic Personal Financial Information for Service Providers and Joint Marketing), other than the purposes specified in the instructions in clause (ii) or (iii) of this subparagraph.

(ii) For our marketing purposes. This reason incorporates sharing information with service providers by a covered entity for its own marketing under §22.17 of this title. A covered entity that shares for this reason may choose to provide an opt out.

(iii) For joint marketing with other financial companies. This reason incorporates sharing information under joint marketing agreements between two or more covered entities or financial institutions and with any service provider used in connection with such agreements under §22.17 of this title. A covered entity that shares for this reason may choose to provide an opt out.

(iv) For our affiliates' everyday business purposes - information about transactions and experiences. This reason incorporates sharing information specified in §603(d)(2)(A)(i) and §603(d)(2)(A)(ii) of the FCRA. A covered entity that shares for this reason may choose to provide an opt out.

(v) For our affiliates' everyday business purposes - information about creditworthiness. This reason incorporates sharing information under §603(d)(2)(A)(iii) of the FCRA. A covered entity that shares for this reason must provide an opt out.

(vi) For our affiliates to market to you. This reason incorporates sharing information specified in §624 of the FCRA. This reason may be omitted from the disclosure table when the covered entity does not have affiliates, or does not disclose personal information to its affiliates; the covered entity's affiliates do not use personal information in a manner that requires an opt out; or the covered entity provides the affiliate marketing notice separately. Covered entities that include this reason must provide an opt out of indefinite duration. A covered entity that must provide an affiliate marketing opt out, but does not include that opt out in the model form under this clause, must comply with §624 of the FCRA and Insurance Code Chapter 601 and 28 TAC Subchapter A, including §§22.8 - 22.12 of this title (relating to Initial Privacy Notice, Annual Privacy Notice, Information to be Included in Privacy Notices, Form of Opt Out Notice to Consumers and Opt Out Methods, and Revised Privacy Notices, respectively), with respect to the initial notice and opt out and any subsequent renewal notice and opt out. A covered entity not required to provide an opt out under this subparagraph may elect to include this reason in the model form.

(vii) For nonaffiliates to market to you. This reason incorporates sharing described in §22.11 and §22.12(a)(1) - (4) of this title. A covered entity that shares personal information for this reason must provide an opt out.

(E) To limit our sharing. A covered entity must include this section of the model form only if it provides an opt out. The word "choice" may be written in either the singular or plural, as appropriate. Covered entities must select one or more of the applicable opt out methods described: telephone, for example, by a toll-free number; a website; or use of a mail-in opt out form. Covered entities may include the words "toll-free" before telephone, as appropriate. A covered entity that allows consumers to opt out online must provide either a specific web address that takes consumers directly to the opt out page or a general web address that provides a clear and conspicuous direct link to the opt out page. The opt out choices made available to the consumer who contacts the covered entity through these methods must correspond accurately to the "Yes" responses in the third column of the disclosure table. In the part titled "Please note," covered entities may insert a number that is 30 or greater in the space marked "(30)." Instructions on voluntary or state privacy law opt out information are in the instructions in subparagraph (G)(v) of this paragraph.

(F) Questions box. Customer service contact information must appear, as appropriate, where "phone number" or "website" appears. Covered entities may elect to provide either a phone number, such as a toll-free number, or a web address, or both. Covered entities may include the words "toll-free" before the telephone number, as appropriate.

(G) Mail-in opt out form. Covered entities must include this mail-in form only if they state in the "To limit our sharing" box that consumers can opt out by mail. The mail-in form must provide opt out options that correspond accurately to the "Yes" responses in the third column in the disclosure table. Covered entities that require customers to provide only name and address may omit the section identified as "account #." Covered entities that require additional or different infor-

mation, for example, a random opt out number or a truncated account number, to implement an opt out election should modify the "account #" reference accordingly. This includes covered entities that require customers with multiple accounts to identify each account to which the opt out should apply. A covered entity must enter its opt out mailing address in the far right of the Version 3: Model Form with Mail-In Opt Out Form. A covered entity must enter its opt out mailing address below the Version 4: Optional Mail-In Form. The reverse side of the mail-in opt out form must not include any content of the model form.

(i) Joint accountholder. Only covered entities that provide their joint accountholders the choice to opt out for only one accountholder, in accord with the instructions in paragraph (3)(A)(v) of this subsection, must include in the far left column of the mail-in form the following statement: "If you have a joint account, your choice(s) will apply to everyone on your account unless you mark below. Apply my choice(s) only to me." The word "choice" may appear in either the singular or plural, as appropriate. Covered entities that provide insurance products or services, provide this option, and elect to use the model form may substitute the word "policy" for "account" in this statement. Covered entities that do not provide this option may eliminate this left column from the mail-in form.

(ii) FCRA §603(d)(2)(A)(iii) opt out. If the covered entity shares personal information under §603(d)(2)(A)(iii) of the FCRA, it must include in the mail-in opt out form the following statement: "Do not share information about my creditworthiness with your affiliates for their everyday business purposes."

(iii) FCRA §624 opt out. If the covered entity incorporates §624 of the FCRA in accord with the instructions in subparagraph (D)(vi) of this paragraph, it must include in the mail-in opt out form the following statement: "Do not allow your affiliates to use my personal information to market to me."

(iv) Nonaffiliate opt out. If the covered entity shares personal information under §22.14(a)(1) - (4) of this title (relating to Limits on Disclosure of Nonpublic Personal Financial Information to Nonaffiliated Third Parties), it must include in the mail-in opt out form the following statement: "Do not share my personal information with nonaffiliates to market their products and services to me."

(v) Additional opt outs. Covered entities that use the disclosure table to provide opt out options beyond those required by federal law must provide those opt outs in this section of the model form. A covered entity that chooses to offer an opt out for its own marketing in the mail-in opt out form must include one of the two following statements: "Do not share my personal information to market to me." or "Do not use my personal information to market to me." A covered entity that chooses to offer an opt out for joint marketing must include the following statement: "Do not share my personal information with other financial institutions to jointly market to me."

(H) Barcodes. A covered entity may elect to include a barcode, a tagline, or both as an internal identifier in 6-point font at the bottom of page one, as needed for information internal to the institution, so long as these do not interfere with the clarity or text of the form.

(3) Page two instructions.

(A) General instructions for the questions. Certain of the questions may be customized as follows:

(i) "Who is providing this notice?" A covered entity may omit this question where only one covered entity provides the model form and that covered entity's name clearly appears in the title on page one. Two or more covered entities or financial institutions that jointly provide the model form must use this question to identify themselves as required by §22.13(g) of this title (relating to Delivery). Where the list of covered entities or financial institutions exceeds four lines, the covered entity must describe in the response to this question the general types of covered entities or financial institutions jointly providing the notice and must separately identify those covered entities or financial institutions, in minimum 8-point font, directly following the "Other important information" box, or, if that box is not included in the covered entity's form, directly following the "Definitions." The list may appear in a multi-column format.

(ii) "How does (name of covered entity) protect my personal information?" The covered entity may only provide additional information about its safeguarding practices following the designated response to this question. This may include information about the covered entity's use of "cookies" or other measures it uses to safeguard personal information. Covered entities are limited to a maximum of 30 additional words.

(iii) "How does (name of covered entity) collect my personal information?" Covered entities must use at least five of the following terms to complete the bulleted list for this question: open an account, deposit money, pay your bills, apply for a loan, use your credit or debit card, seek financial or tax advice, apply for insurance, pay insurance premiums, file an insurance claim, seek advice about your investments, buy securities from us, sell securities to us, direct us to buy securities, direct us to sell your securities, make deposits or withdrawals from your account, enter into an investment advisory contract, give us your income information, provide employment information, give us your employment history, tell us about your investment or retirement portfolio, tell us about your investment or retirement earnings, apply for financing, apply for a lease, provide account information, give us your contact information, pay us by check, give us your wage statements, provide your mortgage information, make a wire transfer, tell us who receives the money, tell us where to send the money, show your government-issued ID, show us your driver's license, or order a commodity futures or option trade. Covered entities that collect personal information from their affiliates, credit bureaus, or both, must include after the bulleted list the following statement: "We also collect your personal information from others, such as credit bureaus, affiliates, or other companies." Covered entities that do not collect personal information from their affiliates or credit bureaus but do collect information from other companies must include the following statement instead: "We also collect your personal information from other companies." Only covered entities that do not collect any personal information from affiliates, credit bureaus, or other companies can omit both statements.

(iv) "Why can't I limit all sharing?" Covered entities that describe state privacy law provisions in the "Other important information" box must use the bracketed sentence: "See below for more on your rights under state law." Other covered entities must omit this sentence.

(v) "What happens when I limit sharing for an account I hold jointly with someone else?" Only covered entities that provide opt out options must use this question. Other covered entities must omit this question. Covered entities must choose one of the following two statements to respond to this question: "Your choices will apply to everyone on your account," or "Your choices will apply to everyone on your account-unless you tell us otherwise." Covered entities that provide insurance products or services and elect to use the model form may substitute the word "policy" for "account" in these statements.

(B) General instructions for the definitions. The covered entity must customize the space below the responses to the three definitions in this area of the form. This specific information must be in italicized lettering to set off the information from the standardized definitions.

(i) Affiliates. As required by §22.10(b)(3) of this title, where (affiliate information) appears, the covered entity must:

(I) if it has no affiliates, state: "(name of covered entity) has no affiliates";

(II) if it has affiliates but does not share personal information, state: "(name of covered entity) does not share with our affiliates"; or

(III) if it shares with its affiliates, state, as applicable: "Our affiliates include companies with a (common corporate identity of covered entity) name; financial companies such as (insert illustrative list of companies); nonfinancial companies, such as (insert illustrative list of companies); and others, such as insert illustrative list."

(ii) Nonaffiliates. As required by §22.10(d) of this title, where (nonaffiliate information) appears, the covered entity must:

(I) if it does not share with nonaffiliated third parties, state: "(name of covered entity) does not share with nonaffiliates so they can market to you"; or

(II) if it shares with nonaffiliated third parties, state, as applicable: "Nonaffiliates we share with can include (list categories of companies such as mortgage companies, insurance companies, direct marketing companies, and nonprofit organizations)."

(iii) Joint marketing. As required by §22.17 of this title, where (joint marketing) appears, the covered entity must:

(I) if it does not engage in joint marketing, state: "(name of covered entity) doesn't jointly market"; or

(II) if it shares personal information for joint marketing, state, as applicable: "Our joint marketing partners include (list categories of companies, such as credit card companies)."

(C) General instructions for the "Other important information" box. This box is optional. The space provided for information in this box is not limited. Only the following types of information may appear in this box:

(i) State, international privacy law information, or both; or

(ii) Acknowledgment of receipt form; or

(iii) Both (i) and (ii).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 2014.

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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 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 55. REQUESTS FOR RECONSIDERATION AND CONTESTED CASE HEARINGS; PUBLIC COMMENT

SUBCHAPTER F. REQUESTS FOR RECONSIDERATION OR CONTESTED CASE HEARING

30 TAC §55.201

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendment to §55.201 *with change* to the proposed text as published in the May 30, 2014, issue of the *Texas Register* (39 TexReg 4125).

Background and Summary of the Factual Basis for the Adopted Rule

Passage of House Bill (HB) 1079, 83rd Legislature, 2013, amended Texas Water Code (TWC), §27.0513 to revise the language that establishes when an application for a production area authorization (PAA) is an uncontested matter, not subject to an opportunity for a contested case hearing. Under former TWC, §27.0513(d), an application for a production area to be issued under a Class III Underground Injection Control (UIC) area permit for *in situ* uranium mining was an uncontested matter except in three circumstances. The three exceptions removed from former TWC, §27.0513(d)(1) - (3), were, respectively: an application to amend a restoration table value; an application for the initial establishment of monitor wells, unless the executive director uses the recommendations of an independent third-party expert; and an application to amend the type of amount of bond required for groundwater restoration and for plugging and abandonment of wells.

Under HB 1079, these three exceptions were removed and replaced with different conditions under which an application for a PAA is an uncontested matter. These conditions are, respectively: the authorization is for a production area within the boundary of a Class III UIC area permit, that includes a permit range table of groundwater quality restoration values used to measure groundwater restoration by the commission; the application includes groundwater quality restoration values falling at, or below, the upper limits of the range established in TWC, §27.0513(d)(1); and the authorization is for a production area located within the boundary of a permit that incorporates groundwater baseline characteristics of the wells for the application required by commission rule. Because of the complexity of the various conditions that determine whether an application for a production authorization is, or is not, subject to an opportunity for a contested case hearing, the commission adopts the conditions in a stand-alone section in 30 TAC §331.108, Opportunity for a Contested Case Hearing on a Production Area Authorization Application. The commission included these provisions in 30 TAC Chapter 331 because the conditions that determine the procedural requirements on the PAA application are linked to the terms of the corresponding permit regarding the permit range table or compliance with rule requirements in Chapter 331 regarding baseline wells and monitor wells.

Under this rulemaking, the revisions to TWC, §27.0513(d) under HB 1079 are addressed through the adopted amendment to §55.201(i)(11).

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also adopts amendments to 30

TAC Chapter 305, Consolidated Permits, and 30 TAC Chapter 331, Underground Injection Control.

Section by Section Discussion

§55.201, Requests for Reconsideration or Contested Case Hearing

Section 55.201(i) is revised to amend paragraph (11). Section 55.201(i)(11)(A) - (C) was adopted in 2009 to address the amendment to TWC, §27.0513(d), Senate Bill 1604 (2007). As previously discussed, TWC, §27.0513(d)(1) - (3) was removed under HB 1079. The adopted amendment to §55.201(i)(11) now states that there is no right to a contested case hearing on an application for a PAA except as provided in §331.108. The commission adopts the amendment to §331.108 to establish the conditions for determining when an application for a PAA may be subject to a contested case hearing consistent with TWC, §27.0513, as amended by HB 1079. Under the conditions in TWC, §27.0513 and 30 TAC §331.108, the only time an application for a PAA may be subject to an opportunity for a contested case hearing is if the application proposes an amendment to increase a restoration table value and the PAA is issued under a Class III UIC area permit that does not include a permit range table.

Final Regulatory Impact Analysis Determination

The commission adopts the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of "a major environmental rule" as defined in the statute. "A major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking action implements legislative requirements in HB 1079, establishing the conditions for when an application for a PAA may be subject to an opportunity for contested case hearing. The adopted rulemaking is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the amendment does not alter in a material way the existing requirements for injection wells used for *in situ* recovery of uranium. The adopted rulemaking action also amends requirements for injection well permit applications by requiring a permit range table in Chapter 305 and amends requirements for injection well permits and PAAs in Chapter 331.

Furthermore, the adopted rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The commission's UIC program is authorized by the United States Environmental Protection Agency (EPA) and the adopted changes for injection well permit applications do not exceed a standard of federal law or requirement of a delegation agreement. There are no federal standards regarding an opportunity for contested case hearings on applications for PAAs. The adopted rule is compatible with federal law.

The adopted rule does not exceed a requirement of state law. TWC, Chapter 27, the Injection Well Act, establishes requirements for the commission's UIC program. HB 1079 amended the Injection Well Act to establish the conditions for when an application for a PAA may be subject to a contested case hearing. The purpose of the rulemaking is to implement requirements consistent with TWC, Chapter 27, as amended by HB 1079.

The adopted rule is compatible with the requirements of a delegation agreement or contract between the state and an agency of the federal government. The commission's UIC program is authorized by the EPA, and the adopted rule is compatible with the state's delegation of the UIC program.

The rule is adopted under specific laws. TWC, Chapter 27, establishes requirements for the commission's UIC program and TWC, §27.019, requires the commission to adopt rules reasonably required to implement the Injection Well Act, and TWC, §27.0513 authorizes the commission to adopt rules to establish requirements for PAAs.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated the adopted rule and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment is that implementation of the adopted rule would not constitute a taking of real property.

The purpose of the adopted rule is to implement legislative requirements in HB 1079, establishing the conditions for when an application for a PAA may be subject to an opportunity for a contested case hearing. The adopted amendment would substantially advance this purpose by amending the conditions in §55.201(i)(11) that establish when an application for a PAA may be subject to an opportunity for a contested case hearing to be consistent with the requirements of HB 1079.

Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of private real property. The adopted rule does not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The adopted rule establishes the conditions for when an application for a PAA may be subject to an opportunity for a contested case hearing that does not affect real property. The adopted rule applies only to the procedural requirements for PAA applications. HB 1079 became effective on September 1, 2013, and applies in the absence of adopted amendment. Therefore, the adopted rule does

not affect real property in a manner that is different than would have been affected without these revisions.

Consistency with the Coastal Management Program

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

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the consistency with the CMP.

Public Comment

The commission held a public hearing on this proposal in Austin on June 17, 2014. The comment period closed on June 30, 2014. The commission received no comments on the amendment to §55.201.

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and TWC, §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendment implements House Bill 1079, 83rd Legislature, 2013 and TWC, §27.0513.

§55.201. Requests for Reconsideration or Contested Case Hearing.

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's decision and response to comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

(b) The following may request a contested case hearing under this chapter:

(1) the commission;

(2) the executive director;

(3) the applicant; and

(4) affected persons, when authorized by law.

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, and may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(d) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(5) provide any other information specified in the public notice of application.

(e) Any person, other than a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title (relating to Definitions), may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

(f) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request reconsideration or a contested case hearing shall be treated as public comment.

(g) Procedures for late filed public comments, requests for reconsideration, or contested case hearing are as follows.

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk shall accept a request for reconsideration or contested case hearing, or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file.

(2) The commission may extend the time allowed to file a request for reconsideration, or a request for a contested case hearing.

(h) Any person, except the applicant, the executive director, the public interest counsel, and a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title, who was provided notice as required under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn

the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

(i) Applications for which there is no right to a contested case hearing include:

(1) a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title;

(3) any air permit application for the following:

(A) initial issuance of a voluntary emission reduction permit or an electric generating facility permit;

(B) permits issued under Chapter 122 of this title (relating to Federal Operating Permits Program);

(C) a permit issued under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review) that would authorize only emissions of greenhouse gases as defined in §101.1 of this title (relating to Definitions); or

(D) amendment, modification, or renewal of an air application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

(4) hazardous waste permit renewals under §305.65(8) of this title (relating to Renewal);

(5) an application, under Texas Water Code, Chapter 26, to renew or amend a permit if:

(A) the applicant is not applying to:

(i) increase significantly the quantity of waste authorized to be discharged; or

(ii) change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant public comment has been given; and

(E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit;

(6) an application for a Class I injection well permit used only for the disposal of nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals under Texas Water Code, §27.021, concerning Permit for Disposal of Brine From Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(7) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under Texas Water Code, §27.023, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

(8) an application for a pre-injection unit registration under §331.17 of this title (relating to Pre-injection Units Registration);

(9) an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018;

(10) other types of applications where a contested case hearing request has been filed, but no opportunity for hearing is provided by law; and

(11) an application for a production area authorization, except as provided in accordance with §331.108 of this title (relating to Opportunity for a Contested Case Hearing on a Production Area Authorization Application).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
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CHAPTER 305. CONSOLIDATED PERMITS

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendments to §305.49 and §305.154 *with changes* to the proposed text as published in the May 30, 2014, issue of the *Texas Register* (39 TexReg 4160).

Background and Summary of the Factual Basis for the Adopted Rules

The adopted changes to this chapter are necessary to implement passage of House Bill (HB) 1079, 83rd Legislature, 2013. HB 1079 amended Texas Water Code (TWC), §27.0513 to establish a requirement for new, amended, or renewed Class III Underground Injection Control (UIC) area permits to include a table of high and low values for each groundwater quality parameter that is used to determine aquifer restoration, herein referred to as the permit range table, to modify the conditions that determine when certain types of production area authorization (PAA) applications are subject to an opportunity for a contested case hearing; and, to require that restoration table values of a new or amended PAA must fall within the range table that is established in the corresponding permit.

The adopted amendments to §305.49 and §305.154 address the requirement for inclusion of a permit range table in all new,

amended, or renewed Class III UIC area permits for *in situ* mining of uranium.

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also adopts amendments to 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment, and Chapter 331, Underground Injection Control.

Section by Section Discussion

§305.49, Additional Contents of Application for an Injection Well Permit

The adopted amendment to §305.49(a)(10) addresses the requirements of amended TWC, §27.0513(a), as amended by HB 1079. Under this adopted rule, an application for a new, amended, or renewed Class III UIC area permit for *in situ* mining of uranium must include a table of pre-mining low and high values for each groundwater quality parameter used to measure groundwater restoration, herein referred to as a permit range table. These values must be established from analysis of groundwater samples from baseline wells and from all available wells completed in the production zone within the area of review associated within an existing or proposed permit boundary. The adopted rule will require that pre-mining low and high values in the permit range table be established for each of the parameters listed in existing §331.104(b). The parameters identified in §331.104(b) are those that are used to establish pre-mining groundwater quality and are used to establish the restoration table of a PAA. Values must be established from analysis of groundwater samples, collected prior to mining, from all baseline wells required under §331.104(c), and from all other wells, within the associated area of review, that are completed in the production zone.

Existing §305.49(a)(10) is re-numbered as paragraph (11).

The executive director considered, as part of this rulemaking, recommending the amendment of §305.49 to specify that the values in the permit range table be based on a minimum number of sample analyses. The rule, however, does not include a requirement for a minimum number of samples.

Conceptually, for a Class III permit area, each parameter in the permit range table will have some true range of values. This true range is unknown, and must be estimated. The purpose of sampling wells in the area, as required under adopted §305.49(a)(10), is to obtain a sufficient number of sample values to obtain an acceptable estimate of this true range. The estimation technique in this case is to select the low and high values for each parameter from the sample values obtained through analysis of groundwater samples collected from wells completed in the production zone. As is true with other estimation techniques, the larger the number of values used in the estimation, the better the estimate.

It is in the interest of the permittee that the estimated range of values for each parameter includes a large proportion of the true range. Values in the restoration table in each PAA cannot exceed the maximum values for the respective parameters in the permit range table. If the maximum value for a parameter in the permit range table was estimated too low, achieving the restoration table values established in the PAA may be difficult, if not impossible. Therefore, in considering how many samples to use to estimate the range for each parameter in the permit range table, the applicant or permittee should decide to what extent these ranges should include the true range of each parameter. To assist in that decision, the executive director offers the following analysis.

Statistically, the true range may be considered to represent the population of values for a parameter, and the estimated range to be an interval estimate of a particular proportion of that population. One technique used to estimate a population proportion is a tolerance interval. A tolerance interval is a statistical interval designed to include a proportion of a population with an associated level of confidence. For example, a tolerance interval could be constructed to include 95% of a population with a confidence level of 99%. That is, a person could be 99% "sure" that the interval included 95% of the population. The desired proportion of the population is called the "coverage".

The level of confidence associated with a particular coverage is dependent on the number of values used to construct the tolerance interval. If the level of confidence is defined as (1-α)100% and P equals the desired coverage, then the number of values needed (n) for a desired coverage and level of confidence is:

$n = \ln(\alpha)/\ln(P)$

This equation applies to a nonparametric tolerance interval, and is described on page 93 of *Statistical Methods for Groundwater Monitoring* (1994, John Wiley and Sons, Inc.) by Robert D. Gibbons.

Using this method, 22 samples would be needed to construct a nonparametric tolerance interval with coverage of 90% and a level of confidence of 90%:

Desired level of confidence: $\alpha = 0.1$; $(1 - 0.1)100\% = 90\%$

Desired coverage (P): 90%

$n = \ln(\alpha)/\ln(P)$

$n = \ln(0.1)/\ln(0.9)$

$n = (-2.306)/(-0.1054)$

$n = 21.854$

The range for a permit range table parameter would be the high and low values from these 22 samples. To construct an interval with 95% coverage with a level of confidence of 99%, the interval would have to be based on 298 values.

Based on this analysis, the executive director recommends that determination of the high and low values for each parameter in the permit range table be based on a minimum of 22 values for each parameter from groundwater analyses. In the preamble to the proposed rule, the commission invited comments on this analysis and whether a specified number of samples should be required in the permit application requirements in this rule. Two comments were received and are discussed in the Response to Comments Section of this adoption preamble.

§305.154, Standards

The adopted amendment to §305.154(b)(5) would address the new requirement that a Class III UIC area permit include a permit range table. In addition to other requirements under existing §305.154(b)(1) - (4), such permits will also require the permit range table. Adopted §305.154(b)(5) implements TWC, §27.0513(a), as amended by HB 1079.

Final Regulatory Impact Analysis Determination

The commission adopts the rulemaking action under the regulatory analysis requirements of Texas Government Code,§2001.0225, and determined that the action is not subject

to Texas Government Code, §2001.0225 because it does not meet the definition of "a major environmental rule" as defined in the statute. "A major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking action implements legislative requirements in HB 1079, establishing requirements for injection well area permits for *in situ* recovery of uranium. The adopted rulemaking is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the amendments do not alter in a material way the existing requirements for injection wells used for *in situ* recovery of uranium. The adopted rulemaking action also amends procedural requirements for PAA regarding when such applications may be subject to the opportunity for a contested case hearing in Chapter 55 and amends requirements for injection well permits and PAAs in Chapter 331.

Furthermore, the adopted rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The commission's UIC program is authorized by the United States Environmental Protection Agency (EPA) and the adopted changes for injection well permit applications do not exceed a standard of federal law or requirement of a delegation agreement. There are no federal standards regarding permit range tables. The adopted rules are compatible with federal law.

The adopted rules do not exceed a requirement of state law. TWC, Chapter 27, the Injection Well Act, establishes requirements for the commission's UIC program. HB 1079 amended the Injection Well Act to require range tables depicting the range of pre-mining groundwater quality to be included in the injection well permits used for *in situ* recovery of uranium. The purpose of the rulemaking is to implement requirements consistent with TWC, Chapter 27, as amended by HB 1079.

The adopted rules are compatible with the requirements of a delegation agreement or contract between the state and an agency of the federal government. The commission's UIC program is authorized by the EPA, and the adopted rules are compatible with the state's delegation of the UIC program.

The adopted rules are adopted under specific laws. TWC, Chapter 27, establishes requirements for the commission's UIC program and TWC, §27.019, requires the commission to adopt rules reasonably required to implement the Injection Well Act, and TWC, §27.0513 authorizes the commission to adopt rules to establish requirements for PAAs.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated these adopted rules and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment is that implementation of these adopted rules would not constitute a taking of real property.

The purpose of these adopted rules is to implement legislative requirements in HB 1079, establishing requirements for area permits and PAAs for *in situ* recovery of uranium. The adopted rule changes in Chapter 305 will substantially advance this purpose by amending the requirements for submitted applications for Class III injection well area permits authorizing *in situ* uranium mining consistent with the requirements of HB 1079. Applications for such permits must include a range table of pre-mining low and high values for each groundwater quality parameter used in the restoration tables of PAAs.

Promulgation and enforcement of these adopted rules will be neither a statutory nor a constitutional taking of private real property. The adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The adopted rules for injection well permit applications do not affect real property. The adopted rules apply only to those who apply for a permit for injection wells authorizing *in situ* recovery of uranium. Additional requirements for permit applications apply in the absence of these adopted rules, including the statutory requirements of HB 1079 which became effective on September 1, 2013. Therefore, the adopted rules do not affect real property in a manner that is different than would have been affected without these revisions.

Consistency with the Coastal Management Program

The commission reviewed the adopted 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 adopted rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the consistency with the CMP.

Public Comment

The commission held a public hearing on this proposal in Austin on June 17, 2014. The comment period closed on June 30, 2014. No comments were received during the hearing. The commission did receive written comments from the Uranium Committee of the Texas Mining and Reclamation Association (TMRA-UC).

Response to Comments

The members of the TMRA-UC commented that they agree with the executive director's decision to not amend §305.49 to specify that the values in the permit range table be based on a minimum number of sample analyses. TMRA-UC stated that they consider 22 samples analyses discussed in the proposal preamble are a reasonable number of samples in most situations. TMRA-UC also commented that it is important for the TCEQ to be able to address permit range tables on a site-specific basis, and to have the ability to exercise professional judgment in assessing the adequacy of data used to construct a permit range table.

The TCEQ agrees with and appreciates this comment. No changes were made in response to this comment.

TMRA-UC requested clarification on the TCEQ's expectations regarding the sampling process provided in the proposal preamble for Chapter 305. Specifically, TMRA-UC asked if each sample analysis used to develop the permit range table must be based on groundwater samples from separate wells. That is, if an applicant uses 22 samples analyses to construct the permit range table, must they be from 22 respective wells, or could a permit range table be based on multiple samples from several wells?

TCEQ does not believe each sample analysis used to construct the permit range table must be based on a groundwater sample from a separate well. Multiple samples, taken at intervals to ensure independent samples, may be collected from a well. In evaluating the data used to construct a permit range table, TCEQ will consider several factors, including the overall number of sample analyses used, the number of wells sampled, the number of samples collected from each well, the time between collection of samples from a well, the locations of the wells with respect to each other, and the areal distribution of the wells over the permit area. TCEQ's concern is that the range of values for each parameter in the permit range table be based on sufficient data to provide a reasonable estimate of the true range for each parameter. By developing a range table that provides a reasonable estimate of the true range for each parameter, a permittee may avoid having to revise the permit range table to include revised restoration table values, should that need occur after restoration efforts have been completed. Therefore, it is in the permittee's interest to have a permit range table that most closely captures the true ranges of the parameters addressed in the permit range table. As stated in the proposal preamble, the more sample analyses used to construct the permit range table, the better the estimate of the true range for each of the parameters in the permit range table. No changes were made in response to this comment.

SUBCHAPTER C. APPLICATION FOR PERMIT OR POST-CLOSURE ORDER

30 TAC §305.49

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and TWC, §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendment implements House Bill 1079, 83rd Legislature, 2013 and TWC, §27.0513.

§305.49. Additional Contents of Application for an Injection Well Permit.

(a) The following must be included in an application for an injection well permit:

(1) for Class I wells, as defined in Chapter 331 of this title (relating to Underground Injection Control), the information listed in §331.121 of this title (relating to Class I Wells);

(2) for Class III wells, as defined in Chapter 331 of this title, the information listed in §331.122 of this title (relating to Class III Wells);

(3) the manner in which compliance with the financial assurance requirements in Chapter 37 of this title (relating to Financial Assurance) will be attained;

(4) the manner in which compliance with the plugging and abandonment requirements of §331.46 of this title (relating to Closure Standards) will be attained;

(5) the manner in which compliance with the corrective action requirements of §331.44 of this title (relating to Corrective Action Standards) will be attained;

(6) the manner in which compliance with the post-closure requirements of §331.68 of this title (relating to Post-Closure Care) will be attained;

(7) for Class I wells, a letter from the Railroad Commission of Texas stating that the drilling of a disposal well and the injection of the waste into the subsurface stratum selected for disposal will not endanger or injure any oil or gas formation;

(8) for Class III wells, a description of all liquid and solid nonradioactive wastes resulting from mining activities;

(9) a complete delineation by a licensed professional geoscientist or a licensed professional engineer of any aquifer or portion of an aquifer for which exempt status is sought;

(10) an application for a new, amended, or renewed Class III injection well area permit for an *in situ* uranium mine must contain a range table of pre-mining low and high values for each groundwater quality parameter listed in §331.104(b) of this title (relating to Establishment of Baseline and Control Parameters for Excursion Detection). These values shall be established from analysis of independent and representative groundwater samples, collected prior to mining, from:

(A) all baseline wells required under §331.104(c) of this title that are within the area of review associated with the existing or proposed permit boundary, as specified at §331.42(a)(4) of this title (relating to Area of Review); and

(B) all available wells within the existing or proposed permit boundary, provided the well is completed within the production zone identified in the existing or proposed permit; and

(11) any other information reasonably required by the executive director to evaluate the proposed injection well or project, including, but not limited to, the information set forth in Texas Water Code, §27.051(a).

(b) An application for production area authorization shall be submitted with and contain the following for each production area:

(1) mine plan;

(2) a restoration table;

(3) a baseline water quality table;

(4) control parameter upper limits;

(5) monitor well locations;

(6) cost estimate for aquifer restoration and well plugging and abandonment; and

(7) other information reasonably required by the executive director to evaluate the application.

(c) An application under this section shall comply with the requirements of §305.50(a)(4)(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).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
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SUBCHAPTER H. ADDITIONAL CONDITIONS FOR INJECTION WELL PERMITS

30 TAC §305.154

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and TWC, §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendment implements House Bill 1079, 83rd Legislature, 2013, and TWC, §27.0513.

§305.154. Standards.

(a) In addition to other standard permit conditions listed elsewhere in this chapter, the following conditions and other applicable standards listed in Chapter 331 of this title (relating to Underground Injection Control) shall be incorporated into each permit expressly or by reference to this chapter. The commission may impose stricter standards where appropriate.

(1) Construction requirements. Section 331.62 and §331.82 of this title (relating to Construction Standards; and Construction Requirements).

(2) Compliance schedule. See §305.127(3)(E) of this title (relating to Conditions to be Determined for Individual Permits).

(3) Construction plans. Changes in construction plans shall be approved under §331.45 of this title (relating to Executive Director Approval of Construction and Completion), or, by minor modification according to §305.72 of this title (relating to Underground Injection Control (UIC) Permit Modifications at the Request of the Permittee).

(4) Commencing operations. Commencement of injection operations before approval by the executive director of construction and completion is a violation of the permit and may be considered grounds for revocation or suspension of the permit, and for enforcement action. Except for new wells authorized by an area permit under subsection (b) of this section, a new injection well may not commence injection until construction is complete, and:

(A) the permittee has submitted notice of completion of construction to the executive director; and

(B) the executive director has inspected or otherwise reviewed the new injection well and finds it complies with the conditions of the permit; or

(C) the permittee has not received notice from the executive director of intent to inspect or otherwise review the new injection well within 13 days of the date of the notice in subparagraph (A) of this paragraph, in which case prior inspection or review is waived and the permittee may commence injection. The executive director shall include in the notice a reasonable time period in which he shall inspect the well.

(D) for Class I wells, submission of the completion report required by §331.65(b)(1) of this title (relating to Reporting Requirements) shall constitute the notice required in subparagraph (A) of this paragraph.

(5) Operating requirements. Section 331.63 and §331.83 of this title (relating to Operating Requirements).

(6) Monitoring and reporting. All permits shall specify requirements concerning the proper use, maintenance and installation, when appropriate, of monitoring equipment or methods including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including when appropriate, continuous monitoring. Reporting shall be no less frequent than specified in the appropriate sections of Chapter 331 of this title: Section 331.64 of this title (relating to Monitoring and Testing Requirements and §331.65 of this title; §331.84 and §331.85 of this title (relating to Monitoring Requirements; and Reporting Requirements); or Chapter 331, Subchapter F of this title (relating to Standards for Class III Well Production Area Development).

(7) Closure. The permittee shall notify the executive director and obtain approval before plugging an injection well. After failing to operate for a period of two years, the owner or operator shall close the well in accordance with an approved plan unless:

(A) notice is provided to the executive director; and

(B) actions and procedures are described, satisfactory to the executive director, that the owner or operator will take to ensure that the well will not endanger underground sources of drinking water during the period of temporary abandonment. These actions and procedures shall include compliance with the technical requirements applicable, unless waived by the executive director.

(8) Corrective action requirements. Section 331.44 of this title (relating to Corrective Action Standards) and §305.152 of this title (relating to Corrective Action).

(9) Financial assurance requirements. The permittee is required to demonstrate and maintain financial responsibility and

resources to close, plug, and abandon in accordance with Chapter 37, Subchapter Q of this title (relating to Financial Assurance for Underground Injection Control Wells). The permittee shall show evidence of such financial responsibility to the executive director.

(10) Post-closure requirements. Section 331.68 of this title (relating to Post-Closure Care).

(11) Liability coverage requirements. The permittee of hazardous waste injection wells shall maintain sufficient liability coverage for bodily injury and property damage to third parties that is caused by sudden and non-sudden accidents in accordance with Chapter 37, Subchapter Q of this title.

(b) Area permits shall specify:

(1) The area within which underground injections are authorized.

(2) The requirements for construction, monitoring, reporting, operation, and abandonment for all wells authorized by the permit.

(3) The area permit may authorize the permittee to construct and operate, convert, or plug and abandon wells within the permit area provided:

(A) the permittee notifies the executive director at such time as the permit requires;

(B) the additional well satisfies the criteria in §331.7(b) of this title (relating to Permit Required) and meets the requirements specified in the permit under paragraphs (1) and (2) of this subsection; and

(C) the cumulative effects of drilling and operation of additional injection wells are considered by the executive director during evaluation of the area permit application and are acceptable to the executive director.

(4) If the executive director determines that any well constructed pursuant to paragraph (3) of this subsection does not satisfy any of the requirements of this subsection, the executive director may amend, terminate, or take enforcement action. If the executive director determines that cumulative effects are unacceptable, the permit may be amended under §305.62 of this title (relating to Amendments).

(5) Permit range table. The high and low values for each aquifer restoration parameter are identified in §331.104(b) of this title (relating to Establishment of Baseline and Control Parameters for Excursion Detection). All values shall be determined in accordance with the requirements of §305.49(a)(10) of this title (relating to Additional Contents of Application for an Injection Well Permit).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 331. UNDERGROUND INJECTION CONTROL

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendments to §§331.82, 331.107, 331.108, and 331.122; and new §331.110.

Amended §§331.107, 331.108, and 331.122 are adopted *with changes* to the proposed text as published in the May 30, 2014, issue of the *Texas Register* (39 TexReg 4165). Amended §331.82 and new §331.110 are adopted *without changes* to the proposed text, and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

The adopted changes to this chapter are necessary to implement passage of House Bill (HB) 1079, 83rd Legislature, 2013. HB 1079 amended Texas Water Code (TWC), §27.0513, to establish a requirement for new, amended, or renewed Class III Underground Injection Control (UIC) area permits, to include a table of high and low values for each groundwater quality parameter that is used to determine aquifer restoration, herein referred to as the permit range table, to modify the conditions that determine when certain types of production area authorization (PAA) applications are subject to an opportunity for a contested case hearing and, to require that restoration table values of a new or amended PAA must fall within the range table that is established in the corresponding permit.

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also adopts amendments to 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment, and 30 TAC Chapter 305, Consolidated Permits.

Section by Section Discussion

§331.82, Construction Requirements

The commission adopts the amendment to existing §331.82(e) to add paragraph (7), under which the pre-mining groundwater quality must be determined in accordance with the requirements of §305.49(a)(10). Adopted paragraph (7) implements TWC, §27.0513(a), as amended by HB 1079, which requires new, amended or renewed Class III injection well permits for mining of uranium to include a table of pre-mining low and high values that represent a range of groundwater quality within the permit boundary and area of review. Under existing §331.82(e), the injection zone characteristics (fluid pressure, temperature, fracture pressure, other physical and chemical characteristics of the injection zone, physical and chemical characteristics of the formation fluids, and compatibility of injected fluids with formation fluids) must be determined as part of the well construction process. This determination applies to all types of UIC wells. Adopted paragraph (7), which pertains to the chemical characteristics of the groundwater in the injection zone, will apply to Class III wells only.

§331.107, Restoration

The commission adopts the amendment to existing §331.107(a)(1) to add the requirement that the values for the parameters listed in the restoration table in a PAA must be within the respective ranges in the permit range table. The adopted amendment to §331.107(a)(1) implements TWC, §27.0513(c) as amended by HB 1079. Under TWC, §27.0513(c) a restoration table value in a new or amended PAA cannot exceed the respective high value in the permit range

table. In the case where a restoration table value would exceed the respective high value in the permit range table, the permit range table must be revised through a major amendment to increase the permit range table value (or values) such that the respective values in the PAA restoration table do not exceed the respective values in the permit range table. Applications for major amendments of a Class III injection well permit are subject to opportunity for a contested case hearing.

The commission adopts the amendment to existing §331.107(g) to address the requirement in TWC, §27.0513(c), as amended by HB 1079, that a value in an amended PAA restoration table cannot exceed the maximum respective value in the associated permit range table. The commission further adopts amendments to this subsection to specify that if any proposed PAA restoration table value is not within the respective range in the permit range table, the permittee must submit an application for major amendment of the permit to revise the permit range table such that the proposed PAA restoration table value is within the respective range in the permit range table.

The commission adopts the amendment to existing §331.107(g)(1), (2), and (4) to specify that the commission may amend a permit range table, as well as a PAA restoration table. Currently, paragraphs (1), (2), and (4) apply to amendment of a PAA restoration table value. Under TWC, §27.0513(c), as amended by HB 1079, revision of a PAA restoration table value requires amendment to the associated permit range table if the proposed amended restoration table value is not within the respective range in the associated permit range table. Therefore, the factors considered by the commission and the required findings of the commission in reviewing an application for amendment of a PAA restoration range table under §331.107(g)(1), (2), and (4) should also apply to an application for a permit amendment to revise a permit range table.

§331.108, Opportunity for a Contested Case Hearing on a Production Area Authorization Application

The commission adopts the amendment to existing §331.108 to remove the existing language in subsections (a) - (h), regarding the requirements for independent third-party experts and for the use of recommendations of such an expert. Additionally, the commission adopts the amendment to the title of this section to "Opportunity for a Contested Case Hearing on a Production Area Authorization Application." HB 1079 amended TWC, §27.0513 to remove the option for using the recommendations of an independent third-party expert regarding monitor well requirements. Under the previous language in TWC, §27.0513(d)(2) an application for a PAA that seeks an initial establishment of monitor wells was subject to opportunity for a contested case hearing unless the executive director used the recommendations of such an expert regarding establishment of monitor wells. Section 331.108 originally was adopted to address the use of an independent third-party expert, and the qualifications of such an expert. Deletion of the previous language at TWC, §27.0513(d)(2), by HB 1079, removed the necessity for the existing language in §331.108 regarding independent third-party experts.

HB 1079 amended TWC, §27.0513 to establish the conditions for determining when a PAA application is an uncontested matter, not subject to the opportunity for a contested case hearing. To address this change to the TWC, the commission adopts the amendment to further amend existing §331.108 to specify the required conditions for a PAA application to be an uncontested matter as further described.

The commission adopts the amendment to existing §331.108(a) to remove the current language regarding use of an independent third-party expert, and to add the conditions at TWC §27.0513(d)(1) - (3), as amended by HB 1079. Under the adopted amendment to §331.108(a)(1) - (4), an application for a new PAA is an uncontested matter if the permit under which the authorization will be issued includes a permit range table established in accordance with the requirements of §305.49(a)(10); the PAA application includes a restoration table with restoration parameter values that do not exceed the high values for the respective parameters in the permit range table; the application is for a PAA within the boundary of the permit under which the proposed PAA will be issued; and the PAA application meets the requirements at §331.104(a) - (d) regarding baseline wells. Adopted §331.108(a)(1) implements TWC, §27.0513(d)(1), as amended by HB 1079. Adopted §331.108(a)(2) implements TWC, §27.0513(d)(2), as amended by HB 1079. Adopted §331.108(a)(3) implements TWC, §27.0513(d)(3), as amended by HB 1079. Adopted §331.108(a)(4) implements TWC, §27.0513(g), as amended by HB 1079.

The commission adopts the amendment to existing §331.108(b) to remove the requirements that apply for a person to be designated as an independent third-party expert. HB 1079 amended TWC, §27.0513 to eliminate the use of such experts. Section 331.108(b) is further revised to establish the conditions for when an application to amend a PAA restoration table is an uncontested matter, not subject to an opportunity for a contested case hearing. If the application proposes to amend a restoration table value and the values in the amended restoration table do not exceed the respective values in the associated permit range table, the application is not subject to an opportunity for a contested case hearing. Adopted §331.108(b) implements TWC, §27.0513(d)(2), as amended by HB 1079.

The commission adopts the amendment to existing §331.108(c) to remove the requirement that the executive director will not designate an independent third-party expert unless requested to do so by the applicant. Revision to TWC, §27.0513(d) under HB 1079 removed the option of using such an expert. The commission further adopts the amendment to §331.108(c) to establish the conditions when an application for the amendment of a PAA restoration table is subject to opportunity for a contested case hearing. If the application proposes amendment to increase a restoration table value and the PAA is issued under a Class III UIC area permit that does not include a permit range table, the application is subject to the opportunity for a contested case hearing. The adopted amendment to existing §331.108(c) implements TWC, §27.0513(d), as amended by HB 1079, establishing the only PAA application situation that can be subject to an opportunity for contested case hearing. The condition at amended §331.108(c) can only apply to any of the currently-issued PAAs if the permittee does not amend the Class III injection well permit to include a range table. Because all new Class III injection well permits must have a range table, because all new PAAs must have restoration table values that fall within the values of the permit range table, and all existing Class III injection well permits have at least one PAA issued under the permit, adopted §331.108(c) describes the only situation where a PAA application can be subject to an opportunity for a contested case hearing under TWC, §27.0513(d), as amended by HB 1079. An application for a PAA that is not subject to an opportunity for contested case hearing is still subject to applicable public notice requirements and opportunity for the public to submit comments on the application.

§331.110, General Requirements for Production Area Authorization

The commission adopts new §331.110 to address the requirements in TWC, §27.0513(g), as amended by HB 1079. Under this adopted rule, a PAA may not authorize: the use of groundwater from a well for purposes of providing supplemental water production; expansion of a permit boundary or a production area outside of a permit boundary; or a reduction in the number of monitor wells or an increase in the distance between wells as required under §331.103. The conditions addressed in TWC, §27.0513(g) do not alter the commission's existing practice regarding PAAs. PAAs do not confer any authority to the permittee regarding the uses of groundwater for supplemental groundwater; PAAs do not expand the area authorized under an area permit; and PAAs must comply with the number and spacing requirements for monitor wells established in commission rules.

§331.122, Class III Wells

The commission adopts the amendment to existing §331.122 to add §331.122(2)(O) to the list of information the commission shall consider before issuing a Class III injection well or area permit. This revision is necessary to address the requirement that a Class III UIC area permit include the permit range table. Adopted §331.122(2)(O) implements TWC, §27.0513(a), as amended by HB 1079.

Final Regulatory Impact Analysis Determination

The commission adopts the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of "a major environmental rule" as defined in the statute. "A major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking action implements legislative requirements in HB 1079, establishing requirements for area permits and PAAs for *in situ* recovery of uranium. The adopted rulemaking is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the amendments do not alter in a material way the existing requirements for injection wells used for *in situ* recovery of uranium. The adopted rulemaking action also amends procedural requirements for PAA regarding when such applications may be subject to the opportunity for a contested case hearing in Chapter 55 and amends requirements for injection well permit applications by requiring a permit range table in Chapter 305.

Furthermore, the adopted rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The commission's UIC program is authorized by the United States Environmental Protection Agency (EPA) and the adopted changes for injection well permits and PAAs, do not exceed a standard of federal law or requirement of a delegation agreement. There are no federal standards for PAAs. The adopted rules are compatible with federal law.

The adopted rules do not exceed a requirement of state law. TWC, Chapter 27, the Injection Well Act, establishes requirements for the commission's UIC program. HB 1079 amended the Injection Well Act to require permit range tables depicting the range of pre-mining groundwater quality to be included in the injection well permits used for *in situ* recovery of uranium. HB 1079 also amended the Injection Well Act to require that a PAA's restoration table reflect groundwater restoration values that are within the range of values provided in the corresponding permit's range table. The purpose of the rulemaking is to implement requirements consistent with TWC, Chapter 27, as amended by HB 1079.

The adopted rules are compatible with the requirements of a delegation agreement or contract between the state and an agency of the federal government. The commission's UIC program is authorized by the EPA, and the adopted rules are compatible with the state's delegation of the UIC program.

The rules are adopted under specific laws. TWC, Chapter 27, establishes requirements for the commission's UIC program and TWC, §27.019, requires the commission to adopt rules reasonably required to implement the Injection Well Act, and TWC, §27.0513 authorizes the commission to adopt rules to establish requirements for PAAs.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated these adopted rules and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment is that implementation of these adopted rules would not constitute a taking of real property.

The purpose of these adopted rules is to implement legislative requirements in HB 1079, establishing requirements for area permits and PAAs for *in situ* recovery of uranium. The adopted rule changes in Chapter 331 would substantially advance this purpose by amending the requirements applicable to *in situ* uranium mining consistent with the requirements of HB 1079.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The adopted rules for injection well permits and PAAs do not affect real property. The adopted rules apply only to those who use or apply

for permit or authorization of injection wells for *in situ* recovery of uranium. Significant requirements for wells used for *in situ* recovery of uranium apply in the absence of these adopted rules, including the statutory requirements of HB 1079 which became effective on September 1, 2013. Therefore, the adopted rules do not affect real property in a manner that is different than would have been affected without these revisions.

Consistency with the Coastal Management Program

The commission reviewed the adopted 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 adopted rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the consistency with the CMP.

Public Comment

The commission held a public hearing on this proposal in Austin on June 17, 2014. The comment period closed on June 30, 2014. No comments were received on the new or amended rules in Chapter 331.

SUBCHAPTER E. STANDARDS FOR CLASS III WELLS

30 TAC §331.82

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and TWC, §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendment implements House Bill 1079, 83rd Legislature (2013), and TWC, §27.0513.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER F. STANDARDS FOR CLASS III WELL PRODUCTION AREA DEVELOPMENT

30 TAC §§331.107, 331.108, 331.110

Statutory Authority

The amendments and new section are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments and new section are also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and TWC, §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendments and new section implement House Bill 1079, 83rd Legislature (2013), and TWC, §27.0513.

§331.107. Restoration.

(a) Aquifer restoration. Groundwater in the production zone within the production area must be restored when mining is complete. Each Class III permit or production area authorization shall contain a description of the method for determining that groundwater has been restored in the production zone within the production area. Restoration must be achieved for all values in the restoration table of all parameters in the suite established in accordance with the requirements of §331.104(b) of this title (relating to Establishment of Baseline and Control Parameters for Excursion Detection).

(1) Restoration table. Each permit or production area authorization shall contain a restoration table for all parameters in the suite established in accordance with the requirements of §331.104(b) of this title. The restoration value for each parameter listed in the restoration table cannot exceed the maximum value for the respective parameter in the permit range table required under §331.82(e)(7) of this title (relating to Construction Requirements). A restoration table value for a parameter shall be established by:

(A) the mean concentration or value for that parameter based on all measurements from groundwater samples collected from baseline wells prior to mining activities; or

(B) a statistical analysis of baseline well information proposed by the owner or operator and approved by the executive director that demonstrates that the restoration table value is representative of baseline quality.

(2) Achievement of restoration. Achievement of restoration shall be determined using one of the following methods:

(A) when all sample measurements from groundwater samples from all baseline wells for a restoration parameter are equal to or below (or, in the case of pH, within an established range) the restoration table value for that parameter, then restoration for that parameter will be assumed to have occurred. Complete restoration will be assumed to have occurred when measurements from all samples from all baseline wells for all restoration parameters are equal to or below (or, in the case of pH, within an established range) each respective restoration table value; or

(B) a statistical analysis of information from groundwater samples from baseline wells proposed by the owner or operator and approved by the executive director that demonstrates that the groundwater quality is representative of the restoration table values.

(b) Mining completion. When the mining of a permit or production area is completed, the permittee shall notify the appropriate commission regional office and the executive director and shall proceed to reestablish groundwater quality in the affected permit or production

area aquifers in accordance with the requirements of subsection (a) of this section. Restoration efforts shall begin as soon as practicable but no later than 30 days after mining is completed in a particular production area. The executive director, subject to commission approval, may grant a variance from the 30-day period for good cause shown.

(c) Timetable. Aquifer restoration, for each permit or production area, shall be accomplished in accordance with the timetable specified in the currently approved mine plan, unless otherwise authorized by the commission. Authorization for expansion of mining into new production areas may be contingent upon achieving restoration progress in previously mined production areas within the schedule set forth in the mine plan. The commission may amend the permit to allow an extension of the time to complete restoration after considering the following factors:

(1) efforts made to achieve restoration by the original date in the mine plan;

(2) technology available to restore groundwater for particular parameters;

(3) the ability of existing technology to restore groundwater to baseline quality in the area;

(4) the cost of achieving restoration by a particular method;

(5) the amount of water which would be used or has been used to achieve restoration;

(6) the need to make use of the affected aquifer; and

(7) complaints from persons affected by the permitted activity.

(d) Reports. Beginning six months after the date of initiation of restoration of a permit or production area, as defined in the mine plan, the operator shall provide to the executive director semi-annual restoration progress reports until restoration is accomplished for the production area. This report shall contain the following information:

(1) all analytical data generated during the previous six months;

(2) graphs of analysis for each restoration parameter for each baseline well;

(3) the volume of fluids injected and produced;

(4) the volume of fluids disposed;

(5) water level measurements for all baseline and monitor wells, and for any other wells being monitored;

(6) a potentiometric map for the area of the production area authorization, based on the most recent water level measurements; and

(7) a summary of the progress achieved towards aquifer restoration.

(e) Restoration table values achieved. When the permittee determines that constituents in the aquifer have been restored to the values in the Restoration Table, the restoration shall be demonstrated by stability sampling in accordance with subsection (f) of this section.

(f) Stability sampling. The permittee shall obtain stability samples and complete an analysis for certain parameters listed in the restoration table from all production area baseline wells. Stability samples shall be conducted at a minimum of 30-day intervals for a minimum of three sample sets and reported to the executive director. The permittee shall notify the executive director at least two weeks in advance of sample dates to provide the opportunity for splitting samples and for selecting additional wells for sampling, if desired. To insure water quality has stabilized, a period of one calendar year must elapse between cessation of restoration operations and the final set of stability samples. Upon acknowledgment in writing by the executive director confirming achievement of final restoration, the permittee shall accomplish closure of the area in accordance with §331.86 of this title (relating to Closure).

(g) Amendment of restoration table or range table values. After an appropriate effort has been made to achieve restoration in accordance with the requirements of subsection (a) of this section, the permittee may cease restoration operations, reduce bleed and request that the restoration table be amended. An amended restoration table value for each parameter listed in the restoration table cannot exceed the maximum value for the respective parameter in the permit range table required under §331.82(e)(7) of this title. With the request for amendment of the restoration table values, the permittee shall submit the results of three consecutive sample sets taken at a minimum of 30-day intervals from all production area baseline wells used in determining the restoration table to verify current water quality. Stabilization sampling may commence 60 days after cessation of restoration operations. The permittee shall notify the executive director of his or her intent to cease restoration operations and reduce the bleed 30 days prior to implementing these steps. The permittee shall submit an application for an amendment to the restoration table within 120 days of receipt of authorization from the executive director to cease restoration operations and reduce the bleed. If any restoration table value for any parameter listed in the restoration table will exceed the maximum value for the respective parameter in the permit range table, the permittee must submit an application for a major amendment of the permit range table.

(1) In determining whether the restoration table or range table should be amended, the commission will consider the following items addressed in the request:

(A) uses for which the groundwater in the production area was suitable at baseline water quality levels;

(B) actual existing use of groundwater in the production area prior to and during mining;

(C) potential future use of groundwater of baseline quality and of proposed restoration quality;

(D) the effort made by the permittee to restore the groundwater to baseline;

(E) technology available to restore groundwater for particular parameters;

(F) the ability of existing technology to restore groundwater to baseline quality in the area under consideration;

(G) the cost of further restoration efforts;

(H) the consumption of groundwater resources during further restoration; and

(I) the harmful effects of levels of particular parameter.

(2) The commission may amend the restoration table or range table if it finds that:

(A) reasonable restoration efforts have been undertaken, giving consideration to the factors listed in paragraph (1) of this subsection;

(B) the values for the parameters describing water quality have stabilized for a period of one year;

(C) the formation water present in the exempted portion of the aquifer would be suitable for any use to which it was reasonably suited prior to mining; and

(D) further restoration efforts would consume energy, water, or other natural resources of the state without providing a corresponding benefit to the state.

(3) If the restoration table is amended, restoration sampling shall commence and proceed as described in subsection (f) of this section, except the stability period shall be for a period of two years unless the owner or operator can demonstrate through modeling or other means that a period of less than two years is appropriate for a demonstration of stability.

(4) If the request for an amendment of the restoration table or range table values is not granted, the permittee shall restart restoration efforts.

§331.108. Opportunity for a Contested Case Hearing on a Production Area Authorization Application.

(a) An application for a new production area authorization is not subject to opportunity for a contested case hearing if:

(1) the authorization is for a production area within the boundary of the permit under which the authorization will be issued and the permit includes a range table with values established in accordance with the requirements in §305.49(a)(10) of this title (relating to Additional Contents of Application for an Injection Well Permit);

(2) the application includes a restoration table with restoration parameter values that do not exceed the high values for the respective parameters in the permit range table; and

(3) the application is for a production area within the boundary of the permit under which the proposed authorization will be issued, and the application meets the requirements at §331.104(a) - (d) of this title (relating to Establishment of Baseline and Control Parameters for Excursion Detection) regarding baseline wells; or

(4) the application requests authorization for a new, and subsequent, production area within the permit boundary of a permit after the first production area authorization has been issued for a production area within the permit boundary.

(b) An application to amend a restoration table included in an issued production area authorization is not subject to opportunity for a contested case hearing if the restoration parameter values in the proposed amended restoration table do not exceed the respective values in the permit range table included in the permit under which the production area authorization was issued.

(c) An application to amend a restoration table to increase any restoration table value included in an issued production area authorization is subject to opportunity for a contested case hearing if the permit under which the production area authorization was issued does not include a permit range table, established in accordance with the requirements of §305.49(a)(10) of this title.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER G. CONSIDERATION PRIOR TO PERMIT ISSUANCE

30 TAC §331.122

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and TWC, §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendment implements House Bill 1079, 83rd Legislature (2013), and TWC, §27.0513.

§331.122. Class III Wells.

The commission shall consider the following before issuing a Class III Injection Well or Area Permit:

(1) all information in the completed application for permit;

(2) all information in the Technical Report submitted with the application for permit, including the following:

(A) a map showing the injection well(s) and area for which the permit is sought and the applicable area of review. Within the area of review, the map must show the number, or name, and location of all existing producing wells, injection wells, dry holes, surface bodies of water, mines (surface and subsurface), quarries, public water systems, water wells, and other pertinent surface features, including residences and roads. The map should also show faults, if known or suspected. Only information of public record is required to be on this map. If production area authorizations are required prior to the commencement of mining, the proposed production areas must be shown on the map;

(B) a tabulation of reasonably available data on all wells within the area of review which penetrate the proposed injection zone. This data shall include a description of each well's type, construction, date drilled, location, depth, record of plugging and completion, and any additional information the executive director may require;

(C) maps and cross-sections indicating the vertical and lateral limits of those aquifers within the area of review that contain water with less than 10,000 milligrams per liter of total dissolved solids, their position relative to the injection formation, and the direction of water movement;

(D) maps and cross-sections, detailing the geologic structure of the local area;

(E) generalized map and cross-sections illustrating the regional geologic setting;

(F) proposed operating data:

(i) average and maximum daily rate and volume of fluid to be injected;

(ii) average and maximum injection pressure;

(iii) source of the injection fluids; and

(iv) analysis, as needed, of the chemical, physical, and radiological characteristics of the injection fluids;

(G) proposed formation testing program to obtain an analysis of the physical, chemical, and radiological characteristics of the receiving formation;

(H) proposed stimulation program;

(I) proposed operation and injection procedure;

(J) engineering drawings of the surface and subsurface construction details of the system;

(K) plans (including maps) for meeting the minimum monitoring requirements of the rules;

(L) expected changes in pressure, native fluid displacement, direction of movement of injection fluid;

(M) contingency plans to cope with all shut-ins or well failures so as to prevent the migration of contaminating fluids into fresh water;

(N) the corrective action proposed to be taken under §331.44 of this title (relating to Corrective Action Standards); and

(O) the permit range table required under §305.49(a)(10) and §331.82(e)(7) of this title (relating to Additional Contents of Application for an Injection Well Permit; and Construction Requirements);

(3) whether the applicant will assure, in accordance with Chapter 37, Subchapter Q of this title (relating to Financial Assurance for Underground Injection Control Wells), the resources necessary to close, plug, or abandon the well;

(4) the closure plan, in accordance with §331.46 of this title (relating to Closure Standards), submitted in the Technical Report accompanying the application; and

(5) any additional information reasonably required by the executive director for the evaluation of the proposed injection well or project.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 358. STATE WATER PLANNING GUIDELINES

SUBCHAPTER B. DATA COLLECTION

31 TAC §358.6

The Texas Water Development Board (TWDB or Board) adopts amendments to §358.6, relating to Water Loss Audits, with changes to the proposed text as published in the August 8, 2014, issue of the *Texas Register* (39 TexReg 6029).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTION

In 2013, the 83rd Texas Legislature passed House Bill 3605 (HB 3605) (Tex. Gen. Laws ch. 1139) amending Texas Water Code §16.0121, effective September 1, 2013, regarding the water loss audit that is required of all retail public utilities providing potable water. HB 3605 requires that a retail public utility (utility) providing potable water that receives financial assistance from the Board must use a portion of that, or any additional, financial assistance to mitigate the utility's system water loss if the utility's system water loss meets or exceeds a threshold to be established by Board rule. The Board's rules must address the amount of system water loss that requires a utility to take action and must address the use of financial assistance to mitigate system water loss.

DISCUSSION OF THE ADOPTED RULE

The adopted amendments add a new subsection (a) relating to Definitions. The amendments add definitions related to water loss including definitions for "apparent loss," "average system operating pressure," "real loss," "annual real loss," "unavoidable annual real loss," and "total water loss." Water loss consists of both real loss and apparent loss. Real loss includes actual loss of water such as through leaks and breaks. Apparent loss includes the "paper loss" of water, including meter inaccuracies, billing adjustments, and theft. Because both types of loss must be addressed in order to obtain an accurate measure of a utility's water loss, thresholds were proposed and are adopted for each type of loss.

Subsection (a) also provides acronyms for commonly used phrases and definitions for commonly used terms in the discussion of water loss.

Former subsection (a) is redesignated as subsection (b) and succeeding subsections are renumbered accordingly. The reference to "fewer" in subsection (b)(2) calls for the parallel comparative adjective "more" in subsection (b)(1)(A) to indicate a count of units. Therefore, "greater" has been deleted and "more" inserted in subsection (b)(1)(A).

Language in subsection (b)(3) lists the bases for the methodologies developed by the executive administrator in accordance with Texas Water Code §16.0121(d).

The language in subsection (b)(4) prior to the proposal and this adoption has been deleted because the language is in the statute and therefore applies without the need for further reference in the rule, and the language does not directly address an obligation of the utilities.

The adoption of the revision to subsection (d) adds references to Chapter 15, Subchapters G and H, the State Water Implementation Fund for Texas and the State Water Implementation Revenue Fund for Texas, as programs for which a water loss audit must be submitted for a utility to be eligible for financial assistance under one of the listed programs.

New subsection (e) is adopted and provides the thresholds that apply to the various categories of retail public utility listed in the statute. For purposes of the adopted rule, the first three categories defined in subsection (c) of §16.0121, consisting of utilities with populations of more than 10,000, are combined. The fourth category in Texas Water Code §16.0121(c), consisting of utilities with populations of 10,000 or less, is divided according to service connection density.

The adopted rule provides the following thresholds:

For a retail public utility with a population more than 10,000:

- Apparent loss expressed as gallons per connection per day must be less than the allowed apparent loss, consisting of a unique number calculated for each utility.

- Real loss expressed as gallons per connection per day must be less than three times the unavoidable annual real loss, consisting of a unique number calculated for each utility.

For a retail public utility with a population less than or equal to 10,000 and a service connection density more than or equal to 32 connections per mile:

- Apparent loss expressed as gallons per connection per day must be less than the allowed apparent loss, consisting of a unique number calculated for each utility.

- Real loss expressed as gallons per connection per day must be less than 50 gallons per connection per day.

For a retail public utility with a population less than or equal to 10,000 and a service connection density less than 32 connections per mile:

- Apparent loss expressed as gallons per connection per day must be less than the allowed apparent loss, consisting of a unique number calculated for each utility.

- Real loss expressed as gallons per mile per day must be less than 1,600 gallons per mile per day.

Apparent Loss

The adopted measure for apparent loss is gallons per connection per day regardless of the utility's size or connection density. The threshold for apparent loss is the allowed apparent loss $^{L}A_{m}$, which is defined as:

Figure 1: 31 TAC Chapter 358--Preamble

where V_m is the billed and metered volume of water in the system, V_i is the corrected input volume to the system, and N_c is the number of connections. The first term encompasses meter accuracy of 95 percent. The second term represents unauthorized consumption (theft), assumed for illustration to be 0.25 percent of the corrected input volume. The third term represents systematic data handling errors, assumed here to be 0.25 percent of the corrected input volume. This threshold is utility specific and includes assumptions based on industry standards.

Real Loss

For real loss, the population served by the utility as well as connection density determines the appropriate thresholds.

The measure for utilities that serve more than 10,000 people is derived from the Infrastructure Leakage Index. The source of the Index is a utility-specific calculation of unavoidable real loss based on the number of connections, miles of distribution lines, and operating pressure. The Index applies only to utilities with more than 3,000 connections and more than 16 connections per mile.

Application of the Infrastructure Leakage Index allows for a certain multiplier of unavoidable real loss based on water scarcity, water cost, and the economics of addressing water loss. Unavoidable real loss is a theoretical value representing the lowest water loss that could be achieved if all available technology were successfully applied.

In places where water resources are costly to develop, the recognized and desired threshold for real water loss is less than three times the unavoidable real loss. Therefore, a threshold for real loss for utilities that serves more than 10,000 people $^{L}R_{\geq 10,000}$, is proposed as:

Figure 2: 31 TAC Chapter 358--Preamble

where UARL = Unavoidable Annual Real Loss (gallons), N_c is the number of connections, L_m is the length of the water mains in miles, and P is the average system operating pressure in pounds per square inch calculated using a weighted average approach as identified in the American Water Works Association M36 Manual.

This calculation is based on industry methodology. The resulting threshold has units of gallons per connection per day. This threshold for real loss is utility specific.

For utilities serving populations of less than or equal to 10,000 people, two different calculations based on industry performance indices are used: (1) gallons per connection per day for utilities with a service connection density more than or equal to 32 connections per mile, and (2) gallons per mile per day for a service connection density less than 32 connections per mile.

No method to calculate a theoretical unavoidable real loss for smaller systems exists, and the quality of water loss reports submitted for smaller utilities is a concern, with many utilities reporting exceptionally low losses. A statistical approach based on erroneous low water loss reports could unfairly penalize utilities that submit high quality reports with acceptable levels of water loss. To address this concern, Equation (2) is used to calculate the thresholds for utilities that serve between 10,000 and 50,000 people and uses the median threshold as the threshold for utilities that serve less than or equal to 10,000 people with a service connection density more than or equal to 32 connections per mile. In other words, the utilities just above the 10,000 person line are used to help define a threshold for utilities below the 10,000 person line. This threshold is approximately 50 gallons per connection per day.

For utilities that serve less than or equal to 10,000 people and have a service connection density less than 32 connections per mile, a threshold of 1,600 gallons per mile per day is used, calculated by multiplying the threshold of 50 gallons per connection by 32 connections per mile.

Wholesale Factor

In recognition of the fact that many utilities may have volumes of wholesale water (water sold to another provider), an additional factor has been established to take into account those water volumes.

The real loss for those utilities with a wholesale component in their distribution system will be calculated as:

Figure 3: 31 TAC Chapter 358--Preamble

Adopted subsection (f) addresses the requirement that a utility whose water loss meets or exceeds the threshold for that utility must address the amount of system water loss with a portion of any financial assistance provided by the Board through one or more of the following programs:

- the Water Loan Assistance Fund,

- the State Participation Program,

- the State Water Implementation Revenue Fund for Texas,

- the Drinking Water State Revolving Fund,

- the Rural Water Assistance Fund,

- the Water Infrastructure Fund, or

- the Economically Distressed Areas Program.

Because each utility, each project, and the nature and extent of the water loss will be unique for a given utility, the nature of the mitigation measures will be determined by the Executive Administrator and the utility at the time the financial assistance is provided.

Adopted subsection (g) provides that the requirements in subsection (f) will apply to applications for financial assistance received by the Board after January 1, 2015.

PUBLIC COMMENTS

Comments on the proposed rule were received from the City of Austin, the City of Houston, the Lone Star Chapter of the Sierra Club, the National Wildlife Federation, and the Texas Rural Water Association.

RESPONSE TO COMMENTS

The National Wildlife Federation commented that the definitions of this rule in section 358.6(a) needed more specificity, partially regarding "a unique number" that is referenced in the rules. No changes will be made on the basis of this comment. The use of this term and what it represents is fully discussed in the preamble where the calculations and formulas are outlined. The intent is that these formulas and calculations will be used uniformly as outlined in the preamble.

The Sierra Club and the National Wildlife Federation expressed concern that mitigation not be limited to improving water loss assessment. The Sierra Club comments that state financial assistance for an infrastructure project should not be provided before a detailed water loss audit meeting quality control standards has been conducted and reviewed by TWDB staff and the results of that audit have been used to develop a plan that will address the water loss effectively. The Board makes no change to the rule based on these comments. The dictionary defines mitigation as "to make less severe," not necessarily "to solve." The rule defines "mitigation" as an action or actions taken to reduce the amount of total water loss in a system. The proposed rule has been structured to account for the unique circumstances of each utility. It also tailors the steps to be taken so that excessive water loss is identified, addressed, and managed in a manner that is appropriate for a given utility.

The National Wildlife Federation suggested amending subsection (a)(7), the definition of "mitigation," by adding the phrase "but not limited to" in order to clarify that the list of possible mitigation actions is not intended to be comprehensive. The Board makes no change in the rule based on this comment. The term "including" is generally understood as exemplary rather than exhaustive. Therefore the additional language is not necessary.

The National Wildlife Federation commented that the reference to "metrics" in §358.6(e) of the draft rule introduces unnecessary ambiguity regarding what constitutes a threshold. The Board acknowledges that the reference may be confusing. Therefore, the Board has removed the term "metrics" throughout the rule.

The City of Houston suggested that the Board consider whether water pressure should be part of the calculations of water loss in section 358.6(e). Industry methodology includes water pressure in calculating performance indicators for water loss. At this time, staff does not recommend a change in the rule based on this comment. Staff will include a request for the methodology used by the utility to determine water pressure when reviewing a utility's water loss data in association with an application for financial assistance.

The City of Houston also asked that the Board provide guidance on what evidence is needed to support the meter accuracy used in developing a utility's data. Staff does not recommend any change to the rule based on this comment. Staff will include a request for the methodology used by the utility to determine meter accuracy when reviewing a utility's water loss data in association with an application for financial assistance.

Regarding subsection (e)(1)(B), related to calculating the real loss of a utility with a population of more than 10,000, the Sierra Club recommended using a multiplier of two times unavoidable loss rather than the multiplier of three times. The Sierra Club suggested that the rationale for adopting a multiplier of three times is not clear and that a multiplier of two times would provide a sufficient adjustment. The Board makes no change in the rule based on this comment. The Infrastructure Leakage Index metric developed by the American Water Works Association and the International Water Association uses three variables for target-setting: water resource considerations, operational considerations, and financial considerations.

The American Water Works Association M36 Manual, "Water Audits and Loss Control Programs" recommends setting the target Infrastructure Leakage Index between 1 and 3 when:

- available resources are greatly limited and are very difficult and/or environmentally unsound to develop;

- operating with system leakage above this level would require expansion of existing infrastructure and/or additional water resources to meet demand; and

- water resources are costly to develop or purchase, and the ability to increase revenues via water rates is greatly limited due to regulations or low ratepayer affordability.

Based on this national standard and experience with data from utilities in the state, the Board believes that the three times multiplier is an appropriate measure.

The City of Austin recommended using a rolling three-year average of water loss instead of a single year's data when assessing whether the utility's water loss meets or exceeds a threshold. The Board makes no change in the rule based on this comment. The Board acknowledges that any given year may not accurately characterize the general status of a utility's water loss. But the mitigation requirement in the statute is "based on *a* water audit filed by the utility." In addition, not all utilities that are required to submit an audit under the statute will have three years of data. Nonetheless, such data, if available, may be part of the assessment by the executive administrator under subsection (f).

Both the National Wildlife Federation and the Sierra Club commented on the ambiguity of §358.6(e)(4), relating to utilities that have a large volume of wholesale water sales. The Sierra Club notes that the rule does not indicate what constitutes a "large volume." And the National Wildlife Federation observed that, because of the lack of quantification, utilities will not know when this section would apply. Based on these comments, the Board proposes to revise this section as follows: "(4) For a utility that has a volume of wholesale water sales that flow through the retail water distribution system:"

The Sierra Club also suggested that the "wholesale factor" in §358.6(e)(4) needs to be specified, either on an absolute or percentage basis. The wholesale factor was developed as an "acknowledgement" for the additional losses in a utility's distribution system due to wholesale water flowing through it. This factor only applies to loan applicants whose wholesale water travels through their retail distribution system, as opposed to those whose wholesale water is directly delivered to the customer(s). The Board believes that the revision noted above will address the Sierra Club's concern in a way that removes the uncertainty regarding when the factor applies.

The National Wildlife Federation points out a discrepancy between the label for Figure 2 in the preamble as representing utilities that serve more than 10,000 people and the symbol used in the equation that represents "more than or equal to" rather than "more than." The Board notes the clerical error and will make the appropriate change.

REGULATORY ANALYSIS

The board has reviewed the adopted rulemaking pursuant to Texas Government Code §2001.0225, which requires a regulatory analysis of major environmental rules. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The board is required to conduct a regulatory impacts analysis of a major environmental rule when the result of the adopted rulemaking is to exceed a standard set by federal law, unless the adopted rulemaking is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government implementing a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. The specific intent of the adopted rulemaking is to implement new state statutory requirements imposed by HB 3605 on the Texas Water Development Board to establish thresholds for retail public utility excess water loss and address the use of financial assistance to mitigate system water loss. The board has determined that the adopted rulemaking does not meet the definition of "major environmental rule" under that section; therefore, no regulatory impacts analysis of the adopted rulemaking is required. No comments were received by the board on the draft regulatory impacts analysis.

TAKINGS IMPACT ASSESSMENT

The board has determined that the promulgation and enforcement of this adopted rule constitutes neither a statutory nor a constitutional taking of private real property. The adopted rule does not adversely affect a landowner's rights in private real property, in whole or in part, because the adopted rule does not burden or restrict or limit the owner's right to or use of property. The specific intent of the adopted rulemaking is to implement new state statutory requirements imposed by HB 3605 on the Texas Water Development Board to establish thresholds for retail public utility excess water loss and address the use of financial assistance to mitigate system water loss. The adopted rulemaking would substantially advance this purpose by amending 31 TAC §358.6 to incorporate new statutory requirements. Therefore, the rulemaking does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

STATUTORY AUTHORITY

This rulemaking is adopted 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; and Texas Water Code §16.0121, which requires the board to develop appropriate thresholds and methodologies for a water loss audit required under that statute.

The adopted rulemaking affects Texas Water Code §16.0121, relating to Water Loss Audits.

§358.6. Water Loss Audits.

(a) Definitions. Unless otherwise indicated, in this section the following terms shall have the meanings assigned.

(1) Allowed apparent loss--A unique number for allowable apparent loss calculated for each utility.

(2) Annual real loss--A unique number calculated for each utility based on the utility's real loss on an annualized basis.

(3) Apparent loss--Unauthorized consumption, meter inaccuracy, billing adjustments, and waivers.

(4) Average system operating pressure--System operating pressure in pounds per square inch calculated using a weighted average approach as identified in the American Water Works Association M36 Manual.

(5) Category or Categories--A category of retail public utility as listed in Texas Water Code §16.0121(c).

(6) Executive Administrator--The executive administrator of the Board.

(7) Mitigation--An action or actions taken by a retail public utility to reduce the amount of total water loss in a system. Mitigation may include a detailed water loss assessment, pipe or meter replacement, or addition or improvement of monitoring devices to detect water loss.

(8) Real loss--Loss from main breaks and leaks, storage tank overflows, customer service line breaks, and line leaks.

(9) Retail public utility or utility--A retail public utility as defined by Texas Water Code §13.002.

(10) Service connection density--The number of a retail public utility's connections on a per mile basis.

(11) Total water loss--The sum of a utility's real loss and apparent loss.

(12) Unavoidable annual real loss--A unique number calculated for each utility based on the number of connections, miles of distribution lines, and operating pressure.

(b) A retail public utility that provides potable water shall perform a water loss audit and file with the executive administrator a water

loss audit computing the utility's system water loss during the preceding calendar year, unless a different 12-month period is allowed by the executive administrator. The water loss audit may be submitted electronically.

(1) Audit required annually. The utility must file the water loss audit with the executive administrator annually by May 1st if the utility:

(A) has more than 3,300 connections; or

(B) is receiving financial assistance from the board, regardless of the number of connections. A retail public utility is receiving financial assistance from the board if it has an outstanding loan, loan forgiveness agreement, or grant agreement from the board.

(2) Audit required every five years. The utility must file the water loss audit with the executive administrator by May 1, 2016, and every five years thereafter by May 1st if the utility has 3,300 or fewer connections and is not receiving financial assistance from the board.

(3) The water loss audit shall be performed in accordance with methodologies developed by the executive administrator based on the population served by the utility and taking into consideration the financial feasibility of performing the water loss audit, population density in the service area, the retail public utility's source of water supply, the mean income of the service population, and any other factors determined by the executive administrator. The executive administrator will provide the necessary forms and methodologies to the retail public utility.

(c) The executive administrator shall determine if the water loss audit is administratively complete. A water loss audit is administratively complete if all required responses are provided. In the event the executive administrator determines that a retail public utility's water loss audit is incomplete, the executive administrator shall notify the utility.

(d) A retail public utility that provides potable water that fails to submit a water loss audit or that fails to correct a water loss audit that is not administratively complete within the timeframe provided by the executive administrator is ineligible for financial assistance for water supply projects under Texas Water Code, Chapter 15, Subchapters C, D, E, F, G, H, J, O, Q, and R; Chapter 16, Subchapters E and F; and Chapter 17, Subchapters D, I, K, and L. The retail public utility will remain ineligible for financial assistance until a complete water loss audit has been filed with and accepted by the executive administrator.

(e) The following thresholds shall apply to the indicated categories of retail public utility:

(1) For a retail public utility with a population of more than 10,000:

(A) Apparent loss expressed as gallons per connection per day must be less than the utility's allowed apparent loss.

(B) Real loss expressed as gallons per connection per day must be less than three times the utility's unavoidable annual real loss.

(2) For a retail public utility with a population of 10,000 or fewer and a service connection density more than or equal to 32 connections per mile:

(A) Apparent loss expressed as gallons per connection per day must be less than the utility's allowed apparent loss.

(B) Real loss expressed as gallons per connection per day must be less than 50 gallons per connection per day.

(3) For a retail public utility with a population of 10,000 or fewer and a service connection density less than 32 connections per mile:

(A) Apparent loss expressed as gallons per connection per day must be less than the utility's allowed apparent loss.

(B) Real loss expressed as gallons per mile per day must be less than 1,600 gallons per mile per day.

(4) For a utility that has a volume of wholesale water sales that flow through the retail water distribution system:

(A) Apparent loss expressed as gallons per connection per day, determined using a modified calculation that includes the wholesale volume, must be less than the utility's allowed apparent loss.

(B) Real loss, expressed as gallons per connection per day and including a wholesale factor that takes into account the wholesale water volume, must be less than three times the utility's unavoidable annual real loss.

(f) If a retail public utility's total water loss meets or exceeds the threshold for that utility, the retail public utility must use a portion of any financial assistance received from the board for a water supply project to mitigate the utility's water loss. Mitigation will be in a manner determined by the retail public utility and the executive administrator in conjunction with the project proposed by the utility and funded by the board.

(g) Subsection (f) of this section shall apply to applications for financial assistance received by the board after January 1, 2015.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2014.

TRD-201405565
Les Trobman
General Counsel
Texas Water Development Board
Effective date: December 10, 2014
Proposal publication date: August 8, 2014
For further information, please call: (512) 463-8061

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER N. COUNTY SALES AND USE TAX

34 TAC §§3.251 - 3.253

The Comptroller of Public Accounts adopts the repeal of Subchapter N, concerning County Sales and Use Tax, without changes to the proposed text as published in the May 30, 2014, issue of the *Texas Register* (39 TexReg 4174). The content of §3.251 (Adopting or Abolishing County Tax) is being repealed entirely and will not be included in another section of this or another subchapter. The content of §3.252 (Collection and

Allocation of County Tax) and §3.253 (Use Tax) will be included and updated in new §3.334 of this title, Local Sales and Use Taxes.

No comments were received regarding adoption of the repeals.

These repeals are adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2. These repeals implement Tax Code, Chapter 323, County Sales and Use Tax Act.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 18, 2014.

TRD-201405490
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2015
Proposal publication date: May 30, 2014
For further information, please call: (512) 475-0387

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SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.334

The Comptroller of Public Accounts adopts new §3.334, concerning local sales and use taxes, with changes to the proposed text as published in the May 30, 2014, issue of the *Texas Register* (39 TexReg 4175). The new section is located in Title 34, Chapter 3, Subchapter O, which is retitled State and Local Sales and Use Taxes.

As of October 2013, there were a total of 1,510 local sales and use taxing jurisdictions in Texas - 1,147 cities, 123 counties, 10 transit authorities, and 230 special purpose districts. Existing sections of this title that address how to collect, accrue, and remit taxes to these jurisdictions and other jurisdictions that are currently authorized, or may be authorized by the legislature in the future, are out of date and not conveniently organized. The new section replaces Subchapters N (County Sales and Use Tax), P (Municipal Sales and Use Tax), and R (Transit Sales and Use Tax) of Title 34, which are repealed. Relevant content from the sections in Subchapters N, P, and R is included and updated in this new section, which also incorporates applicable law and policy changes and policy clarifications and provides information about the rules that apply to the collection and accrual of local sales and use taxes by sellers and purchasers.

In addition, information about the collection, accrual, and remittance of local taxes is currently found in other sections of this title concerning specific taxable items - as noted, for example, in subsection (k) of this section - and the comptroller intends for the information in this new section to be consistent with the local sales and use tax information in those other sections. To the extent the information in this section differs from the information concerning local sales and use tax contained in other sections of this title, it is the comptroller's intent that this section control.

At a public hearing on the proposed section held on October 15, 2014, Mr. Darrell Boeske, speaking on behalf of the City of Humble, noted the substantial impact this section would have for communities like Humble, where more than 90% of the municipal budget comes from local sales and use taxes. Mr. Kyle Kasner requested that the comptroller clarify which policies in the section are longstanding and which will be applied prospectively. The legislature has delegated to the comptroller the responsibility for administering, collecting, and enforcing the local sales and use taxes, and the comptroller appreciates the importance of these tasks. In order to provide certainty to taxpayers and localities alike, the comptroller will apply subsection (h)(5) of this section, concerning drop shipments, and subsection (n) of this section, concerning prior contract exemptions, on a prospective basis as of the effective date of this section, January 1, 2015, in accordance with Tax Code, §151.022.

Subsection (a) contains definitions of key terms and phrases. The statutory sources for some of the defined terms and phrases are provided in the definitions themselves. In other cases the defined terms are deemed clear without the need for further explanation. The sources for certain terms and phrases are explained as follows.

The term "cable system" is used in Tax Code, §321.203(j) and §323.203(j) but is not defined in those statutory provisions. Subsection (a)(1) explains the comptroller's determination that the term "cable system" means a system that is used to provide cable television or bundle cable service, as those terms are defined in §3.313 of this title (concerning Cable Television Service and Bundle Cable Service).

Subsection (a)(6) provides a definition for the term "drop shipment," which is a commonly used term that appeared in sections of this title that are repealed. See, for example, §3.252(e) of this title (concerning Collection and Allocation of County Tax). This section defines the term according to longstanding comptroller policy.

New subsection (a)(7), which defines the term "engaged in business" by reference to §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules), is added to the version of this section that was proposed for public comment. Subsequent paragraphs are renumbered accordingly.

Subsection (a)(8) provides a definition of the term "extraterritorial jurisdiction" that is based on Local Government Code, §42.021.

The term "itinerant vendor" was defined in sections of Subchapters N, P, and R of this title, which are repealed. The definition provided in new subsection (a)(10) expands on the existing definition to provide additional guidance and clarity consistent with current comptroller policy as reflected in Tax Publication 94-105, "Guidelines for Collecting Local Sales and Use Tax" (February 2009).

The definition for the term "kiosk" in subsection (a)(11) comes directly from Tax Code, §321.002(a)(3).

The general definition for the term "place of business" provided in subsection (a)(14) is based on Tax Code, §321.002(a)(3). Additional information explaining agency policy as to how the term is defined for administrative offices; distribution centers, manufacturing plants, storage yards, warehouses, and similar facilities; job sites; kiosks; and purchasing offices, is provided in subsection (e).

Written comments regarding the proposed definition of the term "place of business" were provided by: Mr. Bill Hammond, on behalf of the Texas Association of Business; Mr. Ronnie Volkening, on behalf of the Texas Retailers Association; and Mr. Eric Cannon, on behalf of the City of Addison, Ms. Julie M. Robinson, on behalf of the City of Dickinson, Mr. Darrell Boeske, on behalf of the City of Humble, Ms. Sandra Yarbrough, on behalf of the City of Kerrville, Mr. Corby D. Alexander, on behalf of the City Manager's Office of the City of La Porte, Ms. Pam Moon, on behalf of the City of Lubbock, Mr. Alan Guard, on behalf of the City of Rowlett, Mr. Steve Smith, on behalf of the Town of Cross Roads, Mr. Robert D. Harmon, on behalf of the Fort Worth Transportation Authority, and Mr. Chris Yeary, on behalf of MuniServices (hereinafter "local governments"). Each of these commenters expressed concern about the statement in the proposed definition that a place of business is a location operated by a seller for the purpose of making sales "to members of the general public or to specific segments of the public."

The comptroller also received written comments from Mr. Wayne J. Sabo, on behalf of the City of Webster, expressing concern that the proposed section would inadvertently result in private clubs, such as Sam's Club, no longer being treated as places of business. Mr. Sabo recommended amending the language of the section to state: "An established outlet, office, or location operated by a seller for the purpose of selling taxable items to those other than employees, contractors, and individuals affiliated with the seller..."

In addition, at a public hearing held on October 15, 2014, the comptroller received oral comments on the proposed definition from: Mr. Boeske, Mr. Volkening, and Mr. John Kroll, on behalf of Michael's, Inc. Mr. Boeske echoed Mr. Sabo's concerns and voiced support for Mr. Sabo's recommended language. Mr. Kroll noted that the proposed definition could inadvertently result in purchasing offices no longer being places of business, as they often make sales only to related entities.

The comptroller has determined that the definition of the term "place of business of the retailer" in Tax Code, §321.002(a)(3) is subject to multiple interpretations. Consequently, additional guidance on the application of the term is necessary.

The comptroller's proposal that a place of business must sell taxable items to members of the general public, or specific segments of the public, was intended to give weight and meaning to the statutory language requiring that the location be established for the purpose of receiving orders. The comptroller appreciates that the proposed definition could have created confusion because the phrases "general public" and "segment of the public" do not have a single, clear meaning. In response to the concerns raised in the oral and written comments, the definition is revised from the version published for public comment. The revised definition states that a place of business must be operated for the purpose of selling taxable items "to those other than employees, contractors, and individual persons affiliated with the seller." It is the comptroller's intent that locations operated by warehouse membership clubs, such as Costco and Sam's Club, be treated as places of business. In addition, the comptroller intends for purchasing offices that make sales to related entities be treated as places of business, subject to the requirements of subsection (e)(4) concerning valid purchasing offices. Finally, in response to the concerns identified in the comments, the comptroller has revised the definition of "place of business" from the version that was proposed for public comment to delete the phrase "with regular hours of operation."

The term "purchasing office" in subsection (a)(15) is based on the statutory language in Tax Code, §321.002(a)(3). Written comments received by the comptroller from Mr. Volkening expressed concern that the proposed definition exceeded the comptroller's statutory authority. At a public hearing held on October 15, 2014, the comptroller also received oral comments from Mr. Volkening, Mr. Kroll, and Mr. Ned Munoz, on behalf of the Texas Association of Builders, expressing concern that the proposed definition deviated from the statutory language. In response to these concerns, the definition of the term is revised to follow the wording of Tax Code, §321.002(a)(3)(B) as closely as possible.

The word "receive" is widely used in the controlling local tax statutes, along with the modifiers "first" and "initially," but is not defined in those statutes. Compare, for example, Tax Code, §321.203(c) and (e)(2). A definition was included in subsection (a)(15) of the version of this section that was proposed for public comment. The comptroller received written comments from Mr. Volkening expressing concern that the proposed definition was too vague. At a public hearing on the proposed section held on October 15, 2014, the comptroller received oral comments from Mr. Kasner, representing unspecified north Texas cities, stating that the proposed definition was consistent with the definitions of the term adopted in other states with an origin-based sales tax. At the hearing, the comptroller also received oral comments from Mr. Volkening and Ms. Susan Bittick, on behalf of Ryan, LLC, stating that they did not understand the language used in the proposed definition. In response to the concerns identified in these oral and written comments, the definition of the term "receive" is deleted from the section. Subsequent paragraphs are renumbered accordingly. The comptroller intends to define the term in a future version of this section, however, and anticipates holding public discussions to solicit input on this topic.

A definition for the term "temporary place of business" provided in subsection (a)(19) memorializes policies that the comptroller has developed over time clarifying that locations such as a booth at a flea market, weekend trade show, or craft fair are places of business of the seller as the term is defined in Tax Code, §321.002(a)(3) because such locations are established for the purpose of selling taxable items to the public.

The comptroller has developed local tax guidelines relating to "traveling salespersons." The definition included in subsection (a)(21) memorializes those policy guidelines.

Subsection (a)(22) provides a definition for the term "two percent cap," which is the comptroller's longstanding terminology for describing the statutory requirement found in Tax Code, §321.101(f), that, as a general rule, local sales and use taxes due on a single transaction may total no more than 2.0% of the sales price.

Subsection (b), concerning the effect of other laws and comptroller policy, is included to explain that the laws and rules that apply to the collection of state sales and use taxes, such as the laws and rules governing the use of resale and exemption certificates and the determination of which items are taxable and which are exempt, also apply to local sales and use taxes, unless the law provides otherwise.

Subsection (c) addresses local tax rates, specifically identifying the range of tax rates that the four different types of local taxing jurisdictions authorized by the legislature may adopt.

Subsection (d) concerns the physical boundaries of the authority of local taxing jurisdictions. The subsection is titled, "Jurisdic-

tional boundaries, combined areas, and city tax imposed through strategic partnership agreements." Paragraph (1) explains how jurisdictional boundaries are established for the four different types of local taxing jurisdictions as determined by Local Government Code, Chapters 41, 42, and 43, Tax Code, Chapters 321, 322, and 323, and those entities identified in the Special District Local Laws Code and other provisions of other Texas Codes. Paragraph (2) explains how state and local taxes are to be collected in what are referred to as "combined areas" that have been authorized by the legislature through Tax Code, §321.102, and the responsibility the comptroller has to provide for the sharing of those revenues. In combined areas where the total sales and use tax imposed would otherwise exceed 2.0%, the Tax Code provides direction for how the rates of the jurisdictions in the combined area are to be adjusted in order to maintain the two percent cap. Paragraph (2) also implements House Bill 3159, 83rd Legislature, 2013, which enacted Health and Safety Code, §775.0754. This new section provides, in certain circumstances, an alternate method for maintaining the two percent cap. Paragraph (3) discusses how local city sales tax is to be collected under strategic partnership agreements that are authorized by Local Government Code, §43.0751.

Subsection (e) provides guidance on how the term "place of business" is applied in specific situations that are outside the scope of the general definition. These rules, which have been developed over time, address administrative offices that support a traveling salesperson (see, e.g., STAR Accession No. 200805376L (May 19, 2008) and STAR Accession No. 200904406H (April 29, 2009)); distribution centers, manufacturing plants, storage yards, warehouses, or similar facilities (see, e.g., §3.374(a) of this title (concerning Collection and Allocation of the City Sales Tax)); construction job sites concerning both residential and nonresidential real property according to longstanding agency policy and as passed into law in House Bill 3319, 80th Legislature, 2007; and kiosks (Tax Code, §321.002(a)(3)).

Written comments regarding proposed subsection (e)(2)(D), addressing when a distribution center, manufacturing plant, warehouse, or similar facility is not a place of business, were received from Mr. Hammond and Mr. Volkening. In addition, at a public hearing held on October 15, 2014, the comptroller received oral comments on this subsection from Mr. Volkening. The proposed subsection memorialized guidance previously provided in STAR Accession No. 200508201L (August 3, 2005). In response to the comments received, the comptroller is deleting subsection (e)(2)(D), revising subsection (e)(2)(C) to state that a retail location and an attached warehouse or distribution center will be treated as a single place of business, and superseding the guidance provided in STAR Accession No. 200508201L.

Subsection (e)(4), concerning valid purchasing offices, implements House Bill 590, 82nd Legislature, 2011 and Senate Bill 1533, 83rd Legislature, 2013. Written comments regarding proposed subsection (e)(4) were received from: Mr. Volkening; Mr. Kroll; Mr. Munoz; Ms. Robinson; Mr. Boeske; and Mr. John Hawkins, on behalf of the Texas Hospital Association. These comments expressed concern that the list of factors provided in subsection (e)(4)(C), which the comptroller proposed to consider in making a determination as to whether a purchasing office was a place of business, exceeded the comptroller's authority under Tax Code, §321.002(a)(3)(B). This provision was proposed to memorialize guidance previously provided in STAR Accession No. 200704372L (April 12, 2007). In response to these concerns, the comptroller is deleting proposed subsection (e)(4)(C) and superseding the guidance provided in STAR Accession No. 200704372L.

The written comments also expressed concern about proposed subsection (e)(4)(D), which was included to explain the comptroller's interpretation of the ambiguous term "significant business services." In addition to the written comments, at a public hearing held on October 15, 2014, the comptroller received oral comments on this issue from: Mr. Volkening, Mr. Kroll, and Mr. Munoz. The comptroller declines to delete all of subsection (e)(4)(D), as an explanation of the statutory term "significant business services" is necessary to provide guidance to taxpayers and to administer the statute consistently. In response to the concerns raised, however, the subsection is revised to more closely follow the language of Tax Code, §321.002(a)(3)(B).

Subsection (e) also states, in paragraph (4)(E) of the section that was proposed for public comment, that the special exclusion under Special District Local Laws Code, §3853.202(d), concerning the Dickinson Management District, for purchasing offices from the application of Tax Code, §321.203(m), formerly Tax Code, §321.203(l), to the administration of a sales and use tax imposed by the Dickinson Management District is invalid and the comptroller will not adopt or implement that exclusion. Written comments on this subsection were received from Ms. Robinson. In addition, at a public hearing held on October 15, 2014, the comptroller received oral comments on this subsection from the following individuals: Mr. Loren Smith, on behalf of the City of Dickinson; Mr. Renn Neilson of Baker Botts, LLP, on behalf of Exterran; and Mr. Ralph Parman of Exterran. Mr. Neilson also provided additional written comments. These oral and written comments requested that subsection (e)(4)(E) be deleted from the section.

The comptroller's position on the Dickinson Management District exemption is longstanding. As explained in correspondence to Senator Mike Jackson and Representative Larry Taylor on September 8, 2011, it is the comptroller's view that Special District Local Laws Code, §3853.202(d) violates Article III, Section 56 of the Texas Constitution, concerning Local and Special Laws, because it attempts to relieve the comptroller's office of the duties delegated to it by Tax Code, Chapter 321. Further, the comptroller believes that the general law codified as Tax Code, §321.002(a)(3) and §321.203(m) is a later-amended general provision that applies in place of the preexisting local law. In fact, the legality of the exclusion created under Special District Local Laws Code, §3853.202(d) was the subject of litigation. See City of Dickinson v. Combs, No. D-1-GV-12-000094 (353rd Dist. Ct., Travis County, Tex. filed Feb. 2, 2012). The City of Dickinson and the Intervenors (CIL Procurement LLC, EES Leasing LLC, EXLP Leasing LLC, and T.A.S. Proco LLC) filed a Joint Notice of Nonsuit on March 13, 2014. The comptroller declines to make the requested change.

Subsection (f) explains which local taxes are due when a place of business is bisected or otherwise crossed by multiple local taxing jurisdiction boundaries. Over the years, the comptroller has received requests for guidance when, for example, the boundaries of a local taxing jurisdiction cross a construction job site or a seller's brick and mortar store such that only part of the job site or store is located within the jurisdiction. The Tax Code is silent as to what local taxes are due in these types of situations. The comptroller has issued guidance over the years to address these situations. See, e.g. STAR Accession No. 9009L1044E01 (September 14, 1990) (explaining that the location of a store's cash register determines the local jurisdiction that is entitled to

any local tax that is due). This subsection memorializes that guidance. Minor revisions are made to paragraph (2)(A) and (B) from the version of this section that was proposed for adoption. These revisions are intended to improve the readability of this subsection.

Subsection (g) concerns sellers' and purchasers' responsibilities for collecting or accruing and remitting local sales and use taxes. Subsection (g)(1) and (2) of the version of the section that was proposed for public comment reflected a proposed change in comptroller policy with respect to the local taxing jurisdictions for which a seller must collect local use taxes. Under current policy, a seller's collection responsibilities are limited to those local taxing jurisdictions in which the seller is "engaged in business." See, for example, §3.253(c) and (d) of this title (concerning County Use Tax), which is repealed. This local use tax policy reflects the nexus requirement established by the United States Supreme Court's analysis of the Due Process and Commerce Clauses of the United States Constitution and enacted in Tax Code, §151.103 and §151.107. The comptroller determined that the plain language of the controlling statutes does not support the application of federal nexus requirements to intrastate sales of taxable items. Local use tax is due to the local taxing jurisdictions in which a taxable item is first used, stored or consumed. See Tax Code, §§321.205, 322.105, and 323.205. The comptroller therefore proposed ending the "engaged in business" limitation on sellers' obligation for collecting use tax and instead requiring all sellers with nexus in the state to collect all local taxes that are due.

Written comments regarding proposed subsection (g)(1) and (2) were received from: Mr. Doug Duffie, on behalf of the Texas Society of Certified Public Accountants; Mr. Hammond; Mr. Volkening; and local governments. These comments raised a variety of conflicting concerns. In their written comments, Mr. Duffie, Mr. Hammond, and Mr. Volkening expressed concern that sellers would be unable to comply with the proposed requirements. In contrast, the local governments requested that the proposed policy be implemented retrospectively. At a public hearing held on October 15, 2014, the comptroller received additional oral comments on the proposed change from: Mr. John Kennedy, on behalf of the Texas Taxpayers and Research Association; Ms. Eleanor Kim of DuCharme, McMillen & Associates, Inc.; and Mr. Volkening. These commenters expressed concern that the deletion of the "engaged in business" requirement would violate the due process and commerce clauses of the U.S. Constitution.

In response to the written and oral comments provided, the comptroller has decided not to change sellers' local use tax collection obligations at this time. The section is amended from the version that was proposed for public comment to incorporate existing policy from §§3.253(c) and (d), 3.375(c) and (d), and 3.425(c) and (d) of this title, which are repealed. Going forward, the comptroller intends to continue to evaluate sellers' local tax collection responsibilities, including holding discussions with representatives from industry, local government, and the public at large, in order to develop a policy that better follows the statutory language while addressing retailers' concerns and protecting the interests of local governments.

The comptroller also received oral comments from Ms. Kim recommending that the provisions of subsection (g)(2) regarding trailing nexus be revised to mirror proposed changes to §3.286 of this title. The comptroller agrees and has made the requested change.

Subsection (g)(3) reflects existing law and policy that if a seller does not collect sales or use tax that is due, the purchaser is liable for, and must accrue and pay, the tax directly to the comptroller. Minor revisions are made to the version of subsection (g)(3) proposed for public comment. Subparagraphs (A) and (B) are amended to use similar phrasing. In addition, the last sentence of subsection (g)(3)(B) is adopted as subsection (g)(2)(C).

Written comments on this subsection were also received from the local governments requesting that subsection (g) be revised to state that the failure by a seller or purchaser to properly charge, collect, report, or pay local tax to the proper local tax authority will result in delinquent local taxes for which the comptroller will issue a deficiency determination under Tax Code, §111.008. After carefully considering this request, the comptroller has determined that the change requested would duplicate language already present in this section. Subsection (b)(1) of this section provides that Tax Code, Title 2, Subtitles A (General Provisions) and B (Enforcement and Collection) apply to transactions involving local taxes. Tax Code, Chapter 111, concerning collection procedures, falls within Subtitle B. The comptroller therefore declines to make the requested change.

Subsection (h) explains how to determine the local taxing jurisdiction in which sales taxes are due. Paragraph (1) explains the consummation of sale concept. The place where a sale is consummated per Texas laws and agency policy determines which local sales taxes are due, not the location where a purchaser acquires title to a taxable item. See Tax Code, §321.203(a) and §323.203(a).

Subsection (h)(2) addresses the situation, which is not addressed by statute, in which a sale is consummated at a location that is within the boundaries of multiple special purpose taxing jurisdictions and/or multiple transit authority taxing jurisdictions. This paragraph reflects longstanding agency policy.

Subsection (h)(3) sets forth five general rules for determining where the sale of a taxable item is consummated for local sales tax purposes. These rules are taken from Tax Code, §321.203 and §323.203, and apply to all sellers engaged in business in this state, regardless of whether they have one or more places of business in Texas. Subsection (h)(3)(A) states that a sale made in person at a place of business in Texas is consummated at that place of business. This is based on Tax Code, §321.203(b) and (c) and §323.203(b) and (c). Subsection (h)(3)(B) states that if an order is (1) not placed in person, (2) is received at a place of business of the seller in Texas, and (3) is fulfilled at a location that is not a place of business in Texas, then the sale is consummated at the place of business where the order is received. This is based on Tax Code, §321.203(b) and (d) and §323.203(b) and (d). Subsection (h)(3)(C) states that if an order is placed by any means other than in person at a place of business in Texas, including the situation in which an order is placed in person at a kiosk, and the order is fulfilled at a place of business in Texas, then the sale is consummated at the place of business where the order is fulfilled. This is based on Tax Code, §321.203(b) and (c-1) and §323.203(b) and (c-1). Subsection (h)(3)(D) states that if an order is received by a seller at any location other than a place of business of the seller in Texas, and the order is fulfilled at a location in Texas that is not a place of business of the seller, then the sale is consummated at the location in Texas to which the order is shipped or delivered. This is based on Tax Code, §321.203(e)(2) and §323.203(e)(2). Finally, subsection (h)(3)(E) states that if an order is received outside of Texas, and is fulfilled outside of Texas, the sale is not consum-

mated in Texas. If the order is shipped or delivered to a location in Texas, however, local use tax is due based upon the location in Texas to which the order is shipped or delivered. This is based on Tax Code, §321.205 and §323.205.

Written comments on this subsection were received from local governments requesting that subsection (h)(3) of this section be amended to add the following language: "Order received at a place of business within the state, order fulfilled outside of the state. When an order is received by a seller at a place of business of the seller in this state, and the seller fulfills the order at a location outside of the state, the sale is consummated at the Texas place of business where the order is received." The scenario identified by the local governments is already addressed in subsection (h)(3)(A) and (B), which states that if an order is placed in person at a place of business of the seller in this state, or otherwise received at a place of business of the seller in this state and shipped or delivered from a location that is not a place of business of the seller, then the sale is consummated at the place of business at which the order is received. The comptroller declines to make the requested revision.

Subsection (h)(3)(F) addresses the exception to the general rules for certain economic development agreements established by Tax Code, §321.203(c-4) - (c-5) and §323.203(c-2) - (c-5). This subsection implements Senate Bill 997, 83rd Legislature, 2013. This subsection is revised from the version of the section proposed for public comment to follow the language of the statute more closely by stating that a qualifying warehouse must be a place of business of the seller. In addition, references to Tax Code, §321.203(c-2) - (c-3) and §321.203(c-2) - (c-3) are deleted as those provisions expired September 1, 2014.

Subsection (h)(4) explains where sales are consummated when made by traveling salespersons.

Subsection (h)(5) explains how a seller is to collect local sales and use taxes when the transaction involves a drop shipment. The provisions of this subsection will be applied on a prospective basis as of the effective date of this section, January 1, 2015, in accordance with Tax Code, §151.022. Prior policy on drop shipments, as expressed in STAR Accession No. 200501993L (January 13, 2005), provided that when an item is shipped directly to the purchaser from a third-party supplier, local sales taxes are due based on the location of the place of business of the seller where the order is received. Subsection (h)(5)(A) supersedes this sourcing rule, as well as the exclusive application of use tax to all items shipped from out of state that is currently found in the local tax rules. Subsection (h)(5)(A) provides that when an order is received at a seller's place of business in Texas, the sale is consummated at that location and local sales taxes apply, as provided under Tax Code, §321.203, rather than subjecting the order to use tax only under Tax Code, §321.205. This change in policy is intended to give weight to Tax Code, §151.051 (sales tax imposed on each sale of a taxable item in this state) and §321.203 (sale is consummated as provided by this section). In addition, the policy change will ease the administrative burden for sellers since drop shipments will be sourced in the same manner as all other sales consummated in this state, which, generally, is to the place of business where the order is received. This provision of the new section will be applied on a prospective basis to give affected sellers time to change their tax collection systems and practices.

The comptroller received written comments on this subsection from Mr. John Torigian of Krell & Torigian suggesting the addition of a drop-shipment scenario to subsection (h)(5). The comptroller agrees with Mr. Torigian's suggestion. The subsection is amended to add: "When an order for a taxable item is received by a seller at one location, but shipped by the seller to the purchaser from a different location, the sale is consummated at, and local sales tax is due based upon, the location designated in paragraph (3) of this subsection."

Subsection (h)(5)(B) concerning drop shipments of orders that are placed outside Texas reflects current law and longstanding agency policy that if an item is shipped to the purchaser from the third-party supplier, local use taxes are due based on the point of delivery. This is consistent with §§3.253, 3.375, and 3.425 of this title (concerning County Use Tax, City Use Tax, and Transit Use Tax, respectively), which are repealed, but which provided that use tax based on point of delivery is due whenever an item is shipped to a location in Texas for storage, use, or consumption.

Subsection (h)(6) provides guidance for itinerant vendors and persons operating vending machines or temporary places of business. Subsection (h)(6)(A) states longstanding policy as to how itinerant vendors are to collect sales tax, and only sales tax. Subsection (h)(6)(B) reflects longstanding policy that persons who operate vending machines in the state are treated as itinerant vendors. See, e.g., STAR Accession Nos. 8312H0552B06 (December 29, 1983) and 200111617L (November 15, 2001). Subsection (h)(6)(C) explains how tax is to be collected when a seller establishes a temporary place of business in the state, both under the law in effect prior to June 19, 2009, when there was a change in statute as noted in the paragraph, and the law in effect after that date. This paragraph implements Senate Bill 636, 81st Legislature, 2009.

Subsection (i) explains how sellers and purchasers determine the local tax jurisdiction in which use tax is due, if any. This subsection notes that the provisions of §3.346 of this title, concerning state use tax, apply to the local use tax.

Subsection (i) is revised from the version of the section proposed for public comment to reflect changes made to subsection (g). Subsection (i)(1) explains longstanding agency policy as to which local use taxes are due when all local sales taxes have been collected and the two percent cap has not been reached. Subsection (i)(1)(A) restates the well-established rule that applicable use taxes are due in the following order: city, county, special purpose district, and transit authority. Subsection (i)(1)(D) and (E) specifically addresses how local use tax is determined when tax is due to multiple special purpose districts or transit authorities. These paragraphs explain longstanding agency policy for determining the order in which such jurisdictions are to receive local use tax.

Subsection (i)(2) illustrates the application of the general use tax rules in four specific fact situations. Subsection (i)(2)(A) is amended to correct a misstatement in the version of the section that was proposed for public comment. If an order is received at any location that is not a place of business of the seller in Texas, including an out of state location, and the item is delivered to the purchaser in Texas from a location in this state that is not a place of business of the seller, then the sale is consummated at the location to which it is delivered. See subsection (h)(3)(D) of this section. In addition, minor revisions are made to subsection (i)(2)(B) and (C) to reflect the changes made to subsection (g)(1) and (2) to limit a seller's local use tax collection obligations to those local taxing jurisdictions in which the seller is engaged in business.

In addition, the comptroller received written comments on this subsection from Mr. Mark Vane of Gardere Wynne Sewell LLP on behalf of two Texas caterpillar dealers, Holt Cat and Mustang Cat. Mr. Vane expressed concerns about the ability of sellers to comply with the provisions of subsection (i) of this section. The comptroller appreciates the concerns Mr. Vane has identified; however, subsection (i) simply implements the Local Tax Code, which imposes a local use tax on any taxable item that is sold in this state within a local taxing jurisdiction that has not adopted a local tax and is shipped or delivered directly into a local taxing jurisdiction that has adopted a local tax. For example, Local Tax Code, §321.205(b) states: "If a sale of a taxable item is consummated in this state but not within a municipality that has adopted the taxes authorized by this chapter and the item is shipped directly, or brought by the purchaser or lessee directly, into a municipality that has adopted the taxes authorized by this chapter, the item is subject to the municipality's use tax." See also Local Tax Code, §321.105(b) and §323.205(b).

Subsection (j) provides guidance to persons who make purchases under a direct payment permit, which is based on Tax Code, §§321.205(c) and (d), 322.105(c), and 323.205(c) and (d). Subsection (j)(2) makes clear that a direct payment permit holder may make an irrevocable election to pay local use tax on purchases at the time the purchased items are first stored or when the items are first removed from storage for use in Texas. Local tax is due to the jurisdictions where the item is first stored regardless of which election is chosen. See §3.346(g) of this title.

Subsection (k) contains special rules for determining the application of local sales and use taxes to certain taxable goods and services. The paragraphs of this subsection reflect agency policies and statutory mandates for determining where the sales of items such as natural gas and electricity, amusement services, and cable television services are consummated, and they also provide cross-references to relevant sections in this title that provide additional information about these taxable items.

Subsection (l) identifies the special exemptions and provisions applicable to individual jurisdictions, or types of jurisdictions, mandated by the legislature - specifically, emergency services districts; jurisdictions that impose tax on residential sales of natural gas and electricity; jurisdictions that impose tax on sales of telecommunications services; the East Aldine Management District; and the Fort Bliss military installation.

Subsection (m) explains the restrictions that apply to local sales tax rebates and other economic incentives that may be authorized by certain local development corporations. The subsection implements Local Government Code, §501.161, and is also consistent with direction provided by the Attorney General of Texas in his publication: Economic Development Handbook for Texas Cities (2013).

Subsection (n) addresses the special rules that exist for prior contract exemptions that may apply when local taxing jurisdictions are authorized and voted into existence, tax rates are increased over time, or areas of existing local taxing jurisdictions are expanded through annexations. These provisions implement Tax Code, §§321.209 (Transition Exemption: General Purpose Sales and Use Tax), 321.2091 (Transition Exemption: Additional Municipal Sales and Use Tax), 321.303(b) (Sales Tax Permits and Exemption Resale Certificates), 322.108(a)(6) - (7) (Certain Provisions of Municipal Sales and Use Tax Applicable), 323.209 (Transition Exemption), and 323.303(c) (Sales Tax Permits and Exemption and Resale Certificates).

In this subsection, for purposes of administrative convenience and on a prospective basis from the effective date of this section, in accordance with Tax Code, §151.022, prior contract exemptions will be allowed when there is a new tax adopted by, or a tax increase in, any local taxing jurisdiction. The only place in the statutes that says a prior contract exemption applies to a tax increase is with regards to the additional city sales and use tax. See Tax Code, §321.101(b) and §321.2091. In addition, many STAR documents have allowed a prior contract exemption for city tax rate increases. However, taxpayers usually do not have the resources necessary to determine whether an increase in a city sales tax is tied to the imposition of the regular city sales tax, the imposition or increase of the additional city tax, or the imposition or increase of a street maintenance, Type A/B Development Corporation, or a sports and community venue project sales and use tax, which are also categorized by the comptroller as city taxes.

In addition, while the legislature has tied the administration of many special purpose districts to Tax Code, Chapter 321 concerning city sales and use taxes, some districts have been authorized with a specific exclusion from the statutes authorizing a prior contract exemption. Therefore, the legislature's intent is not clear whether to allow a prior contract exemption for an increase in a special purpose district tax rate when the district is administered under Tax Code, Chapter 321.

Other provisions of this subsection are not changed from what exists in §3.376 (concerning Prior Contract Exemptions for Cities) and §3.426 of this title (concerning Prior Contract Exemptions for Transit Authorities), which are repealed, with the exception of the attached graphics, which identify a special exemption certificate to be used to claim prior contract exemptions. These graphics are also being repealed, but the comptroller intends to develop a new exemption form to be used for local tax prior contract exemptions that will be available on the agency's website. Until the new exemption form is promulgated, taxpayers may use Texas Sales and Use Tax Exemption Certificate, Form 01-339, or any form promulgated by the comptroller that succeeds such form, to claim the exemption.

The comptroller received additional comments, both oral and written, from Mr. Volkening requesting that a small business impact study be performed in accordance with Government Code, §2006.002. The comptroller has considered Mr. Volkening's request, but has determined that because this section is proposed under Tax Code, Title 2, a statement of fiscal implications for small businesses is not required. Tax Code, §321.003 states: "Subtitles A and B, Title 2, and Chapters 142 and 151 apply to the taxes and to the administration and enforcement of the taxes imposed by this chapter in the same manner that those laws apply to state taxes, unless modified by this chapter." See also Tax Code, §323.002. Nothing in Tax Code, Chapters 321 or 323 modifies the application of Tax Code, Title 2, or otherwise requires the comptroller to perform a small business impact study.

The comptroller has also received both written and oral comments from Mr. Volkening, and oral comments from Ms. Bittick and Mr. Kroll, expressing concerns about the transparency of the rulemaking process. In promulgating this section, the comptroller has closely followed the requirements of the Administrative Procedures Act (Government Code, Chapter 2001), and has, in fact, gone beyond them. The comptroller first circulated a draft version of the section to the Taxpayer Advisory Group, including Mr. Volkening and representatives of Ryan, LLC, on November 15, 2013. The Texas Society of Certified

Public Accountants (TSCPA) provided comments, and changes were made to the section in response to their concerns. Neither the Texas Retailers Association nor Ryan, LLC provided any response to the draft section - no comments were made, no concerns were raised, and no meetings were requested. The section, as amended based on the comments received from TSCPA, was proposed in the *Texas Register* for public comment on May 30, 2014. The comptroller considered and responded to all written comments received in the 30-day comment period, as well as all written comments received thereafter. In response to Mr. Volkening's request, the comptroller held a public hearing on the proposed section on October 15, 2014. In the Notice of Hearing published on September 26, 2014, the comptroller provided a detailed description of those areas of the section that would be revised based on the written comments received. In short, the comptroller has provided several forums for all parties impacted by local tax issues to provide suggestions and raise concerns.

The new section is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and Tax Code, §§321.306, 322.203, and 323.306, which all provide that the comptroller may adopt reasonable rules and prescribe forms that are consistent with the provisions of those chapters regarding the administration of local sales and use taxes.

The new section implements Tax Code, Chapters 321 (Municipal Sales and Use Tax Act), 322 (Sales and Use tax for Special Purpose Taxing Authorities), and 323 (County Sales and Use Tax Act). However, other Texas code provisions determine what local taxing jurisdictions have authority to impose local sales and use taxes and some, but not all, of these code provisions are identified in the preamble of, or throughout, the section. Throughout the new section are other references to authorities and code provisions that are implemented by the provisions in the section.

§3.334. Local Sales and Use Taxes.

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

(1) Cable system--The system through which a cable service provider delivers cable television or bundled cable service, as those terms are defined in §3.313 of this title (relating to Cable Television Service and Bundled Cable Service).

(2) City--An incorporated city, municipality, town, or village.

(3) City sales and use tax--The tax authorized under Tax Code, §321.101(a), including the additional municipal sales and use tax authorized under Tax Code, §321.101(b), the municipal sales and use tax for street maintenance authorized under Tax Code, §327.003, the Type A Development Corporation sales and use tax authorized under Local Government Code, §504.251, the Type B Development Corporation sales and use tax authorized under Local Government Code, §505.251, a sports and community venue project sales and use tax adopted by a city under Local Government Code, §334.081, and a municipal development corporation sales and use tax adopted by a city under Local Government Code, §379A.081. The term does not include the fire control, prevention, and emergency medical services district sales and use tax authorized under Tax Code, §321.106, or the municipal crime control and prevention district sales and use tax authorized under Tax Code, §321.108.

(4) Comptroller's website--The agency's website concerning local taxes located at: http://www.window.state.tx.us/taxinfo/local/index.html.

(5) County sales and use tax--The tax authorized under Tax Code, §323.101, including a sports and community venue project sales and use tax adopted by a county under Local Government Code, §334.081. The term does not include the county health services sales and use tax authorized under Tax Code, §324.021, the county landfill and criminal detention center sales and use tax authorized under Tax Code, §325.021, or the crime control and prevention district sales and use tax authorized under Tax Code, §323.105.

(6) Drop shipment--A transaction in which an order is received by a seller at one location, but the item purchased is shipped by the seller from another location, or is shipped by the seller's third-party supplier, directly to a location designated by the purchaser.

(7) Engaged in business--This term has the meaning given in §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules).

(8) Extraterritorial jurisdiction--An unincorporated area that is contiguous to the corporate boundaries of a city as defined in Local Government Code, §42.021

(9) Fulfill--To complete an order by transferring a taxable item directly to a purchaser at a Texas location, or to ship or deliver a taxable item to a location in Texas designated by the purchaser.

(10) Itinerant vendor--A person who travels to various locations for the purpose of receiving orders and making sales of taxable items and who does not operate a place of business. For example, a person who sells rugs from the back of a truck that the person drives to a different location each day is an itinerant vendor. A person who sells items through vending machines is also an itinerant vendor. A salesperson that operates out of an office, place of business, or other location that provides administrative support to the salesperson is not an itinerant vendor.

(11) Kiosk--A small stand-alone area or structure:

(A) that is used solely to display merchandise or to submit orders for taxable items from a data entry device, or both;

(B) that is located entirely within a location that is a place of business of another seller, such as a department store or shopping mall; and

(C) at which taxable items are not available for immediate delivery to a purchaser.

(12) Local taxes--Sales and use taxes imposed by any local taxing jurisdiction.

(13) Local taxing jurisdiction--Any of the following:

(A) a city that imposes sales and use tax as provided under paragraph (3) of this subsection;

(B) a county that imposes sales and use tax as provided under paragraph (5) of this subsection;

(C) a special purpose district created under the Special District Local Laws Code or other provisions of Texas law that is authorized to impose sales and use tax by the Tax Code or other provisions of Texas law and as governed by the provisions of Tax Code, Chapters 321 or 323 and other provisions of Texas law; or

(D) a transit authority that imposes sales and use tax as authorized by Transportation Code, Chapters, 451, 452, 453, 457, or 460 and governed by the provisions of Tax Code, Chapter, 322.

(14) Place of business - general definition--An established outlet, office, or location operated by a seller for the purpose of selling taxable items to those other than employees, contractors, and individual persons affiliated with the seller. Places of business include, but are not limited to, call centers, showrooms, and clearance centers. The term also includes any location operated by a seller at which the seller receives three or more orders for taxable items during a calendar year. For example, a home office at which three or more items are sold through an online auction website is a place of business. Additional criteria for determining when a location is a place of business are provided in subsection (e) of this section for administrative offices; distribution centers, manufacturing plants, storage yards, warehouses and similar facilities; kiosks; and purchasing offices.

(15) Purchasing office--An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business.

(16) Seller--This term has the meaning given in §3.286 of this title and also refers to any agent or employee of the seller.

(17) Special purpose district--A local governmental entity authorized by the Texas legislature for a specific purpose, such as crime control, a local library, emergency services, county health services, or a county landfill and criminal detention center.

(18) Storage--This term has the meaning given in §3.346 of this title (relating to Use Tax).

(19) Temporary place of business--A location operated by a seller for a limited period of time for the purpose of selling and receiving orders for taxable items and where the seller has inventory available for immediate delivery to a purchaser. For example, a person who rents a booth at a weekend craft fair or art show to sell and take orders for jewelry, or a person who maintains a facility at a job site to rent tools and equipment to a contractor during the construction of real property, has established a temporary place of business.

(20) Transit authority--A metropolitan rapid transit authority (MTA), advanced transportation district (ATD), regional or subregional transportation authority (RTA), city transit department (CTD), county transit authority (CTA), regional mobility authority (RMA) or coordinated county transportation authority created under Transportation Code, Chapters 370, 451, 452, 453, 457, or 460.

(21) Traveling salesperson--A seller, or an agent or employee of a seller, who visits potential purchasers in person to solicit sales, and who does not carry inventory ready for immediate sale, but who may carry samples or perform demonstrations of items for sale.

(22) Two percent cap--A reference to the general rule that, except as otherwise provided by Texas law and as explained in this section, a seller cannot collect, and a purchaser is not obligated to pay, more than 2.0% of the sales price of a taxable item in total local sales and use taxes for all local taxing jurisdictions

(23) Use--This term has the meaning given in §3.346 of this title.

(24) Use tax--A tax imposed on the storage, use or other consumption of a taxable item in this state.

(b) Effect of other law.

(1) Tax Code, Title 2, Subtitles A (General Provisions) and B (Enforcement and Collection), Tax Code, Chapter 141 (Multistate Tax Compact) and Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax) apply to transactions involving local taxes. Related sections of this title and comptroller rulings shall also apply with respect to local taxes. This includes authorities such as court cases and federal law that affect whether an item is taxable or is excluded or exempt from taxation.

(2) Permits, exemption certificates, and resale certificates required by Tax Code, Chapter 151, shall also satisfy the requirements for collecting and remitting local taxes, unless otherwise indicated by this section or other sections of this title. For example, see subsection (n) of this section concerning prior contract exemptions.

(3) Any provisions in this section or other sections of this title related to a seller's responsibilities for collecting and remitting local taxes to the comptroller shall also apply to a purchaser if the seller does not collect local taxes that are due. The comptroller may proceed against the seller or purchaser for the local tax owed by either.

(c) Tax rates. Except as otherwise provided by law, no local governmental entity may adopt or increase a sales and use tax if, as a result of the adoption or increase of the tax, the combined rate of all sales and use taxes imposed by local taxing jurisdictions having territory in the local governmental entity would exceed 2.0% at any location within the boundaries of the local governmental entity's jurisdiction. The following are the local tax rates that may be adopted.

(1) Cities. Cities may impose sales and use tax at a rate of up to 2.0%.

(2) Counties. Counties may impose sales and use tax at rates ranging from 0.5% to 1.5%.

(3) Special purpose districts. Special purpose districts may impose sales and use tax at rates ranging from 0.125% to 2.0%.

(4) Transit authorities. Transit authorities may impose sales and use tax at rates ranging from 0.25% to 1.0%.

(d) Jurisdictional boundaries, combined areas, and city tax imposed through strategic partnership agreements.

(1) Jurisdictional boundaries.

(A) City boundaries. City taxing jurisdictional boundaries cannot overlap one another and a city cannot impose a sales and use tax in an area that is already within the jurisdiction of another city.

(B) County boundaries. County tax applies to all locations within that county.

(C) Special purpose district and transit authority boundaries. Special purpose districts and transit authorities may cross or share boundaries with other local taxing jurisdictions and may encompass, in whole or in part, other local taxing jurisdictions, including cities and counties. A geographic location or address in this state may lie within the boundaries of more than one special purpose district or more than one transit authority.

(D) Extraterritorial jurisdictions. Except as otherwise provided by paragraph (3) of this subsection concerning strategic partnership agreements and subsection (l)(5) of this section concerning the City of El Paso and Fort Bliss, city sales and use tax does not apply to taxable sales that are consummated outside the boundaries of the city, including sales made in a city's extraterritorial jurisdiction. However, an extraterritorial jurisdiction may lie within the boundaries of a special purpose district, transit authority, county, or any combination of the three, and the sales and use taxes for those jurisdictions would apply to those sales.

(2) Combined areas. A combined area is an area where the boundaries of a city overlap the boundaries of one or more other local taxing jurisdictions as a result of an annexation of additional territory by the city, and where, as the result of the imposition of the city tax in the area in addition to the local taxes imposed by the existing taxing jurisdictions, the combined local tax rate would exceed 2.0%. The comptroller shall make accommodations to maintain a 2.0% rate in any combined area. Sellers engaged in transactions on which local sales or use taxes are due in a combined area, or persons who must self-accrue and remit tax directly to the comptroller, must use the combined area local code when reporting the tax rather than the codes for the individual city, county, special purpose districts, or transit authorities that make up the combined area. The comptroller shall distribute the tax revenue generated in these combined areas to the local taxing jurisdictions located in the combined areas as provided in Tax Code, §321.102 or Health and Safety Code, §775.0754. Combined areas are identified on the comptroller's website.

(3) City tax imposed through strategic partnership agreements.

(A) The governing bodies of a district, as defined in Local Government Code, §43.0751, and a city may enter into a limited-purpose annexation agreement known as a strategic partnership agreement. Under this agreement, the city may impose sales and use tax within all or part of the boundaries of a district. Areas within a district that are annexed for this limited purpose are treated as though they are within the boundaries of the city for purposes of city sales and use tax.

(B) Counties, transit authorities, and special purpose districts may not enter into strategic partnership agreements. Sales and use taxes imposed by those taxing jurisdictions do not apply in the limited-purpose annexed area as part of a strategic partnership agreement between a city and an authorized district. However, a county, special purpose district, or transit authority sales and use tax, or any combination of these three types of taxes, may apply at locations included in a strategic partnership agreement between a city and an authorized district if the tax is imposed in that area by the applicable jurisdiction as allowed under its own controlling authorities.

(C) Prior to September 1, 2011, the term "district" was defined in Local Government Code, §43.0751 as a municipal utility district or a water control and improvement district. The definition was amended effective September 1, 2011, to mean a conservation and reclamation district operating under Water Code, Chapter 49.

(e) Place of business - special definitions. In addition to the general definition of the term "place of business" in subsection (a)(13) of this section, the following rules apply.

(1) Administrative offices supporting traveling salespersons. Any outlet, office, or location operated by a seller that serves as a base of operations for a traveling salesperson or that provides administrative support to a traveling salesperson is a place of business.

(2) Distribution centers, manufacturing plants, storage yards, warehouses, and similar facilities.

(A) A distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller at which the seller receives three or more orders for taxable items during the calendar year is a place of business.

(B) If a salesperson who receives three or more orders for taxable items within a calendar year is assigned to work from, or to work at, a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the facility is a place of business.

(C) If a location that is a place of business of the seller, such as a sales office, is in the same building as a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the entire facility is a place of business of the seller.

(3) Kiosks. A kiosk is not a place of business for the purpose of determining where a sale is consummated for local tax purposes. A seller who owns or operates a kiosk in Texas is, however, engaged in business in this state as provided in §3.286 of this title.

(4) Purchasing offices

(A) A purchasing office is not a place of business if the purchasing office exists solely to rebate a portion of the local sales and use tax imposed by Tax Code, Chapter 321 or 323 to a business with which it contracts; or if the purchasing office functions or exists to avoid the tax legally due under Tax Code, Chapter 321 or 323. A purchasing office does not exist solely to rebate a portion of the local sales and use tax or to avoid the tax legally due under Tax Code, Chapter 321 or 323 if the purchasing office provides significant business services, beyond processing invoices, to the contracting business, including logistics management, purchasing, inventory control, or other vital business services.

(B) When the comptroller determines that a purchasing office is not a place of business, the sale of any taxable item is deemed to be consummated at the place of business of the seller from whom the purchasing office purchased the taxable item for resale and local sales and use taxes are due according to the following rules.

(i) When taxable items are purchased from a Texas seller, local sales taxes are due based on the location of the seller's place of business where the sale is deemed to be consummated, as determined in accordance with subsection (h) of this section.

(ii) When the sale of a taxable item is deemed to be consummated at a location outside of this state, local use tax is due based on the location where the items are first stored, used or consumed by the entity that contracted with the purchasing office in accordance with subsection (i) of this section.

(C) In making a determination under subparagraph (A) of this paragraph, as to whether a purchasing office provides significant business services to the contracting business, the comptroller will look to the books and records of the purchasing office to determine whether the total value of the business services provided to the contracting business equals or exceeds the total value of processing invoices. If the total value of the business services provided, including logistics management, purchasing, inventory control, or other vital business services, is less than the total value of the service to process invoices, then the purchasing office will be presumed not to be a place of business of the seller.

(D) Dickinson Management District; purchasing office exclusion invalid. Special District Local Laws Code, §3853.202(d) is invalid to the extent that it attempts to exclude the Dickinson Management District from the application of Tax Code, §321.203(m), formerly Tax Code, §321.203(l). Any purchasing office operated within the Dickinson Management District is subject to this paragraph.

(f) Places of business and job sites crossed by local taxing jurisdiction boundaries.

(1) Places of business crossed by local taxing jurisdiction boundaries. If a place of business is crossed by one or more local taxing jurisdiction boundaries so that a portion of the place of business is located within a taxing jurisdiction and the remainder of the place of business lies outside of the taxing jurisdiction, tax is due to the local

taxing jurisdictions in which the sales office is located. If there is no sales office, sales tax is due to the local taxing jurisdictions in which any cash registers are located.

(2) Job sites.

(A) Residential repair and remodeling; new construction of an improvement to realty. When a contractor is improving real property under a separated contract, and the job site is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on any separately stated charges for taxable items incorporated into the real property must be allocated to the local taxing jurisdictions based on the total square footage of the real property improvement located within each jurisdiction, including the square footage of any standalone structures that are part of the construction, repair, or remodeling project. For more information about tax due on materials used at residential and new construction job sites, refer to §3.291 of this title (relating to Contractors).

(B) Nonresidential real property repair and improvement. When taxable services are performed to repair, remodel, or restore nonresidential real property, including a pipeline, transmission line, or parking lot, that is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on the taxable services, including materials and any other charges connected to the services performed, must be allocated among the local taxing jurisdictions based upon the total mileage or square footage, as appropriate, of the repair, remodeling, or restoration project located in each jurisdiction. For more information about tax due on materials used at nonresidential real property repair and remodeling job sites, refer to §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance).

(g) Sellers' and purchasers' responsibilities for collecting or accruing local taxes.

(1) Sale consummated in Texas; seller responsible for collecting local sales taxes and applicable local use taxes. When a sale of a taxable item is consummated at a location in Texas as provided by subsection (h) of this section, the seller must collect each local sales tax in effect at the location. If the total rate of local sales tax due on the sale does not reach the two percent cap, and the seller ships or delivers the item into another local taxing jurisdiction in which the seller is engaged in business, then the seller is required to collect additional local use taxes due, if any, based on the location to which the item is shipped or delivered. For more information regarding local use taxes, refer to subsection (i) of this section.

(2) Out-of-state sale; seller engaged in business in Texas. A seller who is engaged in business in this state is required to collect and remit local use taxes due, if any, on orders of taxable items shipped or delivered at the direction of the purchaser into a local taxing jurisdiction in this state in which the seller is engaged in business.

(3) Purchaser responsible for accruing and remitting local taxes if seller fails to collect.

(A) If a seller does not collect the state sales tax, any applicable local sales taxes, or both on a sale of a taxable item that is consummated in Texas, then the purchaser is responsible for filing a return and paying the tax. The local sales taxes due are based on the location in this state where the sale is consummated as provided in subsection (h) of this section.

(B) A purchaser who buys an item for use in Texas from a seller who does not collect the state use tax, any applicable local use taxes, or both, is responsible for filing a return and paying the tax. The local use taxes due are based on the location where the item is first stored, used, or consumed by the purchaser.

(C) For more information about how to report and pay use tax directly to the comptroller, see §3.286 of this title.

(4) Local tax is due on the sales price of a taxable item, as defined in Tax Code, §151.007, in the report period in which the taxable item is purchased or the period in which the taxable item is first stored, used, or otherwise consumed in a local taxing jurisdiction.

(h) Local sales tax. Determining the local taxing jurisdictions to which sales tax is due; consummation of sale.

(1) General rule. Except for the special rules applicable to direct payment permit purchases and certain taxable items as provided in subsections (j) and (k) of this section, each sale of a taxable item is consummated at the location indicated by the provisions of this subsection. Local sales taxes must be collected for all local taxing jurisdictions in effect at the location where the sale is consummated. Local use tax may also be due if the total amount of local sales taxes due does not reach the two percent cap, and the item purchased is shipped or delivered to a location in one or more different local taxing jurisdictions, as provided in subsection (i) of this section.

(2) Multiple special purpose district taxes, multiple transit authority sales taxes, or a combination of the two may apply to a single transaction. If the sale of a taxable item is consummated at a location within the boundaries of multiple special purpose districts or transit authorities, local sales tax is owed to each of the jurisdictions in effect at that location. For example, a place of business located in the city of San Antonio is within the boundaries of both the San Antonio Advanced Transportation District and the San Antonio Metropolitan Transit Authority, and the seller is required to collect sales tax for both transit authorities. Similarly, a place of business in Flower Mound is located within the boundaries of two special purpose districts, the Flower Mound Crime Control District and the Flower Mound Fire Control District, and the seller is responsible for collecting sales tax for both special purpose districts.

(3) Consummation of sale. The following rules, taken from Tax Code, §321.203 and §323.203, apply to all sellers engaged in business in this state, regardless of whether they have a place of business in Texas or multiple places of business in the state.

(A) Order placed in person at a seller's place of business in Texas. When a purchaser places an order for a taxable item in person at a seller's place of business in Texas, the sale of that item is consummated at that place of business, regardless of the location where the order is fulfilled, except in the limited circumstances described in subparagraph (F) of this paragraph, concerning qualifying economic development agreements.

(B) Order received at a place of business in Texas, fulfilled at a location that is not a place of business. When an order that is placed over the telephone, through the Internet, or by any means other than in person is received by the seller at a place of business in Texas, and the seller fulfills the order at a location that is not a place of business of the seller in Texas, such as a warehouse or distribution center, the sale is consummated at the place of business at which the order for the taxable item is received.

(C) Order fulfilled at a place of business in Texas. When an order is placed in person at a location that is not a place of business of the seller in this state, such as a kiosk, or when an order is placed over the telephone, through the Internet, or by any means other than in person, and the seller fulfills the order at a location that is a place of business in Texas, the sale is consummated at the place of business where the order is fulfilled.

(D) Order fulfilled within the state at a location that is not a place of business. When an order is received by a seller at any

location other than a place of business of the seller in this state, and the seller fulfills the order at a location in Texas that is not a place of business of the seller, then the sale is consummated at the location in Texas to which the order is shipped or delivered, or the location where it is transferred to the purchaser.

(E) Order received outside of the state, fulfilled outside of the state. When an order is received by a seller at a location outside of Texas, and the order is shipped or delivered into a local taxing jurisdiction from a location outside of the state, the sale is not consummated at a location in Texas. However, local use tax is due based upon the location in this state to which the item is shipped or delivered or at which possession of the item is taken by the purchaser as provided in subsection (i) of this section.

(F) Exception for qualifying economic development agreements entered into before January 1, 2009, pursuant to Tax Code, §321.203(c-4) - (c-5) or §323.203(c-4) - (c-5). This subparagraph is effective until September 1, 2024. If applicable, the local sales tax due on the sale of a taxable item is based on the location of the qualifying warehouse, which is a place of business of the seller, from which the item is shipped or delivered or at which the purchaser takes possession of the item.

(4) Orders received by traveling salespersons. Orders taken by traveling salespersons are received by the seller at the administrative office or other place of business from which the traveling salesperson operates, and such sales are consummated at the location indicated in paragraph (3) of this subsection. For example, if a traveling salesperson who operates out of a place of business of a seller in Texas takes an order for a taxable item, and the order is fulfilled at a location that is not a place of business of the seller in this state, the sale is consummated at the place of business from which the salesperson operates, in accordance with paragraph (3)(B) of this subsection. Similarly, if a traveling salesperson takes an order for a taxable item, and the order is fulfilled at a place of business of the seller in this state, the sale is consummated at the location of the place of business where the order is fulfilled, in accordance with paragraph (3)(C) of this subsection.

(5) Drop shipments.

(A) When an order for a taxable item is received at a seller's place of business in Texas, or by a traveling salesperson operating out of a place of business in this state, and the item is drop-shipped directly to the purchaser from a third-party supplier, the sale is consummated at, and local sales tax is due based upon, the location of the place of business where the order is received. When an order for a taxable item is received by a seller at one location, but shipped by the seller to the purchaser from a different location, the sale is consummated at, and local sales tax is due based upon, the location designated in paragraph (3) of this subsection. If the local sales taxes due based on the location of the seller's place of business at which the sale is consummated equal less than 2.0%, additional local use tax may be due based upon the location in this state to which the purchased item is shipped or delivered or at which possession of the item is taken by the purchaser as provided in subsection (i) of this section.

(B) When an order for a taxable item is received by the seller at a location outside of Texas, or by a traveling salesperson operating from a location outside of this state, and the item is drop-shipped directly to the purchaser from a third-party supplier, the item is subject to use tax. See subsection (i) of this section concerning use tax.

(6) Itinerant vendors; vending machines; temporary places of business.

(A) Itinerant vendors. Sales made by itinerant vendors are consummated at, and itinerant vendors must collect sales tax based upon, the location where the item is delivered or where the purchaser takes possession of the item. Itinerant vendors do not have any responsibility to collect use tax.

(B) Vending machines. Sales of taxable items made from a vending machine are consummated at the location of the vending machine. See §3.293 of this title (relating to Food; Food Products; Meals; Food Service) for more information about vending machine sales.

(C) Temporary places of business.

(i) Item transferred to purchaser at time of sale. When a seller operates a temporary place of business, and items purchased are transferred to the purchasers at the time of sale, the sales are consummated at, and local sales tax is due based upon, the location of the temporary place of business.

(ii) Order accepted at temporary place of business prior to June 19, 2009. If a seller received an order at a temporary place of business prior to June 19, 2009, and the order was fulfilled at another place of business of the seller in this state, the sale was consummated at, and local sales taxes are due based upon, the location of the place of business where the order was fulfilled and not the temporary location where the order was received.

(iii) Order accepted at temporary place of business on or after June 19, 2009. When a seller receives an order at a temporary place of business and the order is fulfilled at another location, the sale is consummated at, and local sales taxes are due based upon, the location of the temporary place of business where the order was received.

(i) Use tax. The provisions addressing the imposition of state use tax in §3.346 of this title also apply to the imposition of local use tax. For example, consistent with §3.346(e) of this title, all taxable items that are shipped or delivered to a location in this state that is within the boundaries of a local taxing jurisdiction are presumed to have been purchased for use in that local taxing jurisdiction as well as presumed to have been purchased for use in the state.

(1) General rules.

(A) When local use taxes are due in addition to local sales taxes as provided by subsection (h) of this section, all applicable use taxes must be collected or accrued in the following order until the two percent cap is reached: city, county, special purpose district, and transit authority. If more than one special purpose district use tax is due, all such taxes are to be collected or accrued before any transit authority use tax is collected or accrued. See subparagraphs (D) and (E) of this paragraph.

(B) If a local use tax cannot be collected or accrued at its full rate without exceeding the two percent cap, the seller cannot collect it, or any portion of it, and the purchaser is not responsible for accruing it.

(C) If a seller collects a local sales tax on an item, or a purchaser accrues a local sales tax on an item, a use tax for the same type of jurisdiction is not due on the same item. For example, once a city sales tax has been collected or accrued for an item, no use tax is due to that same or a different city on that item, but use tax may be due to a county, special purpose district, or transit authority. Similarly, if one or more special purpose district sales taxes have been collected or accrued for an item, no special purpose district use tax is due on that item, and if one or more transit authority sales taxes have been collected or accrued for an item, no transit authority use tax is due on that item.

(D) Collection or accrual of use tax for multiple special purpose districts. If more than one special purpose district use tax is in effect at the location where use of an item occurs, the special purpose district taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all special purpose district taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the district with the earliest effective date would exceed the two percent cap, the tax for that district is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (C) of this paragraph, whether use tax is due for the district that next became effective.

(i) If the competing special purpose districts became effective on the same date, the special purpose district taxes are due in the order of the earliest date for which the election in which the district residents authorized the imposition of sales and use tax by the district was held.

(ii) If the elections to impose the local taxes were held on the same date, the special purpose district taxes are due in the order of the earliest date for which the enabling legislation under which each district was created became effective.

(E) Collection or accrual of use tax for multiple transit authorities. If more than one transit authority use tax is in effect at the location where use of an item occurs, and the two percent cap has not been met, the transit authority taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all transit authority taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the authority with the earliest effective date would exceed the two percent cap, the tax for that authority is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (D) of this paragraph, whether use tax is due for the authority that next became effective.

(i) If the competing transit authorities became effective on the same date, the transit authority taxes are due in the order of the earliest date for which the election in which the authority residents authorized the imposition of sales and use tax by the authority was held.

(ii) If the elections to impose local taxes were held on the same date, the transit authority use taxes are due in the order of the earliest date for which the enabling legislation under which each authority was created became effective.

(2) General use tax rules applied to specific situations. The following fact patterns explain how local use tax is to be collected or accrued and remitted to the comptroller based on, and subject to, the general rules in paragraph (1) of this subsection.

(A) Sale consummated outside the state, item delivered from outside the state or from a location in Texas that is not operated by the seller - local use tax due. If a sale is consummated outside of this state according to the provisions of subsection (h) of this section, and the item purchased is either shipped or delivered to a location in this state as designated by the purchaser from a location outside of the state, or if the order is drop shipped directly to the purchaser from a third-party supplier, local use tax is owed based upon the location in this state to which the order is shipped or delivered. If the seller is engaged in business in the local taxing jurisdiction into which the order is shipped or delivered, the seller is responsible for collecting the local use tax due on the sale. If the seller does not collect the local use taxes due on the sale, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller according to the provisions in paragraph (1) of this subsection. For example, if an order for a taxable item is received by a seller at a location outside of Texas, and the order is shipped to the purchaser from a location outside of the state, local use tax is due based upon the location to which the order is shipped or delivered.

(B) Sale consummated in Texas outside a local taxing jurisdiction, item delivered into one or more local taxing jurisdictions - local use tax due. If a sale is consummated at a location in Texas that is outside of the boundaries of any local taxing jurisdiction according to the provisions of subsection (h) of this section, and the order is shipped or delivered to the purchaser at a location in this state that is within the boundaries of one or more local taxing jurisdictions, local use tax is due based on the location to which the items are shipped or delivered. If the seller is engaged in business in the local taxing jurisdiction where the items are shipped or delivered, the seller is responsible for collecting the local use taxes due. If the seller fails to collect any local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller. For example, if a seller uses its own delivery vehicle to transport a taxable item from a place of business that is outside the boundaries of a local taxing jurisdiction to a delivery location designated by a purchaser that is inside the boundaries of a local taxing jurisdiction, the seller is responsible for collecting the local use taxes due based on the location to which the items are delivered.

(C) Sale consummated in any local taxing jurisdictions imposing less than 2.0% in total local taxes - local sales taxes, and possibly use taxes, due. If a sale is consummated at a location in Texas where the total local sales tax rate imposed by the taxing jurisdictions in effect at that location does not equal or exceed 2.0% according to the provisions of subsection (h) of this section, and the item is shipped or delivered to the purchaser at a location in this state that is inside the boundaries of a different local taxing jurisdiction, additional local use tax may be due based on the location to which the order is shipped or delivered, subject to the two percent cap. If the seller is engaged in business in the local taxing jurisdiction into which the order is shipped or delivered, the seller is responsible for collecting any additional local use taxes due. See subsection (g) of this section. If the seller fails to collect the additional local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller. For example, if an order is received in person at a place of business of the seller, such that the sale is consummated at the location where the order is received as provided under subsection (h)(3)(A) of this section, and the local sales tax due on the sale does not meet the two percent cap, additional local use taxes may be due based on the location to which the order is shipped or delivered, subject to the provisions in paragraph (1) of this subsection. Or, if a purchaser places an order for a taxable item at a seller's place of business in Texas, and the seller ships or delivers the item from an out-of-state location to a location in this state as designated by the purchaser, local sales tax is due based upon the location of the place of business where the order is received. If the local sales tax due on the item does not meet the two percent cap, use tax, subject to the provisions in paragraph (1) of this subsection, is due based upon the location where the items are shipped or delivered.

(j) Items purchased under a direct payment permit.

(1) When taxable items are purchased under a direct payment permit, local use tax is due based upon the location where the permit holder first stores the taxable items, except that if the taxable items are not stored, then local use tax is due based upon the location where the taxable items are first used or otherwise consumed by the permit holder.

(2) If, in a local taxing jurisdiction, storage facilities contain taxable items purchased under a direct payment exemption certificate and at the time of storage it is not known whether the taxable items will be used in Texas, then the taxpayer may elect to report the use tax either when the taxable items are first stored in Texas or are first re-

moved from inventory for use in Texas, as long as use tax is reported in a consistent manner. See also §3.288(i) of this title (relating to Direct Payment Procedures and Qualifications) and §3.346(g) of this title.

(3) If local use tax is paid on stored items that are subsequently removed from Texas before they are used, the tax may be recovered in accordance with the refund and credit provisions of §3.325 of this title (relating to Refunds and Payments Under Protest) and §3.338 of this title (relating to Multistate Tax Credits and Allowance of Credit for Tax Paid to Suppliers).

(k) Special rules for certain taxable goods and services. Sales of the following taxable goods and services are consummated at, and local tax is due based upon, the location indicated in this subsection.

(1) Amusement services. Local tax is due based upon the location where the performance or event occurs. For more information on amusement services, refer to §3.298 of this title (relating to Amusement Services).

(2) Cable services. When a service provider uses a cable system to provide cable television or bundled cable services to customers, local tax is due as provided for in §3.313 of this title. When a service provider uses a satellite system to provide cable services to customers, no local tax is due on the service in accordance with the Telecommunications Act of 1996, §602.

(3) Florists. Local sales tax is due on all taxable items sold by a florist based upon the location where the order is received, regardless of where or by whom delivery is made. Local use tax is not due on deliveries of taxable items sold by florists. For example, if the place of business of the florist where an order is taken is not within the boundaries of any local taxing jurisdiction, no local sales tax is due on the item and no local use tax is due regardless of the location of delivery. If a Texas florist delivers an order in a local taxing jurisdiction at the instruction of an unrelated florist, and if the unrelated florist did not take the order within the boundaries of a local taxing jurisdiction, local use tax is not due on the delivery. For more information about florists' sales and use tax obligations, refer to §3.307 of this title (relating to Florists).

(4) Landline telecommunications services. Local taxes due on landline telecommunications services are based upon the location of the device from which the call or other transmission originates. If the seller cannot determine where the call or transmission originates, local taxes due are based on the address to which the service is billed. For more information, refer to §3.344 of this title (relating to Telecommunications Services).

(5) Mobile telecommunications services. Local taxes due on mobile telecommunications services are based upon the location of the customer's place of primary use as defined in §3.344(a)(8) of this title, and local taxes are to be collected as indicated in §3.344(h) of this title.

(6) Motor vehicle parking and storage. Local taxes are due based on the location of the space or facility where the vehicle is parked. For more information, refer to §3.315 of this title (relating to Motor Vehicle Parking and Storage).

(7) Natural gas and electricity. Any local city and special purpose taxes due are based upon the location where the natural gas or electricity is delivered to the purchaser. As explained in subsection (l)(1) of this section, residential use of natural gas and electricity is exempt from all county sales and use taxes and all transit authority sales and use taxes, most special purpose district sales and use taxes, and many city sales and use taxes. A list of the cities and special purpose districts that do impose, and those that are eligible to impose, local sales and use tax on residential use of natural gas and electricity is available on the comptroller's website. For more information, also refer to §3.295 of this title (relating to Natural Gas and Electricity).

(8) Nonresidential real property repair and remodeling services. Local taxes are due on services to remodel, repair, or restore nonresidential real property based on the location of the job site where the remodeling, repair, or restoration is performed. See also subsection (f)(2)(B) of this section and §3.357 of this title.

(9) Residential real property repair and remodeling and new construction of a real property improvement performed under a separated contract. When a contractor constructs a new improvement to realty pursuant to a separated contract or improves residential real property pursuant to a separated contract, the sale is consummated at the job site at which the contractor incorporates taxable items into the customer's real property. See also subsection (f)(2)(A) of this section and §3.291 of this title.

(10) Waste collection services. Local taxes are due on garbage or other solid waste collection or removal services based on the location at which the waste is collected or from which the waste is removed. For more information, refer to §3.356 of this title (relating to Real Property Service).

(l) Special exemptions and provisions applicable to individual jurisdictions.

(1) Residential use of natural gas and electricity.

(A) Mandatory exemptions from local sales and use tax. Residential use of natural gas and electricity is exempt from most local sales and use taxes. Counties, transit authorities, and most special purpose districts are not authorized to impose sales and use tax on the residential use of natural gas and electricity. Pursuant to Tax Code, §321.105, any city that adopted a local sales and use tax effective October 1, 1979, or later is prohibited from imposing tax on the residential use of natural gas and electricity. See §3.295 of this title.

(B) Imposition of tax allowed in certain cities. Cities that adopted local sales tax prior to October 1, 1979, may, in accordance with the provisions in Tax Code, §321.105, choose to repeal the exemption for residential use of natural gas and electricity. The comptroller's website provides a list of cities that impose tax on the residential use of natural gas and electricity, as well as a list of those cities that do not currently impose the tax, but are eligible to do so.

(C) Effective January 1, 2010, a fire control, prevention, and emergency medical services district organized under Local Government Code, Chapter 344 that imposes sales tax under Tax Code, §321.106, or a crime control and prevention district organized under Local Government Code, Chapter 363 that imposes sales tax under Tax Code, §321.108, that is located in all or part of a municipality that imposes a tax on the residential use of natural gas and electricity as provided under Tax Code, §321.105 may impose tax on residential use of natural gas and electricity at locations within the district. A list of the special purpose districts that impose tax on residential use of natural gas and electricity and those districts eligible to impose the tax that do not currently do so is available on the comptroller's website.

(2) Telecommunication services. Telecommunications services are exempt from all local sales taxes unless the governing body of a city, county, transit authority, or special purpose district votes to impose sales tax on these services. However, since 1999, under Tax Code, §322.109(d), transit authorities created under Transportation Code, Chapter 451 cannot repeal the exemption unless the repeal is first approved by the governing body of each city that created the local taxing jurisdiction. The local sales tax is limited to telecommunications services occurring between locations within Texas. See §3.344

of this title. The comptroller's website provides a list of local taxing jurisdictions that impose tax on telecommunications services.

(3) Emergency services districts.

(A) Authority to exclude territory from imposition of emergency services district sales and use tax. Pursuant to the provisions of Health and Safety Code, §775.0751(c-1), an emergency services district wishing to enact a sales and use tax may exclude from the election called to authorize the tax any territory in the district where the sales and use tax is then at 2.0%. The tax, if authorized by the voters eligible to vote on the enactment of the tax, then applies only in the portions of the district included in the election. The tax does not apply to sales made in the excluded territories in the district and sellers in the excluded territories should continue to collect local sales and use taxes for the local taxing jurisdictions in effect at the time of the election under which the district sales and use tax was authorized as applicable.

(B) Consolidation of districts resulting in sales tax sub-districts. Pursuant to the provisions of Health and Safety Code, §775.018(f), if the territory of a district proposed under Health and Safety Code, Chapter 775 overlaps with the boundaries of another district created under that chapter, the commissioners court of each county and boards of the counties in which the districts are located may choose to create a consolidated district in the overlapping territory. If two districts that want to consolidate under Health and Safety Code, §775.024 have different sales and use tax rates, the territory of the former districts located within the consolidated area will be designated as sub-districts and the sales tax rate within each sub-district will continue to be imposed at the rate the tax was imposed by the former district that each sub-district was part of prior to the consolidation.

(4) East Aldine Management District.

(A) Special sales and use tax zones within district; separate sales and use tax rate. As set out in Special District Local Laws Code, §3817.154(e) and (f), the East Aldine Management District board may create special sales and use tax zones within the boundaries of the District and, with voter approval, enact a special sales and use tax rate in each zone that is different from the sales and use tax rate imposed in the rest of the district.

(B) Exemptions from special zone sales and use tax. The sale, production, distribution, lease, or rental of; and the use, storage, or other consumption within a special sales and use tax zone of; a taxable item sold, leased, or rented by the entities identified in clauses (i) - (vi) of this subparagraph are exempt from the special zone sales and use tax. State and all other applicable local taxes apply unless otherwise exempted by law. The special zone sales and use tax exemption applies to:

(i) a retail electric provider as defined by Utilities Code, §31.002;

(ii) an electric utility or a power generation company as defined by Utilities Code, §31.002;

(iii) a gas utility as defined by Utilities Code, §101.003 or §121.001, or a person who owns pipelines used for transportation or sale of oil or gas or a product or constituent of oil or gas;

(iv) a person who owns pipelines used for the transportation or sale of carbon dioxide;

(v) a telecommunications provider as defined by Utilities Code, §51.002; or

(vi) a cable service provider or video service provider as defined by Utilities Code, §66.002.

(5) Imposition of city sales tax and transit tax on certain military installations; El Paso and Fort Bliss. Pursuant to Tax Code, §321.1045 (Imposition of Sales and Use Tax in Certain Federal Military Installations), for purposes of the local sales and use tax imposed under Tax Code, Chapter 321, the city of El Paso includes the area within the boundaries of Fort Bliss to the extent it is in the city's extraterritorial jurisdiction. However, the El Paso transit authority does not include Fort Bliss. See Transportation Code, §453.051 concerning the Creation of Transit Departments.

(m) Restrictions on local sales tax rebates and other economic incentives. Pursuant to Local Government Code, §501.161, Section 4A and 4B development corporations may not offer to provide economic incentives, such as local sales tax rebates authorized under Local Government Code, Chapters 380 or 381, to persons whose business consists primarily of purchasing taxable items using resale certificates and then reselling those same items to a related party. A related party means a person or entity which owns at least 80% of the business enterprise to which sales and use taxes would be rebated as part of an economic incentive.

(n) Prior contract exemptions. The provisions of §3.319 of this title (relating to Prior Contracts) concerning definitions and exclusions apply to prior contract exemptions.

(1) Certain contracts and bids exempt. No local taxes are due on the sale, use, storage, or other consumption in this state of taxable items used:

(A) for the performance of a written contract executed prior to the effective date of any local tax if the contract may not be modified because of the tax; or

(B) pursuant to the obligation of a bid or bids submitted prior to the effective date of any local tax if the bid or bids and contract entered into pursuant thereto are at a fixed price and not subject to withdrawal, change, or modification because of the tax.

(2) Annexations. Any annexation of territory into an existing local taxing jurisdiction is also a basis for claiming the exemption provided by this subsection.

(3) Local taxing jurisdiction rate increase; partial exemption for certain contracts and bids. When an existing local taxing jurisdiction raises its sales and use tax rate, the additional amount of tax that would be due as a result of the rate increase is not due on the sale, use, storage, or other consumption in this state of taxable items used:

(A) for the performance of a written contract executed prior to the effective date of the tax rate increase if the contract may not be modified because of the tax; or

(B) pursuant to the obligation of a bid or bids submitted prior to the effective date of the tax rate increase if the bid or bids and contract entered into pursuant thereto are at a fixed price and not subject to withdrawal, change, or modification because of the tax.

(4) Three-year statute of limitations.

(A) The exemption in paragraph (1) of this subsection and the partial exemption in paragraph (3) of this subsection have no effect after three years from the date the adoption or increase of the tax takes effect in the local taxing jurisdiction.

(B) The provisions of §3.319 of this title apply to this subsection to the extent they are consistent.

(C) Leases. Any renewal or exercise of an option to extend the time of a lease or rental contract under the exemptions provided by this subsection shall be deemed to be a new contract and no exemption will apply.

(5) Records. Persons claiming the exemption provided by this subsection must maintain records which can be verified by the comptroller or the exemption will be lost.

(6) Exemption certificate. An identification number is required on the prior contract exemption certificates furnished to sellers. The identification number should be the person's 11-digit Texas taxpayer number or federal employer's identification (FEI) number.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 18, 2014.

TRD-201405493
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2015
Proposal publication date: May 30, 2014
For further information, please call: (512) 475-0387

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SUBCHAPTER P. MUNICIPAL SALES AND USE TAX

34 TAC §§3.371 - 3.379

The Comptroller of Public Accounts adopts the repeal of Subchapter P, concerning Municipal Sales and Use Tax, without changes to the proposed text as published in the May 30, 2014, issue of the *Texas Register* (39 TexReg 4190). The content of §3.372 (Adopting, Increasing, Decreasing, or Abolishing City Tax) and §3.373 (Change or Alteration of City Boundaries) is being repealed entirely and will not be included in another section of this or another subchapter. The content of §3.374 (Collection and Allocation of the City Sales Tax), §3.379 (Contractors), §3.377 (Divergent Use of a Direct Payment, Resale or Exemption Certificate), §3.371 (Effect of Rules; Permits and Certificates; Exclusion of Certain Sales), §3.378 (Natural Gas and Electricity), §3.376 (Prior Contract Exemptions), and §3.375 (Use Tax) will be included as appropriate and updated in new §3.334 of this title, Local Sales and Use Taxes.

No comments were received regarding adoption of the repeals.

These repeals are adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2. These repeals implement Tax Code, Chapter 321, Municipal Sales and Use Tax Act.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 18, 2014.

TRD-201405491
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2015
Proposal publication date: May 30, 2014
For further information, please call: (512) 475-0387

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SUBCHAPTER R. TRANSIT SALES AND USE TAX

34 TAC §§3.421 - 3.429

The Comptroller of Public Accounts adopts the repeal of Subchapter R, concerning Transit Sales and Use Tax, without changes to the proposed text as published in the May 30, 2014, issue of the *Texas Register* (39 TexReg 4191). The content of §3.422 (Adopting, Increasing, Decreasing, or Abolishing Transit (MTA) Tax) and §3.423 (Change or Alteration of Authority Boundaries; Withdrawal from Authority; Notification Required) is being repealed entirely and will not be included in another section of this or another subchapter. The content of §3.424 (Collection and Allocation of Transit Sales Tax), §3.429 (Contractors), §3.427 (Divergent Use of a Direct Payment, Resale, or Exemption Certificate), §3.421 (Effect of Rules; Permits and Certificates; Exclusion of Certain Sales of Qualified Retailers), §3.428 (Natural Gas and Electricity), §3.426 (Prior Contract Exemptions), and §3.425 (Use Tax) will be included as appropriate and updated in new §3.334 of this title, Local Sales and Use Taxes.

No comments were received regarding adoption of the repeals.

These repeals are adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2. These repeals implement Tax Code, Chapter 322, Sales and Use Tax for Special Purpose Taxing Authorities.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 18, 2014.

TRD-201405492
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2015
Proposal publication date: May 30, 2014
For further information, please call: (512) 475-0387

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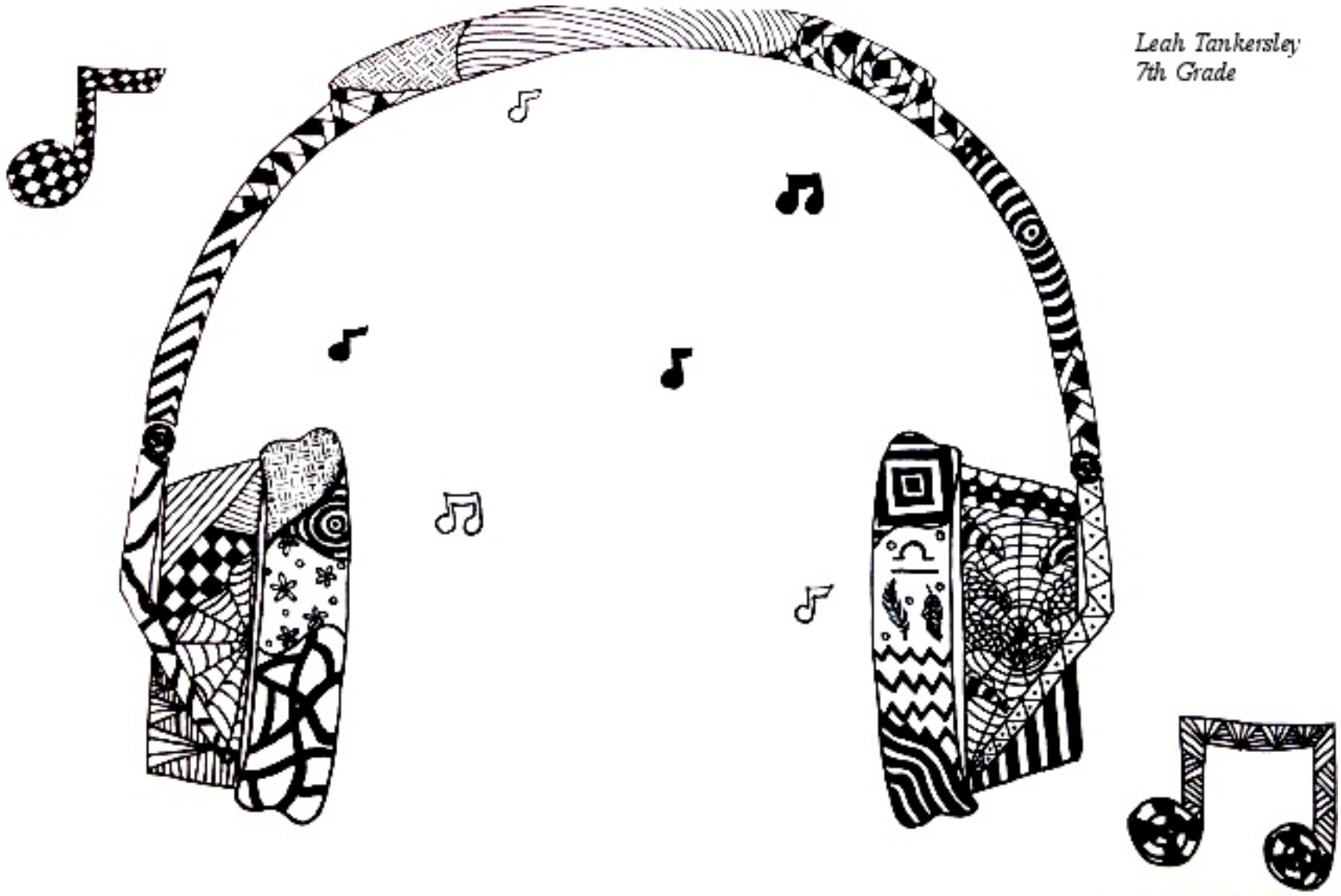

Leah Tankersley
7th Grade

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

State Securities Board

Title 7, Part 7

The State Securities Board (Agency), beginning December 2014, will review and consider for readoption, revision, or repeal Chapter 113, Registration of Securities; Chapter 114, Federal Covered Securities; Chapter 123, Administrative Guidelines for Registration of Open-End Investment Companies; Chapter 125, Minimum Disclosures in Church and Nonprofit Institution Bond Issues; Chapter 135, Industrial Development Corporations and Authorities; and Chapter 137, Administrative Guidelines for Regulation of Offers, in accordance with Texas Government Code, §2001.039. The rules to be reviewed are located in Title 7, Part 7 of the Texas Administrative Code.

The assessment made by the Agency at this time indicates that the reasons for initially adopting the chapters continue to exist.

The Agency's Board will consider, among other things, whether the reasons for adoption of these rules continue to exist and whether amendments are needed. Any changes to the rules proposed by the Agency's Board after reviewing the rules and considering the comments received in response to this notice will appear in the "Proposed Rules" section of the *Texas Register* and will be adopted in accordance with the requirements of the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001. The comment period will last for 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this notice of intention to review may be submitted in writing, within 30 days following the publication of this notice in the *Texas Register,* to Marlene Sparkman, General Counsel, P.O. Box 13167, Austin, Texas 78711-3167 or sent by facsimile to Ms. Sparkman at (512) 305-8336. Comments may also be submitted electronically to proposal@ssb.texas.gov. Comments will be reviewed and discussed in a future Board meeting.

TRD-201405518
John Morgan
Securities Commissioner
State Securities Board
Filed: November 19, 2014

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Adopted Rule Reviews

Office of the Governor

Title 1, Part 1

The Office of the Governor, Texas Military Preparedness Commission (TMPC) has completed its review of 1 TAC Chapter 4 (Texas Military Preparedness Commission).

The notice of proposed rule review was published in the October 3, 2014, issue of the *Texas Register* (39 TexReg 7967). The TMPC received no comments regarding the proposed rule review.

After completing the review of 1 TAC Chapter 4, the TMPC determined that the reasons for adopting these rules continue to exist and readopts these rules, without changes, pursuant to the requirements of §2001.039, Texas Government Code.

As a result of this review process, the TMPC may propose amendments in the future that may further clarify, update or supplement the existing rules, and result in more efficient processes and procedures. Any future proposed changes to the rules will be published in the Proposed Rules section of the *Texas Register* and will be open for public comment prior to final adoption by the TMPC in accordance with the requirements of the Administrative Procedure Act, Chapter 2001, Texas Government Code.

This notice concludes the TMPC's review of 1 TAC Chapter 4.

TRD-201405516
David Zimmerman
Assistant General Counsel
Office of the Governor
Filed: November 19, 2014

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State Securities Board

Title 7, Part 7

Pursuant to the notice of proposed rule review published in the September 5, 2014, issue of the *Texas Register* (39 TexReg 7182), the State Securities Board (Board) has reviewed and considered for readoption, revision, or repeal all sections of the following chapters of Title 7, Part 7 of the Texas Administrative Code, in accordance with Texas Government Code, §2001.039: Chapter 101, General Administration; Chapter 103, Rulemaking Procedure; and Chapter 104, Procedure for Review of Applications.

The Board considered, among other things, whether the reasons for adoption of these rules continue to exist. After its review, the Board finds that the reasons for adopting these rules continue to exist and readopts these chapters, without changes, pursuant to the requirements of the Texas Government Code.

No comments were received regarding the readoption of Chapters 101, 103, and 104.

This concludes the review of 7 TAC Chapters 101, 103, and 104.

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TRD-201405517
John Morgan
Securities Commissioner
State Securities Board
Filed: November 19, 2014

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: 28 TAC §22.3(c)(2):

PRIVACY NOTICE

NEITHER THE U.S. AGENTS THAT HANDLED THIS INSURANCE NOR THE INSURERS THAT HAVE UNDERWRITTEN THIS INSURANCE WILL DISCLOSE NONPUBLIC PERSONAL FINANCIAL INFORMATION CONCERNING THE BUYER TO NONAFFILIATES OF THE AGENTS OR INSURERS EXCEPT AS PERMITTED BY LAW.

Figure 1: 30 TAC Chapter 114--Preamble

Table 1: DACM and LIP Allocations for Collin County

Fiscal Year	DACM Allocation	LIP Allocation
2008	$2,320,809.00	$263,040.00
2009	$2,467,357.00	$275,436.00
2010	$2,662,915.00	$279,726.00
2011	$2,733,141.00	$195,062.00
2012	$348,677.00	$39,022.00
2013	$346,875.00	$39,022.00
2014	$342,517.00	$38,398.00
2015	$342,517.00	$38,398.00

Figure 2: 30 TAC Chapter 114--Preamble

Table 2: Estimated Annual Revenue from LIRAP Fee in Collin County

Fiscal Year	Estimated Revenue
2007	$1,818,948.00
2008	$1,981,020.00
2009	$2,186,430.00
2010	$2,323,410.00
2011	$2,455,248.00
2012	$2,546,550.00
2013	$2,466,336.00

Figure 1: 31 TAC Chapter 358 - Preamble

$$L_{A_m} = \frac{(0.053 \times V_m) + (0.0025 \times V_i) + (0.0025 \times V_i)}{365 \times N_c}$$

Figure 2: 31 TAC Chapter 358 - Preamble

$L_{R_{t \geq 10,000}} = \frac{3 \times UARL}{365 \times N_c}$, and

$UARL = [(0.15 \times N_c) + (5.41 \times L_m)] \times P$

Figure 3: 31 TAC Chapter 358 - Preamble

$L_R = (1 - WF) \times L_{R_n}$

where $WF = \frac{total\ wholesale\ water\ sales}{corrected\ input\ volume + water\ purchased}$, and

L_{R_n} = Real Loss Normalized (gallons/connection/day)

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.

Cancer Prevention and Research Institute of Texas

Request for Applications C-15-ESTCO-4

Established Company Product Development Award

This award mechanism seeks to fund the development of innovative products, services, and infrastructure with significant potential impact on patient care. Companies must have at least one round of professional institutional investment, and must be headquartered in Texas. The proposed project must further the development of new products for the diagnosis, treatment, or prevention of cancer; must establish infrastructure that is critical to the development of a robust industry; or must fill a treatment or research gap.

Award: No maximum amount; Maximum duration of 36 months.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on January 5, 2015, through 3:00 p.m. Central Time on February 9, 2015, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201405616
Heidi McConnell
Chief Operating Officer
Cancer Prevention and Research Institute of Texas
Filed: November 21, 2014

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Request for Applications C-15-NEWCO-4

New Company Product Development Award

This award mechanism seeks to support early-stage "start-up" companies in the development of new products for the diagnosis, treatment, or prevention of cancer. Companies must have a significant presence in Texas or be willing to relocate to Texas. To be eligible for the three (3) year funding award, a company applicant must be an early-stage start-up company with no previous rounds of professional institutional investment *(i.e.,* has not yet received Series A financing.)

Award: No maximum amount; Maximum duration of 36 months.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on January 5, 2015, through 3:00 p.m. Central Time on February 9, 2015, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201405612
Heidi McConnell
Chief Operating Officer
Cancer Prevention and Research Institute of Texas
Filed: November 21, 2014

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Request for Applications C-15-RELCO-4

Company Relocation Product Development Awards

This award mechanism seeks to support companies or limited partnerships that are willing to relocate to Texas in developing new products for the diagnosis, treatment, or prevention of cancer; to establish infrastructure that is critical to the development of a robust industry; or to fill a treatment or research gap. Companies must have at least one round of professional institutional investment.

Award: No maximum amount; Maximum duration of 36 months.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on January 5, 2015, through 3:00 p.m. Central Time on February 9, 2015, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201405613
Heidi McConnell
Chief Operating Officer
Cancer Prevention and Research Institute of Texas
Filed: November 21, 2014

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Comptroller of Public Accounts

Notice of Public Hearing on Proposed Texas Procurement and Support Services Rule Amendment Concerning Protests

The Comptroller of Public Accounts will conduct a public hearing to receive comments from interested persons concerning proposed amendments to 34 Texas Administrative Code §20.384, Protests.

The hearing is scheduled for December 18, 2014, at 2:00 p.m., in Room 1-100 of the William B. Travis Building, 1701 Congress Ave., Austin, Texas, 78701.

Any interested person may appear and offer comments or statements, either orally or in writing. Organizations, associations, or groups are encouraged to present their commonly held views or similar comments through a representative member where possible.

Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services should contact Charlene Rendon at Charlene.Rendon@cpa.state.tx.us. Requests should be made as far in advance as possible so that appropriate arrangements can be made.

TRD-201405500
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: November 19, 2014

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ, agency 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 **January 12, 2015.** 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 January 12, 2015.** 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: A N A ENTERPRISES INCORPORATED dba RB Food Mart; DOCKET NUMBER: 2014-1184-PST-E; IDENTIFIER: RN101909364; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month; and 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the pressurized piping associated with the UST system; PENALTY: $3,130; ENFORCEMENT COORDINATOR: John Fennell, (512) 239-2616; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480.

(2) COMPANY: AMERICAN HERITAGE HOUSING CORPORATION dba Northwest Mobile Home Park; DOCKET NUMBER: 2014-1171-PWS-E; IDENTIFIER: RN101224046; LOCATION: Houston, Harris County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.117(c)(2)(A) and (i)(1), by failing to collect lead and copper tap samples at the required five sample sites, have the samples analyzed at an approved laboratory, and submit the results to the executive director; and 30 TAC §290.117(i)(1), by failing to timely provide the results of lead and copper sampling to the executive director for the January 1, 2014 - June 30, 2014 monitoring period; PENALTY: $2,487; ENFORCEMENT COORDINATOR: Katie Hargrove, (512) 239-2569; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486.

(3) COMPANY: ARSHIA C-STORE, INCORPORATED dba Lakeside BBQ & Grocery; DOCKET NUMBER: 2014-1077-PST-E; IDENTIFIER: RN102222700; LOCATION: Bryan, Brazos County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(a)(2) and TWC, §26.3475(d), by failing to ensure the corrosion protection system was operated and maintained in a manner that will ensure corrosion protection is continuously provided to the underground storage tank (UST) system; and 30 TAC §334.10(b)(1)(B), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: $4,375; ENFORCEMENT COORDINATOR: Allyson Plantz, (512) 239-4593; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826.

(4) COMPANY: City of Bardwell; DOCKET NUMBER: 2014-1436-MWD-E; IDENTIFIER: RN101721199; LOCATION: Bardwell, Ellis County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013675001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; and 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0013675001, Monitoring and Reporting Requirements, by failing to timely submit a complete and accurate discharge monitoring report for the monitoring period ending April 30, 2014; PENALTY: $3,712; ENFORCEMENT COORDINATOR: Jacquelyn Green, (512) 239-2587; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951.

(5) COMPANY: City of Goodlow; DOCKET NUMBER: 2014-1228-PWS-E; IDENTIFIER: RN101439982; LOCATION: Goodlow, Navarro County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.109(f)(3) and §290.122(b)(2)(A) and (f), and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level (MCL) for total coliform during the months of June 2014 and July 2014, and by failing to timely provide public notification and submit a copy of the public notification to the executive director regarding the failure to comply with the MCL for total coliform for the month of June 2014; and 30 TAC §21.4 and §209.51(a)(3) and TWC, §5.702, by failing to pay Consolidated Water Quality fees, Public Health Service fees, and/or any associated late fees, for TCEQ Financial Account (FA) Number 23003529 for Fiscal Year (FY) 2014, and FA Number 91750032 for FY 2009 - 2014; PENALTY: $330; ENFORCEMENT COORDINATOR: Jason Fraley, (512) 239-2552; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951.

(6) COMPANY: City of Portland; DOCKET NUMBER: 2012-1472-MWD-E; IDENTIFIER: RN103016416; LOCATION: Portland, San Patricio County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0010478001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits; PENALTY: $36,000; Supplemental Environmental Project offset amount of $28,800 applied to Coastal Bend Bays and Estuaries Program, Incorporated; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503.

(7) COMPANY: City of San Marcos; DOCKET NUMBER: 2014-1188-PWS-E; IDENTIFIER: RN101416337; LOCATION: San Marcos, Hays County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.115(f)(1) 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 locational running annual average; PENALTY: $345; Supplemental Environmental Project offset amount of $345 applied to Texas State University - San Marcos; ENFORCEMENT COORDINATOR: Michaelle Garza, (210) 403-4076;

REGIONAL OFFICE: 12100 Park 35 Circle, Building A, Austin, Texas 78753.

(8) COMPANY: HARRISBURG WATER SUPPLY CORPORATION; DOCKET NUMBER: 2014-1057-PWS-E; IDENTIFIER: RN101440360; LOCATION: Jasper, Jasper County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.117(c)(2) and (i)(1), by failing to collect lead and copper tap samples at the required ten sample sites, have the samples analyzed at an approved laboratory, and submit the results to the executive director; and 30 TAC §290.117(i)(1), by failing to provide the results of lead and copper sampling to the executive director for the July 1, 2012 - December 31, 2012 monitoring period; PENALTY: $1,275; ENFORCEMENT COORDINATOR: Katie Hargrove, (512) 239-2569; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892.

(9) COMPANY: HEART O' TEXAS COUNCIL OF THE BOY SCOUTS OF AMERICA; DOCKET NUMBER: 2014-1337-PWS-E; IDENTIFIER: RN101285245; LOCATION: Bridgeport, Wise County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.46(f)(3)(C)(iii) and (4), by failing to submit routine reports and any additional documentation that the executive director may require to determine compliance with the requirements of this chapter; and 30 TAC §290.110(e)(2) and (5), and §290.111(h)(2) and (12), by failing to submit a Surface Water Monthly Operating Report with the required turbidity and disinfectant residual data to the executive director by the tenth day of the month following the end of the reporting period from January 2014 - June 2014; PENALTY: $420; ENFORCEMENT COORDINATOR: Michaelle Garza, (210) 403-4076; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951.

(10) COMPANY: INDEPENDENCE BREWING COMPANY, INCORPORATED; DOCKET NUMBER: 2014-1105-WQ-E; IDENTIFIER: RN106520497; LOCATION: Austin, Travis County; TYPE OF FACILITY: specialty beer brewery; RULES VIOLATED: TWC, §26.121(a)(1), by failing to prevent an unauthorized discharge of process water into or adjacent to any water in the state; and 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 industrial activities under Texas Pollutant Discharge Elimination System Multi-Sector General Permit Number TXR050000; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Alejandro Laje, (512) 239-2547; REGIONAL OFFICE: 12100 Park 35 Circle, Austin, Texas 78753.

(11) COMPANY: Kelly B. Edwards; DOCKET NUMBER: 2014-1677-WOC-E; IDENTIFIER: RN103922811; LOCATION: Richland Springs, San Saba County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license (public water supply); PENALTY: $175; ENFORCEMENT COORDINATOR: Rachel Bekowies, (512) 239-2608; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826.

(12) COMPANY: Lindsey Construction, Incorporated; DOCKET NUMBER: 2014-1701-WQ-E; IDENTIFIER: RN107712929; LOCATION: Porter, Montgomery County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Construction General Permit (stormwater); PENALTY: $875; ENFORCEMENT COORDINATOR: Jill Russell, (512) 239-4564; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452.

(13) COMPANY: ROLLINS HILLS ESTATES WATER SUPPLY CORPORATION; DOCKET NUMBER: 2014-0920-PWS-E; IDENTIFIER: RN101219434; LOCATION: Fort Worth, Parker County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3) and §290.122(c)(2)(A) and (f)(2), by failing to timely submit Disinfectant Level Quarterly Operating Report (DLQOR) to the executive director each quarter by the tenth day of the month following the end of each quarter and failed to provide timely public notification and submit a copy of the public notification to the executive director regarding the failure to submit DLQORs; 30 TAC §290.122(c)(2)(A) and (f)(2), by failing to timely provide public notification and timely submit a copy of the public notification to the executive director regarding the failure to conduct coliform monitoring during the month of March 2013; 30 TAC §290.117(c)(2) and (i)(1), by failing to collect annual lead and copper tap samples at the required five sample sites, have the samples analyzed at an approved laboratory and provide the results to the executive director; and 30 TAC §290.51(a)(6) and TWC, §5.702, by failing to pay Public Health Service fees and associated late fees for TCEQ Financial Administration Account Number 91840137; PENALTY: $710; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951.

(14) COMPANY: SIMMONS CUSTOM BOATS, LLC; DOCKET NUMBER: 2014-1221-AIR-E; IDENTIFIER: RN103039822; LOCATION: Bacliff, Galveston County; TYPE OF FACILITY: custom boat manufacturing plant; RULES 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 constructing and operating a source of air emissions; PENALTY: $3,937; ENFORCEMENT COORDINATOR: Carol McGrath, (210) 403-4063; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486.

(15) COMPANY: SUPERIOR LUBRICANTS TRANSPORT, INCORPORATED dba Superior Transport; DOCKET NUMBER: 2014-1353-PST-E; IDENTIFIER: RN103026993; LOCATION: Fort Worth, Tarrant County and Garland, Dallas County; TYPE OF FACILITY: common carrier; RULES VIOLATED: 30 TAC §334.5(b)(1)(A) and TWC, §26.3467(d), by failing to have deposited a regulated substance into a regulated underground storage tank system that was not covered by a valid, current TCEQ delivery certificate; PENALTY: $2,856; ENFORCEMENT COORDINATOR: Abigail Lindsey, (512) 239-2576; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951.

(16) COMPANY: Texas A&M University; DOCKET NUMBER: 2014-1295-AIR-E; IDENTIFIER: RN100216274; LOCATION: College Station, Brazos County; TYPE OF FACILITY: university; RULES VIOLATED: 30 TAC §122.143(4), Texas Health and Safety Code (THSC), §382.085(b), and Federal Operating Permit (FOP) Number O1624, Special Terms and Conditions Number 3.A.(iv)(1), by failing to conduct quarterly visible emissions observations; 30 TAC §116.115(c), THSC, §382.085(b), and New Source Review Permit Number 44762, Special Conditions Number 14, by failing to mark or physically identify permitted emission points with weatherproof tags; and 30 TAC §122.143(4) and §122.146(2), THSC, §382.085(b), and FOP Number O1624, General Terms and Conditions, by failing to submit the Annual Compliance Certification within 30 days from the end of the certification period; PENALTY: $24,938; ENFORCEMENT COORDINATOR: Farhaud Abbaszadeh, (512) 239-0779; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826.

(17) COMPANY: Town of Anthony; DOCKET NUMBER: 2013-1499-MWD-E; IDENTIFIER: RN102805603; LOCATION: Anthony, El Paso County; TYPE OF FACILITY: wastewater treatment plant; RULES VIOLATED: TWC, §26.121(a)(1), 30 TAC

§305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010120001 Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; 30 TAC §305.125(1) and (17) and §319.7(d) and TPDES Permit Number WQ0010120001, Monitoring and Reporting Requirements Number 1, by failing to timely submit the discharge monitoring reports (DMRs) for the monitoring periods ending November 30, 2012 - March 31, 2013, by the 20th day of the following month; 30 TAC §305.125(1) and §319.1 and TPDES Permit Number WQ0010120001, Monitoring and Reporting Requirements Number 1, by failing to submit complete DMRs for the monitoring periods ending April 30, 2012 - October 31, 2012; and 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0010120001, Sludge Provisions, by failing to timely submit the annual sludge report for the monitoring period ending July 31, 2012, by September 1, 2012; PENALTY: $28,012; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 430-6023; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206.

TRD-201405525
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 20, 2014

Enforcement Orders

An agreed order was entered regarding Waterwood Municipal Utility District 1, Docket No. 2014-0590-PWS-E on November 12, 2014 assessing $250 in administrative penalties with $50 deferred.

Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (210) 403-4077, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding 4J RIVERWAY, LLC, Docket No. 2014-0629-MLM-E on November 12, 2014 assessing $3,611 in administrative penalties with $722 deferred.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villareal, Enforcement Coordinator at (361) 825-3425, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JYKM UNION, INC. dba Liberty Hill Food Mart, Docket No. 2014-0773-PST-E on November 12, 2014 assessing $3,979 in administrative penalties with $795 deferred.

Information concerning any aspect of this order may be obtained by contacting John Fennell, Enforcement Coordinator at (512) 239-2616, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ALINA ENTERPRISES, INC. dba King Grocery, Docket No. 2014-0777-PST-E on November 12, 2014 assessing $3,011 in administrative penalties with $602 deferred.

Information concerning any aspect of this order may be obtained by contacting John Fennell, Enforcement Coordinator at (512) 239-2616, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BKS ENT., INC. dba Handi Stop #106, Docket No. 2014-0793-PST-E on November 12, 2014 assessing $3,375 in administrative penalties with $675 deferred.

Information concerning any aspect of this order may be obtained by contacting Abigail Lindsey, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BRUSH COUNTRY DEVELOPMENT CORPORATION, Docket No. 2014-0805-PWS-E on November 12, 2014 assessing $799 in administrative penalties with $159 deferred.

Information concerning any aspect of this order may be obtained by contacting Katy Montgomery, Enforcement Coordinator at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Allan Badshah Inc dba Bobs Corner Store 2, Docket No. 2014-0811-PST-E on November 12, 2014 assessing $2,813 in administrative penalties with $562 deferred.

Information concerning any aspect of this order may be obtained by contacting Katleyn Samples, Enforcement Coordinator at (512) 239-4728, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Highline Real Estate Group, LLC, Docket No. 2014-0818-EAQ-E on November 12, 2014 assessing $3,750 in administrative penalties with $750 deferred.

Information concerning any aspect of this order may be obtained by contacting Alejandro Laje, Enforcement Coordinator at (512) 239-2547, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding FOREST WATER SUPPLY CORPORATION, Docket No. 2014-0885-PWS-E on November 12, 2014 assessing $685 in administrative penalties with $137 deferred.

Information concerning any aspect of this order may be obtained by contacting Sam Keller, Enforcement Coordinator at (512) 239-2678, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Doyle W. Foster dba Weir Country Store, Docket No. 2014-0938-PST-E on November 12, 2014 assessing $7,255 in administrative penalties with $1,451 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Boyett, Enforcement Coordinator at (512) 239-2503, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Port Central Service Center LP, Docket No. 2014-1086-PWS-E on November 12, 2014 assessing $2,557 in administrative penalties with $510 deferred.

Information concerning any aspect of this order may be obtained by contacting David Carney, Enforcement Coordinator at (512) 239-2583, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bio Energy (Austin), LLC, Docket No. 2014-1121-AIR-E on November 12, 2014 assessing $5,626 in administrative penalties with $1,125 deferred.

Information concerning any aspect of this order may be obtained by contacting Carol McGrath, Enforcement Coordinator at (210) 403-4063, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Justin Vargas, Docket No. 2014-1179-WOC-E on November 12, 2014 assessing $175 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rachel Bekowies, Enforcement Coordinator at (512) 239-2608, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Dean L. Bolen, Docket No. 2014-1180-WOC-E on November 12, 2014 assessing $175 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rachel Bekowies, Enforcement Coordinator at (512) 239-2608, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Balcones Minerals Corporation, Docket No. 2014-1270-WQ-E on November 12, 2014 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alan Barraza, Enforcement Coordinator at (512) 239-4642, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding West Texas Paving Inc, Docket No. 2014-1271-WQ-E on November 12, 2014 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alan Barraza, Enforcement Coordinator at (512) 239-4642, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201405602
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 21, 2014

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ, agency, 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 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 **January 12, 2015.** 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 A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 12, 2015.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, TWC, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: Aspen Power LLC; DOCKET NUMBER: 2012-1851-AIR-E; TCEQ ID NUMBER: RN105224877; LOCATION: northeast junction of Loop 287, State Highway 103, and Kurth Drive, Lufkin, Angelina County; TYPE OF FACILITY: biomass-fired electric generating plant; RULES VIOLATED: Federal Operating Permit (FOP) Number 03002, General Terms and Conditions and Special Terms and Conditions Number 8, 30 TAC §§122.143(4), 122.145(2), and 122.146(1), and Texas Health and Safety Code (THSC), §382.085(b), by failing to submit a permit compliance certification and a semi-annual deviation report; FOP Number 03002, General Terms and Conditions, 30 TAC §122.143(4) and §122.145(2)(A), and THSC, §382.085(b), by failing to report all instances of deviations in the semi-annual deviation report submitted on July 12, 2012, for the period from December 14, 2011 - June 13, 2012; FOP Number 03002, Special Terms and Conditions Number 6, New Source Review Permit (NSRP) Numbers 81706 and HAP12, General Conditions Number 7 and Special Conditions Numbers 24.C, 28.C, and 31.D, 30 TAC §116.115(b)(2)(E) and (c), and §122.143(4), and THSC, §382.085(b), by failing to maintain records to demonstrate compliance; FOP Number 03002, Special Terms and Conditions Number 6, NSRP Numbers 81706 and HAP12, Special Conditions Number 8, 30 TAC §116.115(c) and §122.143(4), and THSC, §382.085(b), by failing to comply with the opacity limit of 10% averaged over a six-minute period for emission point number (EPN) LBLR01; FOP Number 03002, Special Terms and Conditions Number 7, Permit by Rule Registration Number 94393, 30 TAC §§106.6(b), 106.8(c)(2), and 122.143(4), and THSC, §382.085(b), by failing to maintain records to demonstrate compliance with representations made in the registration for Permit by Rule Registration Number 94393; FOP Number 03002, Special Terms and Conditions Number 6, NSRP Numbers 81706 and HAP12, Special Conditions Number 24.A, 30 TAC §116.115(c) and §122.143(4), and THSC, §382.085(b), by failing to meet the requirements of the applicable Performance Specifications in 40 Code of Federal Regulations (CFR) Part 60 Appendix B; FOP Number 03002, Special Terms and Conditions Number 6, NSRP Numbers 81706 and HAP12, Special Conditions Numbers 1 and 9, 30 TAC §116.115(c) and §122.143(4), and THSC, §382.085(b), by failing to comply with the nitrogen oxides and carbon monoxide emissions limit of 0.075 pound per million British thermal units and emissions rate of 52 pounds per hour rolling 30-day averages for EPN LBLR01; FOP Number 03002, Special Terms and Conditions Number 6, NSRP Numbers 81706 and HAP12, Special Conditions Number 26, 30 TAC §116.115(c) and §122.143(4), and THSC, §382.085(b), by failing to test or calculate the ammonia concentration in the Boiler Stack, EPN LBLR01; FOP Number 03002, Special Term and Conditions Number 6, NSRP Numbers 81706 and HAP12, Special Conditions Number 3.B., 40 CFR §60.49b(h) and (w), 30 TAC §116.115(c) and §122.143(4), and THSC, §382.085(b), by failing to submit a 40 CFR Part 60 Subpart Db excess emissions report; and FOP Number 03002, Special Terms and Conditions Number 6, NSRP Numbers 81706 and HAP12, Special Conditions Number 3.B., 40 CFR §60.7(a)(3) and §60.49b(a), 30 TAC §§101.20(1), 116.115(c), and 122.143(4), and THSC, §382.085(b), by failing to submit a notification of initial start-up; PENALTY: $36,940; STAFF ATTORNEY: Elizabeth Lieberknecht, Litigation Division, MC 175, (512) 239-0620; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(2) COMPANY: Flint Hills Resources Polymers, LLC; DOCKET NUMBER: 2013-2149-AIR-E; TCEQ ID NUMBER: RN101618759; LOCATION: 118 Huntsman Way, Longview, Harrison County; TYPE OF FACILITY: polypropylene pellet manufacturing plant; RULES VIOLATED: Texas Health and Safety Code, §382.085(b), 30 TAC §§101.20(1), 116.715(a) and (c)(7), and 122.143(4), 40 Code of Federal Regulations §60.482-6(a)(1) and §60.562-2(a), Federal Operating Permit Number 01282, Special Terms and Conditions Numbers (1)(A), (7), and (9), and Flexible Permit Numbers 18105 and PAL3, Special Conditions Numbers 1 and 13(E), by failing to prevent unauthorized emission; PENALTY: $287,000; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(3) COMPANY: Kleberg County; DOCKET NUMBER: 2013-1562-MWD-E; TCEQ ID NUMBER: RN101716678; LOCATION: southwest corner of Ricardo, approximately 0.1 mile west of United States Highway 77 and approximately 0.34 mile south of Farm-to-Market Road 1118, Kingsville, Kleberg County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1) and (17) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013374003, Monitoring and Reporting Requirements Number 1, by failing to submit monitoring results at the intervals specified in the permit; 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0013374003, Sludge Provisions, by failing to timely submit the annual sludge report; 30 TAC §305.125(1) and §319.4 and TPDES Permit Number WQ0013374003, Effluent Limitations and Monitoring Requirements Number 1, by failing to collect and analyze samples for *Escherichia coli;* and TWC, §26.121(a)(1), 30 TAC §305.125(1), and TPDES Permit Number WQ0013374003, Effluent Limitations and Monitoring Requirements Number 1., by failing to comply with permitted effluent limits; PENALTY: $11,250; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: Corpus Christi Regional Office, NRC Building, Suite 1200, 6300 Ocean Drive, Unit 5839, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(4) COMPANY: Richard Rudnick, Jack Sinton, and Dennis Ray Hammett; DOCKET NUMBER: 2011-1833-IHW-E; TCEQ ID NUMBER: RN106083215; LOCATION: west of Stockyard Road and Cielo Azul Drive, Socorro, El Paso County; TYPE OF FACILITY: former stockyard operation; RULE VIOLATED: 30 TAC §335.4, by causing, suffering, allowing, or permitting the disposal of industrial solid waste; PENALTY: $5,250; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(5) COMPANY: Ricky Ray d/b/a Rayco Roll Off and Demolition Recycling Yard; DOCKET NUMBER: 2012-1090-MSW-E; TCEQ ID NUMBER: RN105919302; LOCATION: 4510 Buchanan Loop Road, Texarkana, Bowie County; TYPE OF FACILITY: recycling facility; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; and TWC, §5.702 and 30 TAC §312.9, by failing to pay TCEQ Waste Management Sludge Haulers fees for the Fiscal Years 2010 and 2011 and associated late fees for TCEQ Financial Administration Account Number 0804239H; PENALTY: $2,675; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(6) COMPANY: Sugar Land Alliance Enterprises, Inc. d/b/a Sunmart 451 and Baber Mohammed d/b/a Sunmart 451; DOCKET NUMBER: 2013-1332-PST-E; TCEQ ID NUMBER: RN101945301; LOCATION: 2221 Ella Boulevard, Houston, Harris County; TYPE OF FACILITY: underground storage tank system and a convenience store with retail sales of gasoline; RULES VIOLATED: Texas Health and Safety Code, §382.085(b) and 30 TAC §115.245(2), by failing to verify proper operation of the Stage II equipment at least once every 12 months; PENALTY: $1,660; STAFF ATTORNEY: Elizabeth Carroll Harkrider, Litigation Division, MC 175, (512) 239-1877; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(7) COMPANY: Zareena Investments, Inc. d/b/a Super Cleaners; DOCKET NUMBER: 2014-0870-MLM-E; TCEQ ID NUMBER: RN103957122; LOCATION: 2725 Pat Booker Road, Universal City, Bexar County; TYPE OF FACILITY: dry cleaning facility; RULES VIOLATED: 40 Code of Federal Regulations §262.11 and 30 TAC §§335.62, 335.503 and 335.504, by failing to conduct hazardous waste determinations and waste classifications; 30 TAC §335.2, by failing to obtain a permit for the storage of municipal hazardous waste; 30 TAC §335.4, by failing to prevent the unauthorized disposal of municipal hazardous waste; 30 TAC §337.20(e)(3)(A), by failing to install a dike or other secondary containment structure around each storage area for dry cleaning solvents, dry cleaning waste, or dry cleaning wastewater; and 30 TAC §337.72(2), by failing to maintain dry cleaning waste disposal records at the facility; PENALTY: $11,250; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-201405526
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 20, 2014

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is 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 **January 12, 2015.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO 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 DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Build-

ing A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 12, 2015.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Amirali Makanojia d/b/a Doc's Country Store; DOCKET NUMBER: 2013-1641-PST-E; TCEQ ID NUMBER: RN104990957; LOCATION: 18818 Highway 290 East, Elgin, Travis County; TYPE OF FACILITY: underground storage tank (UST) system; RULES VIOLATED: TWC, §26.3467(a) and 30 TAC §334.8(c)(5)(A)(i), 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 §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; and 30 TAC §334.602(a), by failing to designate, train, and certify at least one named individual for each class of operator: Class A, Class B, and Class C; PENALTY: $4,537; STAFF ATTORNEY: J. Amber Ahmed, Litigation Division, MC 175, (512) 239-1204; REGIONAL OFFICE: Austin Regional Office, 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400.

(2) COMPANY: Chad Stanley; DOCKET NUMBER: 2014-0582-MSW-E; TCEQ ID NUMBER: RN106829427; LOCATION: 716 Grapevine Trail, Lockhart, Caldwell County; TYPE OF FACILITY: municipal solid waste (MSW) disposal site; RULES VIOLATED: 30 TAC §330.15(c) and §330.7(a), by failing to prevent the unauthorized dumping, collection, storage, transportation, processing, or disposal of MSW; PENALTY: $1,312; STAFF ATTORNEY: Laura Evans, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Austin Regional Office, 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400.

TRD-201405527
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 20, 2014

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapters 37 and 336

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 37, Financial Assurance, §37.9045 and §37.9050 and 30 TAC Chapter 336, Radioactive Substance Rules, §§336.2, 336.105, 336.1111, and 336.1127; and new §336.739, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement Senate Bill 347, 83rd Texas Legislature, 2013, by amending 30 TAC Chapter 37, which would reference the new Environmental Perpetual Care Account and by amending 30 TAC Chapter 336, to provide for volume reduction of low-level radioactive waste.

The commission will hold a public hearing on this proposal in Austin, Texas on January 13, 2015, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

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

Written comments may be submitted to Kris Hogan, 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 2013-056-037-WS. The comment period closes on January 20, 2015. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Bobby Janecka, Radioactive Material Licensing Section, (512) 239-6415.

TRD-201405579
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 21, 2014

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 114 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 114, Control of Air Pollution from Motor Vehicles, §§114.2, 114.7, 114.53, 114.60, 114.62, 114.64, 114.70, and 114.87, and corresponding revisions to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency concerning SIPs.

This proposed rulemaking would allow a county participating in the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) to opt out of the LIRAP.

The commission will hold a public hearing on this proposal in Austin on January 6, 2015, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

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

Written comments may be submitted to Kris Hogan, 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 2014-027-114-AI. The comment period closes January 9, 2015. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Jamie Zech, Air Quality Planning Section, (512) 239-3935.

TRD-201405591
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 21, 2014

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Notice of Public Hearing on Proposed Revisions to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) concerning SIPs.

The proposed SIP revision would satisfy the anti-backsliding obligations for the revoked one-hour ozone National Ambient Air Quality Standard (NAAQS) and ensure that the substance of the redesignation requirements is met for the Houston-Galveston-Brazoria (HGB) area. This redesignation substitute would take the place of a redesignation request and maintenance plan, which the EPA normally requires under a standard that has not been revoked.

The commission will hold a public hearing on this proposal in Houston on January 6, 2015 at 2:00 p.m. in the Auditorium at the Texas Department of Transportation District Office, 7600 Washington Avenue. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Joyce Spencer-Nelson, Air Quality Division, at (512) 239-5017. Requests should be made as far in advance as possible.

Written comments may be submitted to Melanie Rousseau, MC 206, Air Quality Division, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-6188. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the *eComments* system. All comments pertaining to the proposed HGB Area Redesignation Substitute for the One-Hour Ozone NAAQS SIP revision should reference Project Number 2014-011-SIP-NR. The comment period closes January 9, 2015. Copies of the proposed SIP revision can be obtained from the commission's Web site at *http://www.tceq.texas.gov/airquality/sip/criteria-pollutants/sip-ozone.*

For further information, please contact Melanie Rousseau, Air Quality Division, (512) 239-0707.

TRD-201405532
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 20, 2014

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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) 463-5800.

Deadline: Lobby Activities Report due September 10, 2014

Luke Bellsnyder, 809 W. 12th St., Ste. E, Austin, Texas 78701

Jennifer E. Sellers, 700 Mandarin Flyway #203, Cedar Park, Texas 78613

TRD-201405573
Natalia Luna Ashley
Executive Director
Texas Ethics Commission
Filed: November 21, 2014

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Texas Facilities Commission

Request for Proposals #303-6-20478

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Criminal Justice (TDCJ), announces the issuance of Request for Proposals (RFP) #303-6-20478. TFC seeks a five (5) or ten (10) year lease of approximately 10,639 square feet of office space in Lubbock, Lubbock County, Texas.

The deadline for questions is January 13, 2015 and the deadline for proposals is January 21, 2015 at 3:00 p.m. The award date is February 18, 2015. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, 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=114699.*

TRD-201405528
Kay Molina
General Counsel
Texas Facilities Commission
Filed: November 20, 2014

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Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number 14-046 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to exempt participating Medicare Advantage Plans from certain Nursing Facility cost sharing obligations. The proposed amendment is effective March 1, 2015.

The proposed amendment is estimated to result in an additional annual expenditure of $1,268,865 for the remainder of federal fiscal year 2015, consisting of $734,994 in federal funds and $533,871 in state general revenue. For federal fiscal year 2016, the estimated additional annual expenditure is $2,269,475, consisting of $1,298,208 in federal funds and $971,267 in state general revenue.

To obtain copies of the proposed amendment, interested parties may contact Meghan Young, State Plan Coordinator, by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-600, Austin, Texas 78711; by telephone at (512) 462-6238; by facsimile at (512) 730-7472; or by e-mail at meghan.young@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201405592
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: November 21, 2014

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Texas Department of Insurance

Notice of Hearing

2014 Texas Workers' Compensation Biennial Rate Hearing

DOCKET NO. 2773 AND REVISED WORKERS' COMPENSATION CLASSIFICATION RELATIVITIES DOCKET NO. 2774

The commissioner of insurance will hold public hearings to review rates charged by insurers for workers' compensation insurance in this state, and to consider revised Texas workers' compensation classification relativities to replace those adopted under Commissioner's Order No. 2312, dated February 25, 2013. The hearings will proceed consecutively, and will begin at 9 a.m., Central time, December 12, 2014, in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas.

Docket No. 2773: 2014 Texas Workers' Compensation Biennial Rate Hearing

Subject and Scope

The commissioner will consider

* the impact of House Bill 7 (HB 7), 79th Legislature, Regular Session, 2005, on workers' compensation rates and premiums

* the participation of employers in certified workers' compensation health care networks

* the participation of Texas businesses in the workers' compensation system, and

* any other factors that may have affected workers' compensation in Texas since 2005.

Applicable Authority, Jurisdiction, Statutes, and Rules

The commissioner has jurisdiction over this hearing under Insurance Code Chapter 2053 and §31.021 and §2051.002, and Title 5 of the Labor Code.

Insurance Code Chapter 2053 governs this proceeding. Section 2053.056(a) requires the commissioner to conduct a public hearing each biennium to review rates to be charged for workers' compensation insurance written in this state. This hearing is not a contested case under Government Code §2001.003.

Requested Information

The commissioner is interested in receiving input in the following areas:

* the impact of HB 7 on workers' compensation rates and premiums paid by Texas employers, including the projected workers' compensation rate and premium savings realized by employers as a result of the implementation of certified workers' compensation health care networks

* the effect of HB 7 legislative reforms on market competition, carrier loss ratios and combined ratios, and the use and effect of individual risk premium variations

* the percentage of employers who provide workers' compensation insurance coverage for their employees

* the participation of employers in certified workers' compensation health care networks, with particular emphasis on small and medium-sized employers

* the factors affecting changes in workers' compensation losses and premiums in Texas since 2005, including information regarding

** changes in claim frequency

** changes in indemnity and medical costs

** the use of carrier cost-containment and return-to-work strategies

** the impact of the implementation of return-to-work guidelines

** treatment guidelines and medical fee guidelines, and

** any other factors influencing workers' compensation losses and premiums since 2005, and

* a comparison of workers' compensation experience and average rate and premium levels in Texas with those in other states, and explanations for any differences.

Docket No. 2774: Revised Workers' Compensation Classification Relativities

Subject and Scope

Staff proposes that the commissioner adopt revised classification relativities to replace those adopted under Commissioner's Order No. 2312, dated February 25, 2013.

EXHIBIT A

TEXAS WORKERS' COMPENSATION RELATIVITIES
AVAILABLE FOR IMMEDIATE USE
MANDATORY EFFECTIVE DATE 7/1/2015

Class	Relativity	Class	Relativity
0005	4.63	2288	6.55
0008	6.26	2361	1.48
0011	9.94	2380	1.94
0016	9.44	2501	8.08
0034	7.55	2503	1.40
0035	4.98	2532	2.27
0037	8.52	2534	3.67
0042	6.22	2560	6.93
0059	'a'	2576	7.15
0065	'a'	2578	8.11
0066	'a'	2581	8.92
0067	'a'	2583	3.56
0079	5.41	2587	5.46
0083	8.51	2670	17.43
0106	10.73	2683	4.56
0113	6.52	2688	7.11
0401	24.35	2702	25.54
0913	'a'	2705	14.97
0923	'a'	2710	9.12
1165	'a'	2719	10.57
1321	3.01	2731	6.66
1438	6.72	2790	4.32
1463	19.88	2802	8.00
1472	7.68	2835	6.04
1701	9.49	2881	5.61
1747	3.28	2923	2.32
1803	4.90	3004	6.56
1924	6.30	3022	6.81
2003	8.89	3027	1.92
2014	8.10	3028	8.31
2040	3.48	3040	7.90
2041	4.20	3041	6.10
2068	6.52	3042	3.14
2081	6.61	3064	7.14
2095	6.89	3066	6.20
2105	7.13	3081	5.82
2111	9.67	3082	11.26
2114	8.58	3085	4.98
2121	4.00	3110	6.64
2157	7.57	3111	5.17
2172	1.43	3113	5.42
2211	17.33	3114	5.04
2220	5.04	3126	3.70
2260	4.10	3131	2.97
2286	3.52	3132	5.25

EXHIBIT A

TEXAS WORKERS' COMPENSATION RELATIVITIES
AVAILABLE FOR IMMEDIATE USE
MANDATORY EFFECTIVE DATE 7/1/2015

Class	Relativity	Class	Relativity
3146	5.11	4038	6.80
3179	3.97	4045	7.35
3220	3.78	4062	5.08
3223	4.36	4101	8.39
3224	7.51	4112	0.93
3227	6.71	4114	3.77
3255	7.82	4130	9.30
3257	8.10	4150	1.53
3300	11.10	4206	6.54
3316	1.87	4207	1.31
3331	7.68	4239	3.95
3365	6.66	4243	7.34
3372	5.19	4244	4.01
3383	1.59	4250	3.20
3507	4.87	4273	3.21
3548	4.04	4279	5.83
3574	1.55	4282	1.84
3620	5.69	4283	3.50
3629	2.54	4299	3.35
3632	4.88	4304	7.40
3639	6.68	4307	3.65
3642	4.91	4351	1.02
3643	4.26	4360	6.33
3647	3.37	4361	4.13
3648	3.54	4362	1.27
3681	1.56	4410	6.66
3685	1.86	4417	5.97
3719	2.79	4420	13.56
3724	5.23	4431	6.55
3726	4.96	4432	3.56
3805	1.41	4439	2.50
3807	8.50	4452	4.25
3808	7.37	4459	3.70
3821	7.66	4470	5.00
3822	4.99	4484	5.51
3823	6.39	4511	1.43
3824	5.59	4519	4.92
3830	3.64	4558	2.95
3865	7.34	4568	5.54
3881	8.71	4583	5.68
4000	6.19	4611	1.80
4021	7.81	4635	3.08
4024	4.17	4653	4.92
4034	8.14	4665	13.92
4036	3.42	4670	11.46

EXHIBIT A

TEXAS WORKERS' COMPENSATION RELATIVITIES
AVAILABLE FOR IMMEDIATE USE
MANDATORY EFFECTIVE DATE 7/1/2015

Class	Relativity	Class	Relativity
4692	1.06	5183	5.50
4693	2.53	5190	5.78
4703	4.27	5191	1.61
4712	3.85	5192	5.12
4716	6.31	5200	6.41
4717	8.52	5203	14.27
4720	4.17	5213	7.65
4740	1.53	5220	5.55
4743	2.15	5348	3.98
4751	1.89	5403	9.16
4766	'a'	5437	6.87
4777	'a'	5443	4.55
4800	'a'	5462	8.73
4801	'a'	5474	6.34
4802	'a'	5479	7.87
4803	'a'	5491	3.36
4804	'a'	5506	11.27
4805	'a'	5536	5.07
4806	'a'	5538	12.14
4807	'a'	5551	16.76
4808	'a'	5606	1.47
4809	'a'	5701	7.01
4810	'a'	6003	9.41
4811	'a'	6045	4.81
4812	'a'	6202	12.95
4813	'a'	6203	1.86
4814	'a'	6204	11.93
4815	'a'	6205	'a'
4816	'a'	6206	5.87
4817	'a'	6213	4.76
4818	'a'	6216	7.87
4819	'a'	6219	7.24
4820	'a'	6229	4.06
4821	'a'	6233	4.49
4822	'a'	6237	4.07
4823	'a'	6238	15.75
4902	7.01	6306	10.75
4923	1.76	6319	6.82
5022	9.83	6400	8.45
5040	19.56	6504	5.27
5041	9.17	6823	7.50
5057	7.85	6824	11.22
5070	17.81	6843	14.42
5102	7.37	6872	11.39
5160	4.18	6874	31.15

EXHIBIT A

TEXAS WORKERS' COMPENSATION RELATIVITIES
AVAILABLE FOR IMMEDIATE USE
MANDATORY EFFECTIVE DATE 7/1/2015

Class	Relativity	Class	Relativity
7016	6.14	8033	5.91
7024	4.15	8034	7.81
7046	7.09	8039	4.31
7047	10.50	8044	7.95
7098	7.87	8045	0.83
7099	12.12	8047	1.36
7133	8.37	8058	4.82
7134	9.31	8102	8.35
7135	14.33	8106	8.78
7219	12.59	8107	5.11
7230	16.82	8113	7.48
7309	20.84	8209	8.59
7313	8.73	8215	6.27
7317	7.40	8227	5.07
7327	5.41	8231	13.29
7350	22.69	8234	8.54
7360	6.39	8264	9.27
7380	8.35	8265	10.48
7382	11.40	8288	10.23
7390	9.18	8292	7.09
7405	3.78	8293	17.14
7418	4.92	8295	6.76
7421	1.78	8304	12.23
7422	3.65	8350	11.23
7423	8.80	8385	6.14
7502	2.47	8387	3.96
7515	1.84	8391	3.92
7520	5.83	8601	0.49
7538	15.15	8606	3.74
7539	2.09	8607	2.45
7580	4.09	8709	4.96
7590	7.84	8726	1.62
7600	5.12	8742	0.46
7602	9.53	8748	0.72
7610	0.65	8752	5.20
7704	5.76	8754	1.76
7720	4.53	8755	0.63
7855	7.50	8803	0.16
8002	4.75	8809	0.33
8006	5.09	8810	0.28
8008	2.60	8820	0.21
8013	1.27	8828	4.63
8017	3.36	8829	5.33
8018	6.05	8831	2.46
8032	5.60	8832	0.54

EXHIBIT A

TEXAS WORKERS' COMPENSATION RELATIVITIES
AVAILABLE FOR IMMEDIATE USE
MANDATORY EFFECTIVE DATE 7/1/2015

Class	Relativity	Class	Relativity
8833	1.27		
8837	'a'		
8838	1.09		
8858	0.54		
8868	1.03		
8901	0.39		
9014	5.75		
9015	5.30		
9016	6.13		
9019	5.46		
9032	7.22		
9033	6.34		
9040	5.84		
9052	4.90		
9058	3.35		
9060	3.35		
9061	1.95		
9063	2.00		
9079	2.52		
9080	2.43		
9089	1.62		
9093	2.65		
9101	6.44		
9102	5.61		
9154	3.72		
9156	2.72		
9170	37.87		
9178	12.46		
9179	14.77		
9182	4.42		
9186	14.62		
9220	13.57		
9402	9.97		
9501	5.59		
9522	6.67		
9529	5.93		
9552	12.13		
9586	1.44		
9600	2.14		
9620	2.00		
9984	'a'		
9985	'a'		

Exhibit A is a schedule of the revised classification relativities. Staff requests that the proposed revised classification relativities be available for adoption by insurers immediately, but that their use be mandatory for all policies with an effective date on or after July 1, 2015, unless the insurer files an alternative classification rate basis.

Staff recommends capping changes in the proposed classification relativities to +25 percent and -25 percent of the current classification relativities.

In the past, modifications to the classification relativities required concurrent changes in the expected loss rates and discount ratios. However, the commissioner is considering the adoption of the *National Council on Compensation Insurance Experience Rating Plan Manual for Workers Compensation and Employers Liability Insurance* with Texas exceptions (Petition No. W-0914-07-I, filed September 16, 2014, published at 39 TexReg 7965; and Docket No. 2771, heard October 23, 2014) for experience rating modifications with effective dates on or after July 1, 2015. If adopted, NCCI will update the expected loss rates and the discount ratios each year as part of its annual loss cost filing. For July 1, 2015, NCCI will provide updated expected loss rates and discount ratios in a separate experience rating value filing.

Applicable Authority, Jurisdiction, Statutes, and Rules

The commissioner has jurisdiction over this hearing under Insurance Code §2053.051. Section 2053.051 requires TDI to determine hazards by class and establish classification relativities applicable to the payroll in each classification for workers' compensation insurance. It further provides that the classification system must be revised at least once every five years.

Testimony and Exhibits

To comment on the matters to be considered, you may submit written testimony and exhibits at or prior to the public hearings, or you may present oral testimony at the hearings. Please include the applicable docket number on any comments, testimony, or exhibits. Submit two copies of any written comments no later than 5 p.m., Central time, on January 5, 2015. Send one copy by mail to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104; or by email to chiefclerk@tdi.texas.gov. Send the other copy by mail to J'ne Byckovski, Chief Actuary, Property and Casualty Actuarial Office, Mail Code 105-5F, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104; or by email to j'ne.byckovski@tdi.texas.gov.

Deadlines Subject to Change

The commissioner may change any of the deadlines in this notice, subject to the applicable statutes and rules.

TRD-201405618
Sara Waitt
General Counsel
Texas Department of Insurance
Filed: November 21, 2014

♦ ♦ ♦

Texas Low-Level Radioactive Waste Disposal Compact Commission

Notice of Receipt of Amendment Request for Importation of Waste and Import Agreement

Please take notice that, pursuant to Texas Low-Level Radioactive Waste Disposal Compact Commission rule 31 TAC §675.23, the Compact Commission has received an amendment request for an agreement for import for disposal of low-level radioactive waste from:

RAM Services, Inc. (TLLRWDCC #1-0077-01)

510 County Highway V

Two Rivers, Wisconsin 54241

The amendment request will be placed on the Compact Commission web site, www.tllrwdcc.org, where it will be available for inspection and copying.

Comments on the amendment request are due to be received by December 15, 2014. Comments should be mailed to:

Texas Low-Level Radioactive Waste Disposal Compact Commission

Attn: Leigh Ing, Executive Director

333 Guadalupe St., #3-240

Austin, Texas 78701

Comments may also be submitted via email to: administration@tllrwdcc.org.

TRD-201405564
Audrey Ferrell
Administrator
Texas Low-Level Radioactive Waste Disposal Compact Commission
Filed: November 20, 2014

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on November 14, 2014, with the Public Utility Commission of Texas for an amendment to a certificated service area boundary in Sherman and Oldham Counties, Texas.

Docket Style and Number: Application of XIT Rural Telephone Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for a Service Area Boundary change in Sherman and Oldham Counties. Docket Number 43795.

The Application: The minor boundary amendment is being filed to realign the boundary between the Lautz Exchange of XIT Rural Telephone Cooperative, Inc. and the Sunray Exchange of Windstream Communications. The amendment will transfer a portion of Windstream's serving area in the Sunray Exchange to XIT Rural's Lautz Exchange. Windstream has provided a letter of concurrence endorsing this proposed change. XIT Rural will also amend its service area boundary in the Middlewater Exchange to include an uncertificated area in Oldham County.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by December 5, 2014, by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888)782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 43795.

TRD-201405522
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 2014

♦ ♦ ♦

Notice of Application for Approval of a New Depreciation Rate

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on November 19, 2014, for approval of revised depreciation rates pursuant to Public Utility Regulatory Act §52.252 and §53.056, Tex. Util. Code Ann. (Vernon 2007 & Supp. 2014).

Docket Title and Number: Application of Mid-Plains Rural Telephone Cooperative, Inc. for Approval of a New Depreciation Rate Pursuant to P.U.C. Substantive Rule §26.206, Docket Number 43816.

The Application: Mid-Plains Rural Telephone Cooperative, Inc. (Mid-Plains) filed an application to establish a depreciation rate for a new class of property, Account 2114.300 - Tools and Other Work Equipment - Heavy Equipment. Mid-Plains proposed a depreciation rate of 16%, which reflects an estimated economic life of five years and an estimated net salvage of 20%. Mid-Plains proposed an effective date of October 1, 2014.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All correspondence should refer to Docket Number 43816.

TRD-201405571
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2014

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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 an application filed with the Public Utility Commission of Texas on November 17, 2014, to amend a certificate of convenience and necessity for a proposed transmission line in Gray and Donley Counties, Texas.

Docket Style and Number: Application of Cross Texas Transmission, LLC to Amend its Certificate of Convenience and Necessity for the Proposed Salt Fork to Gray 345-kV Transmission Line in Gray and Donley Counties, Docket Number 43731.

The Application: The application of Cross Texas Transmission, LLC (Cross Texas) is designated as the Salt Fork to Gray 345-kV Transmission Line Project. The facilities include construction of a new single-circuit 345-kV transmission line from the existing Gray Substation owned by Cross Texas to a new substation to be constructed by a wind generation interconnection customer, Salt Fork Wind, LLC. The existing Gray Substation is located approximately two miles west-southwest of Lefors in Gray County. The new substation will be located in Donley County, approximately one mile south of Interstate Highway 40 along County Road 9.

The estimated cost for the project is $51,003,000. The proposed project is estimated to be approximately 24 miles in length. The Public Utility Commission of Texas 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 January 2, 2015. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 43731.

TRD-201405520
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 2014

♦ ♦ ♦

Notice of Application to Amend Water and Sewer Certificates of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application to amend water and sewer certificates of convenience and necessity (CCN) in Montgomery County, Texas.

Docket Style and Number: *Application of Crystal Springs Water Company, Inc. for an Amendment to Water and Sewer Certificates of Convenience and Necessity in Montgomery County,* Docket Number 43807.

The Application: Crystal Springs Water Company, Inc. filed an application to amend its water certificate of convenience (CCN) Number 11373 and sewer CCN Number 20782 in Montgomery County. The total area being requested includes approximately 64 acres of undeveloped land which is in the planning stage of being developed into a residential neighborhood. There are zero current customers.

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 through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 43807.

TRD-201405521
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 2014

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Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

(Editor's Note: On November 19, 2014, the Supreme Court of Texas filed Misc. Docket No. 14-9232, Order Adopting Amendments to the Texas Rules of Evidence, in the Texas Register office. In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the notice is not included in the print version of the Texas Register. The notice is available in the on-line version of the December 5, 2014, issue of the Texas Register.)

Misc. Docket No. 14-9232

ORDER ADOPTING AMENDMENTS TO THE TEXAS RULES OF EVIDENCE

ORDERED that:

1. The Texas Rules of Evidence are amended as follows, effective April 1, 2015.

2. Except for the amendments to Rules 511 and 613, which are addressed separately below, these amendments comprise a general restyling of the Texas Rules of Evidence. They seek to make the rules more easily understood and to make style and terminology consistent throughout. The restyling changes are intended to be stylistic only.

The Restyling Project

Following a lengthy restyling process, the Federal Rules of Evidence were amended effective December 1, 2011. The Texas Rules of Evidence restyling project was initiated with the aim of keeping the Texas Rules as consistent as possible with Federal Rules, but without effecting any substantive change in Texas evidence law.

General Guidelines

Following the lead of the drafters of the restyled Federal Rules, the drafters of the restyled Texas Rules were guided in their drafting, usage, and style by Bryan Garner, *Guidelines for Drafting and Editing Court Rules,* Administrative Office of the United States Courts (1996) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995).

Formatting Changes

Many of the changes in the restyled rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, inconsistent usage can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. *See, e.g.,* Rule 602 (omitting "but need not").

The restyled rules also remove words and concepts that are outdated or redundant.

Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

3. The amendments to Rule 511 align Texas law on waiver of privilege by voluntary disclosure with Federal Rule of Evidence 502.

4. The amendments to Rule 613 retain the requirement that a witness be given an opportunity to explain or deny (a) a prior inconsistent statement or (b) circumstances or a statement showing bias or interest, but the requirement is no longer part of the foundation that an examining attorney must lay before introducing extrinsic evidence of the statement or circumstances.

5. The amendments to Rule 902(10) that were made on August 19, 2014, in Miscellaneous Docket No. 14-9174, included restyling changes. This order does not make any further change to Rule 902(10).

6. The Clerk is directed to:

a. file a copy of this order with the Secretary of State;

b. cause a copy of this order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;*

c. send a copy of this order to each elected member of the Legislature; and

d. submit a copy of the order for publication in the *Texas Register.*

These amendments may be changed in response to comments received by February 28, 2015. Any interested party may submit written comments to Rules Attorney Martha Newton at rulescomments@txcourts.gov.

Dated: November 19, 2014.

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Nathan L. Hecht, Chief Justice

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Paul W. Green, Justice

_____

Phil Johnson, Justice

_____

Don R. Willett, Justice

_____

Eva M. Guzman, Justice

_____

Debra H. Lehrmann, Justice

_____

Jeffrey S. Boyd, Justice

_____

John P. Devine, Justice

_____

Jeffrey V. Brown, Justice

TRD-201405515
Martha Newton
Rules Attorney
Supreme Court of Texas
Filed: November 19, 2014

♦ ♦ ♦

Teacher Retirement System of Texas

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the report is not included in the print version of the Texas Register. The report is available in the on-line version of the December 5, 2014, issue of the Texas Register.)

Report of Fiscal Transactions, Accumulated Cash and Securities, and Rate of Return on Assets and Actuary's Certification of Actuarial Valuation and Actuarial Present Value of Future Benefits

Section 825.108(a) of the Government Code requires the Teacher Retirement System of Texas (TRS) to publish a report in the *Texas Register* no later than December 15 of each year containing the following information: (1) the retirement system's fiscal transactions for the preceding fiscal year; (2) the amount of the system's accumulated cash and securities; and (3) the rate of return on the investment of the system's cash and securities during the preceding fiscal year.

In addition, §825.108(b) of the Government Code requires TRS to publish a report in the *Texas Register* no later than March 1 of each year containing the balance sheet of the retirement system as of August 31 of the preceding fiscal year and containing an actuarial valuation of the system's assets and liabilities, including the extent to which the system's liabilities are unfunded.

TRS publishes the following reports as required by §825.108(a) and (b) of the Government Code:

These reports include the actuarial valuation of the Texas Public School Retired Employees Group Benefits Program (TRS-Care) dated August 31, 2014. This actuarial valuation was prepared for the purposes of complying with the requirements of Statements 43 and 45 of the Governmental Accounting Standards Board (GASB) and Chapter 2266 of the Government Code, including subchapter C of that chapter relating to Other Postemployment Benefits.

TRD-201405572
Brian K. Guthrie
Executive Director
Teacher Retirement System of Texas
Filed: November 20, 2014

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Texas Department of Transportation

Notice of Availability: Final Environmental Impact Statement Harbor Bridge, Nueces County, Texas

Pursuant to Texas Administrative Code, Title 43, §2.108, the Texas Department of Transportation (TxDOT) is advising the public of the availability of the Final Environmental Impact Statement (Final EIS) for the proposed construction of the US Highway 181 (US 181) Harbor Bridge Project improvements in Nueces County, Texas. The project limits extend both north-south along US 181 and the Crosstown Expressway and east-west along I-37 in Nueces County, and include: US 181 at Beach Avenue on the north; Crosstown Expressway at Morgan Avenue on the south; I-37 and Up River Road on the west; and I-37 and Shoreline Boulevard on the east.

The project would replace the existing Harbor Bridge and reconstruct portions of US 181, I-37 and the Crosstown Expressway. The purpose of the project is to maximize the long-term highway operability of the US 181 crossing of the Corpus Christi Ship Channel and to improve safety for the traveling public, including during hurricane evacuations. The social, economic, and environmental impacts of the project have been analyzed in the Final EIS.

The Final EIS further studies the four build alternatives proposed in the Draft EIS and the no-build alternative, and identifies one of the build alternatives (the "Red Alternative") as the recommended alternative. The recommended alternative is investigated at a higher level of detail in the Final EIS to facilitate the development of mitigation measures and to comply with other federal agency requirements.

The recommended alternative would consist of a controlled-access facility and would include six lanes within a right-of-way width that varies between 200-430 feet, three 12-foot lanes in each direction with a median barrier and 12-foot inside and 10-foot outside shoulders. The alternative includes a 10-foot bicycle and pedestrian shared-use path on the main span of the bridge and on the bridge approaches.

Copies of the Final EIS may be viewed at the www.ccharborbridgeproject.com or at any of the following locations:

1. La Retama Central Library, 805 Comanche Street, Corpus Christi, TX 78401;

2. Oveal Williams Senior Center, 1414 Martin Luther King Drive, Corpus Christi, TX 78401; and

3. Texas Department of Transportation Office, 1701 South Padre Island Drive, Corpus Christi, TX 78416.

Requests for hard copies of the Final EIS and further information about the project may be obtained from the Texas Department of Transportation, Christopher Amy, 1701 S. Padre Island Drive, Corpus Christi, Texas 78416 or call (361)739-6960. Paper copies may be obtained at the requestor's expense.

You may submit written comments concerning the Final EIS to the department, Attention: Christopher Amy, Texas Department of Transportation, 1701 S. Padre Island Drive, Corpus Christi, Texas 78416, or you may submit comments by email to HarborBridgeFEIS@urs.com and at the project website at http://www.ccharborbridgproject.com.

Any comments must be submitted no later than January 4, 2015.

TRD-201405614
Leonard Reese
Associate General Counsel
Texas Department of Transportation
Filed: November 21, 2014

♦ ♦ ♦

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §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:

www.txdot.gov/inside-txdot/get-involved/about/hearings-meetings.html.

Or visit www.txdot.gov, How Do I Find Hearings and Meetings, choose Hearings and Meetings, and then choose Schedule.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4500 or 1-800-68-PILOT.

TRD-201405563

Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: November 20, 2014

♦ ♦ ♦

Sam Houston State University

Notice of Invitation to Provide Consulting Services for Academic Compensation Review

Sam Houston State University invites consultants experienced in providing consulting services on Academic Compensation Reviews to provide an offer of consulting services to Sam Houston State University (SHSU). SHSU seeks a consultant to review its compensation processes, models, policies, practices and pay philosophy related to academic ranks (faculty).

Any proposer intending to respond to this notice should obtain a Request for Proposal (RFP) No. 753-15-47449JEB and follow the instructions for responding contained therein. A copy of the RFP may be downloaded from the Texas Electronic Business Daily at http://esbd.cpa.state.tx.us/. Select Sam Houston State University-753 from the drop down menu and then choose the RFP number listed above.

The last day for questions on this RFP is December 9, 2014, at 3:00 p.m. Central Time. All questions should be directed to Jeremy Barrett, jeb037@shsu.edu; or by fax to 936-294-1997. All questions submitted and received by the deadline will be reviewed, consolidated, where possible, and answered in one addendum to the proposal. The addendum will be posted on the Texas Electronic Business Daily under the same RFP number.

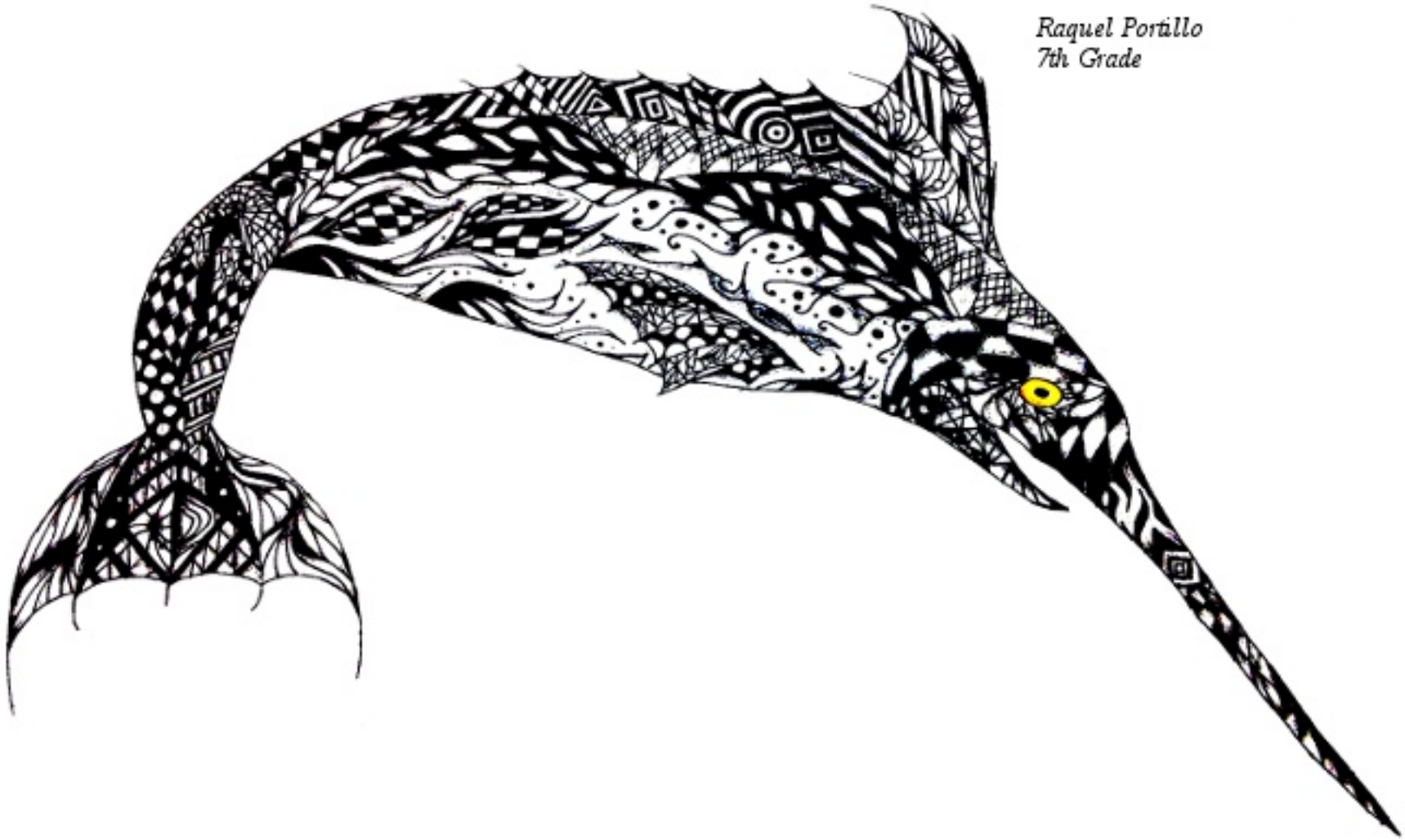
The closing date for receipt of offers is January 7, 2015, at 3:00 p.m. Central Time. SHSU reserves the right to accept or reject any or all proposals submitted. SHSU is under no legal or other obligation to execute a contract or agreement on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits SHSU to pay for any costs incurred prior to the award of a contract or agreement.

The procedure by which SHSU will award the contract is as follows: SHSU will select the Proposal that offers the best value for the institution based on the published selection criteria and on its ranking evaluation. SHSU may first attempt to negotiate a contract with the selected offeror. SHSU may discuss with the selected offeror options for a scope or time modification and any price change associated with the modification. If SHSU is unable to reach a contract with the selected offeror, SHSU may formally end negotiations with that offeror and proceed to the next best value offeror in the order or the selection ranking until a contract is reached or all proposals are rejected. Successful proposer will submit a fully compliant document by November, 2, 2015. See RFP for full details.

As provided in Texas Government Code, §2254.028(c), the chief executive officer of SHSU has found that consulting services sought pursuant to this notice are both reasonable and necessary to SHSU.

TRD-201405519
Rhonda Beassie
General Counsel
Sam Houston State University
Filed: November 19, 2014

♦ ♦ ♦



Raquel Portillo
7th Grade

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 39 (2014) is cited as follows: 39 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 "39 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 39 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)***

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Note**: Back issues of the ***Texas Register, published before September 9, 2005, must be ordered through the Texas Register Section of the Office of the Secretary of State at (512) 463-5561.

Customer Support - For questions concerning your subscription or account information, you may contact LexisNexis Matthew Bender Customer Support from 7am to 7pm, Central Time, Monday through Friday.

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