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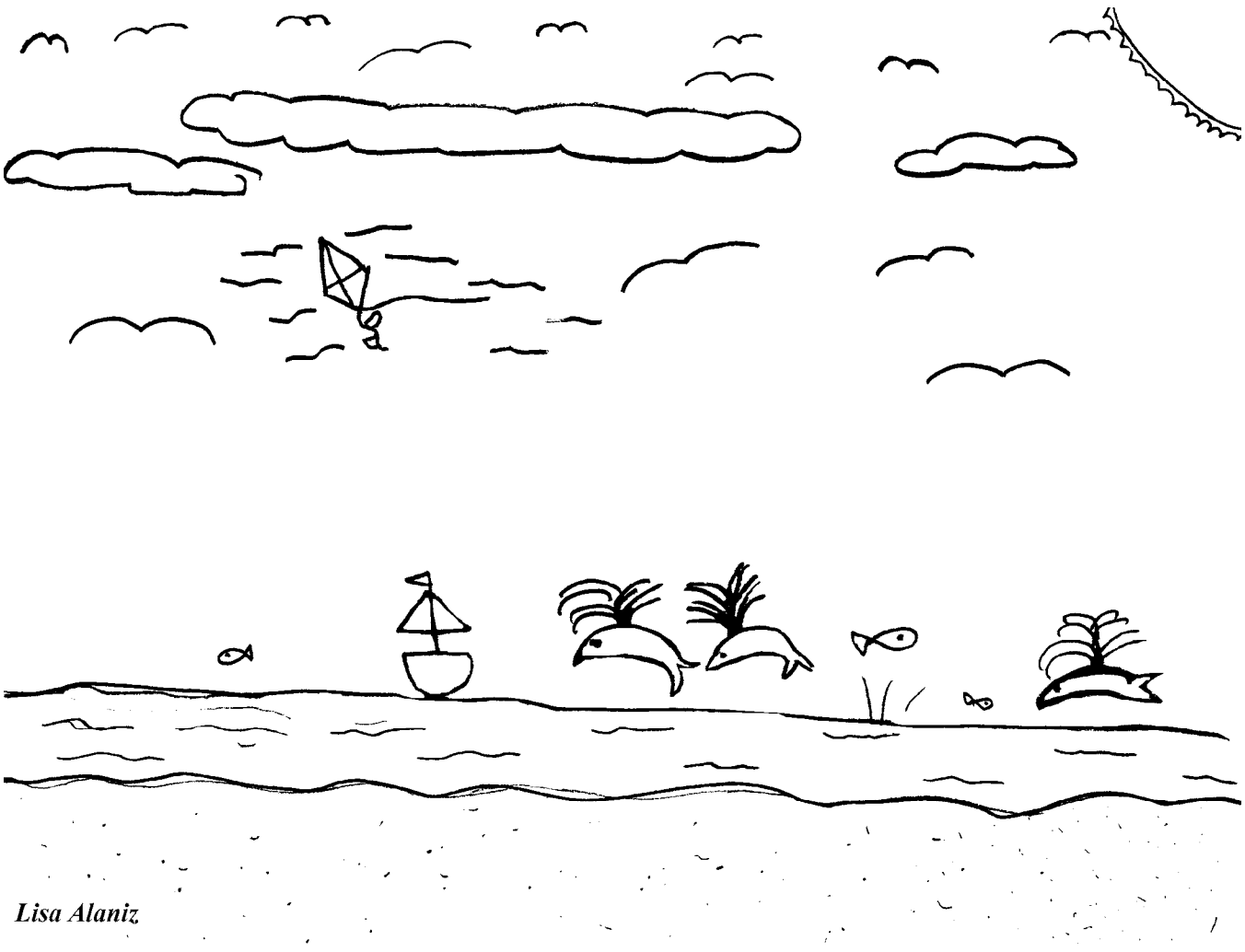

Lisa Alaniz

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

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

ATTORNEY GENERAL

PROPOSED RULES

THE ATTORNEY GENERAL

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

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

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

Request for Opinion

Republication of

RQ-0727-GA

Requestor:

The Honorable Susan Combs

Comptroller of Public Accounts

Post Office Box 13528

Austin, Texas 78711-3528

Re: Whether the Comptroller's report required by Texas Tax Code section 313.032 must be limited to the items listed therein; and whether the Comptroller must redact certain information that has been marked as "confidential" (RQ-0727-GA)

Briefs requested by August 25, 2008

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

TRD-200804285
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: August 11, 2008

♦ ♦ ♦

Opinions

Opinion No. GA-0652

Ms. Martha Galarza

Cameron County Auditor

Post Office Box 3846

Brownsville, Texas 78520

Re: Whether a county's alleged underpayment to indigent health care providers is an unconstitutional debt for purposes of article XI, section 7 of the Texas Constitution (RQ-0672-GA)

SUMMARY

Whether Cameron County contemplated when it entered into indigent health care services contracts that the entire pecuniary obligation thereunder would be paid from current general tax revenues for the 2006-2007 fiscal year or other funds then within the county's immediate control is a question of fact.

If, as suggested here, Cameron County did not contemplate when it entered into indigent health care services contracts that the entire pecuniary obligation thereunder would be paid from current general tax revenues for the 2006-2007 fiscal year or other funds then within the county's immediate control, such contracts created "debt" within the meaning of Texas Constitution article XI, section 7. And unless the county levied a tax to pay interest on the "debt" and provide a sinking fund of at least two percent to pay the principal, the contracts created "debt" prohibited by the constitutional provision. Under these circumstances, indigent health care services invoices submitted pursuant to the contracts in excess of the amount budgeted by the county for such purposes at issue here would constitute "debt" prohibited by article XI, section 7.

If the indigent health services invoices in excess of the amount budgeted by the county for such purposes constitute "debt" prohibited by article XI, section 7, the Cameron County Commissioners Court cannot ratify them; the Cameron County Auditor is prohibited from approving the claims; and the Cameron County Commissioners Court is not authorized to direct their payment.

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

TRD-200804360
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: August 13, 2008

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PROPOSED RULES

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 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 9. RULES OF PROCEDURE FOR CONTESTED CASE HEARINGS, APPEALS, AND RULEMAKINGS

SUBCHAPTER B. CONTESTED CASE HEARINGS

7 TAC §9.28

The Finance Commission of Texas (commission) proposes amendments to 7 TAC §9.28, concerning Prefiled Testimony. The purpose of the proposed amendments is to allow for more flexibility in the admission of prefiled written testimony of an investigator who is not available to testify. The proposed amendments preserve the fundamental right to cross-examination in a due process hearing while allowing an exception for the admission of written agency investigation reports meeting the requirements of Rule 803, Texas Rules of Evidence when the investigator is not available to testify.

Larry Craddock, administrative law judge for the commission and for the Texas Department of Banking, Office of Consumer Credit Commissioner, and Department of Savings and Mortgage Lending (finance agencies) has determined that for each year of the first five years that the proposed amendments are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the proposed amendments.

Mr. Craddock has also determined that, for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the amendments will be more flexibility in admission of the written testimony of an investigator who is not available to testify. There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small or micro-businesses. There will be no effect on individuals required to comply with the amendments as proposed.

Comments concerning the proposed amendments should be submitted within 31 days of publication to Larry Craddock, Administrative Law Judge, Finance Commission of Texas, 2601 North Lamar Boulevard, Austin, Texas 78705-4294, or by email to larry.craddock@banking.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed amendments are published in the *Texas Register.* At the conclusion of the 31st day after the proposed amendments are published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

The amendments are proposed pursuant to Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The amendments are also proposed under specific rulemaking authority contained in the substantive statutes administered by the finance agencies under the jurisdiction of the commission, including Finance Code, §§11.301, 11.302, 11.304, 11.306, 14.157, 31.003, 66.002, 96.002, 151.102, 154.051, 156.102, 181.003, 201.003, 342.551, 351.003 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351.007 (Property Tax Lenders, Acts 2007, 80th Leg., ch. 1220), 348.513, 371.006, 394.214, and 396.051, Health and Safety Code, §711.012(a) and §712.008, and Tax Code, §32.06.

The statutory provisions affected by the proposed amendments are contained in Finance Code, Chapters 11, 12, 13, 14, 31, 35, 61, 66, 91, 96, 121, 151, 154, 156, 181, 185, 201, 301, 341, 342, 348, 351 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351 (Property Tax Lenders, known as the "Property Tax Lender License Act," Acts 2007, 80th Leg., ch. 1220), 371, 394, 396, Health and Safety Code, Chapters 711 and 712, and Tax Code, §32.06 and §32.065.

§9.28. Prefiled Testimony.

On the judge's own motion [~~Sua sponte~~] or on motion of any party, the administrative law judge may omit oral presentation of the direct testimony of any witness and may allow prefiled written testimony to be presented in its place. The written testimony carries the same force and effect as though stated orally by the witness; provided that the witness must be present at the hearing at which such testimony is offered and adopt such testimony under oath, and must be made available for cross-examination. Written reports of agency investigations on fact issues, if offered into evidence in a hearing in which the facts covered by the report are directly at issue, will be treated as prefiled testimony and the investigator must be made available for cross-examination unless the investigator is not available to the agency or unless the report comes into evidence without objection. If the investigator is not available, the report shall be admissible under Rule 803, Texas Rules of Evidence if it meets the requirements for admission into evidence under that rule.

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

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804241

Leslie L. Pettijohn
Executive Director
Finance Commission of Texas
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 936-7621

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PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 15. CORPORATE ACTIVITIES
SUBCHAPTER C. BANK OFFICES

7 TAC §15.44

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes new §15.44, concerning the Establishment and Operation of a Center of Monetary Education for Texans (COMET). The new rule is proposed to facilitate the establishment of bank offices in schools so that young people and other members of the school community may improve their financial literacy. A new rule is needed to minimize the administrative requirements for opening an office in a school.

Proposed new §15.44 allows state banks to participate in a financial education program at a school and, at the school's discretion, provide services including receiving deposits, paying withdrawals, and lending money. Under current law, a state bank cannot pay withdrawals or lend money from a school office unless it obtains approval from the department to open a branch.

The Legislature has recognized the need for Texas residents to become more financially literate. In 2005, it passed House Bill (HB) 492, which requires instruction in personal financial literacy in one or more courses for high school graduation. In 2007, the Legislature passed HB 2007, which requires the department to seek to improve the financial literacy and education of Texans and to encourage access to mainstream financial products by persons who have not previously participated in the conventional finance system (the unbanked). Two of the methods authorized by the Legislature are (1) to encourage and aid banks in the development and promotion of financial literacy and education programs and community outreach, and (2) to promote replication of best practices and exemplary programs that foster financial literacy and education.

State banks currently face administrative hurdles in opening school offices that credit unions and national banks do not face. Credit unions are free to open offices in school without prior regulatory approval. The Office of the Comptroller of the Currency (OCC), which regulates national banks, passed a rule in 2001 which allows a national bank to open an office in a school without the office becoming a branch if the principal purpose for the office is educational. See 12 CFR §7.1021. The Federal Deposit Insurance Corporation (FDIC), which normally requires state banks to file branch applications, passed a very similar rule effective June 23, 2008. Now that the branch application requirement has been removed at the federal level for school financial education programs, proposed new §15.44 will make the department's process for establishment of bank offices in schools consistent with federal rules.

The department receives inquiries from banks desiring to offer financial education programs in schools that would include the provision of banking services. Because of current Texas regulations, the banks have been able to offer only limited services without applying for a branch. Under proposed new §15.44 a school and bank could create a more extensive program that would provide greater financial education without the creation of a bank branch. For example, in a high school, a bank employee could be on site managing and overseeing student tellers. These students would be trained in bank operations. Services could include opening deposit accounts, paying withdrawals, or making loans. The department expects that such services would be limited in nature; available only to students, parents, and faculty of the sponsoring school; and accessible on a part-time basis or designated school days. A program providing these services can train the students in personal financial management, which contributes to their financial stability and that of their communities. Such a program could further the legislative goal of community outreach by providing services to the unbanked who have a relationship with the school.

New §15.44 requires any state bank that plans to open a COMET to give the department 30 days written notice before operations commence. The new rule also mandates that the services are to be provided at the discretion of the school. The program must be conducted consistently with safe and sound banking practices and applicable law.

Robert Bacon, Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rule.

Mr. Bacon has also determined that, for each year of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of adopting the proposed rule is that more financial education programs will be established which include the provision of bank services and which include training of students in bank operations. These programs will enhance the financial literacy of students and parents who may be currently unbanked. The schools will benefit by having more bank partners who will help the schools fulfill their legislative mandate of providing a financial literacy curriculum. The banks will benefit by establishing relationships with students that may grow into long-lasting relationships. The state as a whole will benefit by having a more financially literate population.

For each year of the first five years that the rule will be in effect, there will be no economic costs to persons required to comply with the rule as proposed.

There will be no adverse economic effect on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses.

To be considered, comments on the proposed new section must be submitted no later than 5:00 p.m. on the 31st day after publication of this notice. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

New §15.44 is proposed under Finance Code §12.1085, which requires the department to improve the financial literacy and education of persons in this state and to encourage access to mainstream financial products and services by the unbanked; under Finance Code §31.003(a), which provides that the finance commission may adopt rules to accomplish the purposes of

this subtitle and Chapters 11, 12, and 13; under Finance Code §31.002(a)(8)(H), which excepts from the definition of "branch" another office or facility as provided by a rule adopted under Subtitle A of Title 3 of the Texas Finance Code; and, under Finance Code §32.201(b), which provides that the finance commission may adopt rules further defining functions of a state bank that are not required to be conducted at an approved location.

Finance Code §§12.1085, 31.002(a)(8), and 32.203 are affected by the proposed new section.

§15.44. Establishment and Operation of a Center of Monetary Education for Texans.

(a) "Center Of Monetary Education for Texans" (COMET) means a financial education program in which a state bank participates and provides services such as receiving deposits, paying withdrawals, or lending money.

(b) A COMET is not a branch within the meaning of Finance Code §31.002(a)(8), nor is it subject to licensing, registration, or prior regulatory approval, so long as it meets the following conditions:

(1) The service or services are provided on school premises, or a facility used by the school;

(2) The service or services are provided at the discretion of the school;

(3) The principal purpose of each program is financial education. For example, the principal purpose of a program would be considered to be financial education if the program is designed to teach students the principles of personal financial management, banking operations, or the benefits of saving for the future, and is not designed for the purpose of profit-making; and

(4) The program is conducted in a manner that is consistent with safe and sound banking practices and complies with applicable law.

(c) A state bank shall give the banking commissioner 30 days written notice before it begins providing services at a COMET, except that the banking commissioner may waive or shorten the notice period if the banking commissioner does not have a significant supervisory or regulatory concern regarding the bank or its planned COMET. The written notice must include the name of the school and the physical address of the planned COMET, a list of the specific activities to be performed at the planned COMET, the anticipated date for the opening of the COMET, and other information which the banking commissioner may reasonably request.

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

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804216
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: October 17, 2008
For further information, please call: (512) 475-1300

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PART 4. TEXAS DEPARTMENT OF SAVINGS AND MORTGAGE LENDING

CHAPTER 75. APPLICATIONS

The Finance Commission of Texas (the "Commission") proposes amendments to Subchapter A, §75.1, concerning the application for permission to organize a state savings bank, and §75.3, concerning publication of notice of charter application; Subchapter C, §75.32, concerning types of additional offices, §75.33, concerning branch office applications, and §75.41, concerning offices and remote service units in other states or territories; and, Subchapter E, §75.121, concerning definitions, in conjunction with the Commission's review of Chapter 75. The Commission is proposing the repeal of §75.37, which is published elsewhere in this issue of the *Texas Register.*

In general, the purpose of the amendments is to conform the rules to the Department's current practice, to eliminate obsolete provisions, and to add clarification. Section 75.1 has been revised to remove obsolete language and add clarification. Section 75.3 has been revised to provide clarification. Sections 75.32 and 75.33 add language to clarify a current practice. Section 75.41 has been revised to provide clarification and also to delete proposed repealed language. Section 75.121 has been revised to correct the Department's name.

Douglas B. Foster, Savings and Mortgage Lending Commissioner, has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Foster also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of the proposed amendments will be that the Department's rules will conform to current practice, will be more easily understood by savings banks required to comply with the rules, and will be more easily enforced. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

Comments on the proposed amendments may be submitted in writing to Caroline C. Jones, Chief Thrift Attorney, Texas Department of Savings and Mortgage Lending, 2601 North Lamar, Suite 201, Austin, Texas 78705, or by email to cjones@sml.state.tx.us.

SUBCHAPTER A. CHARTER APPLICATIONS

7 TAC §75.1, §75.3

The amendments are proposed under Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 92.

§75.1. Application for Permission to Organize a State Saving Bank.

(a) (No change.)

(b) The commissioner shall furnish approved forms of application and other information to aid in the filing of the application. The form is available from the department at 2601 North Lamar Boulevard, Suite 201, Austin, Texas 78705 and from the State Savings Bank Information section of the Department's website at www.sml.state.tx.us.

(c) No application to incorporate a savings bank shall be approved unless the application and evidence produced at a hearing satisfy the commissioner that the proposed savings bank has received subscriptions for capital stock and paid-in surplus in the case of a capital stock savings bank, or pledges for savings liability and expense fund

in the case of a mutual savings bank, in the minimum amount of $3 million [~~with at least 80% of the total subscriptions being allocated to capital stock or the savings liability and expense account, as applicable~~]. No savings bank with an approved charter shall open or do business as a savings bank until the commissioner certifies that he has received proof satisfactory to him that the amounts of capital stock and paid-in surplus, or the savings liability and expense fund, as set forth in this section, have been received by the savings bank in cash, free of encumbrance.

(d) (No change.)

§75.3. Publication of Notice of Charter Application.

At least 20 days before the date of the hearing, the [~~The~~] proposed incorporators shall publish a notice, approved by the Commissioner, [~~at least 20 days before the date of the hearing~~] in a newspaper printed in the English language, and in [~~of~~] general circulation in the county where the proposed savings bank will have its principal office [~~a notice approved by the commissioner~~].

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

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804165
Douglas B. Foster
Commissioner
Texas Department of Savings and Mortgage Lending
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 475-1350

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SUBCHAPTER C. ADDITIONAL OFFICES

7 TAC §§75.32, 75.33, 75.41

The amendments are proposed under Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 92.

§75.32. Types of Additional Offices.

Subject to the provisions of §§75.31 - 75.41 of this title (relating to Applications), the following types of additional offices may be established and maintained by a savings bank:

(1) (No change.)

(2) loan production offices at which the savings bank, through its regularly employed personnel, may receive and process applications for loans and contracts and manage or sell real estate owned by the institution but at which no other business of the savings bank is transacted [~~carried on~~];

(3) (No change.)

(4) administrative offices at which the savings bank, through its regularly employed personnel, may transact administrative functions of the institution. Such office may be located separate and apart from the location of any other facility of the savings bank. No savings deposits or loan applications may be accepted at an administrative office; and,[~~.~~]

(5) courier/messenger service to transport items relevant to the bank's transactions with its customers, including courier services between financial institutions.

§75.33. Branch Office Applications.

(a) - (d) (No change.)

(e) A branch office application is also required if a state savings bank would like to establish and operate a courier/messenger service pursuant to §75.32(5) of this title (relating to Types of Additional Offices).

§75.41. Offices[~~and Remote Service Units~~] in Other States or Territories.

To the extent permitted by the laws of the state or territory in question, and subject to this chapter, a savings bank may establish branch offices and[~~,~~] loan production offices[~~, and remote service units~~] in any state or territory of the United States. Each application for permission to establish such a branch office or[~~,~~] loan production office[~~, or remote service unit~~] shall comply with the applicable requirements of this chapter, and shall include a certified copy of an order from the appropriate state or territorial regulatory authority approving the office or unit, or other evidence satisfactory to the commissioner that all state or territorial regulatory requirements have [~~had~~] been satisfied. Each such application shall be set for hearing, if applicable, notice given, hearing held, if applicable, and decision reached in the same manner and within the time provided in this chapter for similar applications for offices [~~or units~~] in this state. The commissioner may not approve such an application unless he shall have affirmatively found from the data furnished with the application, the evidence adduced at the hearing, if applicable, and his official records that all requirements of this chapter applicable to the office [~~or unit~~] have been met, and that all applicable requirements of the laws of the state or territory in question have been met.

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804257
Douglas B. Foster
Commissioner
Texas Department of Savings and Mortgage Lending
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 475-1350

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SUBCHAPTER E. CHANGE OF CONTROL

7 TAC §75.121

The amendments are proposed under Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 92.

§75.121. Definitions.

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

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

(3) Commissioner--The Texas Savings and Mortgage Lending Commissioner [~~savings and loan commissioner~~].

(4) - (8) (No change.)

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804264
Douglas B. Foster
Commissioner
Texas Department of Savings and Mortgage Lending
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 475-1350

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SUBCHAPTER C. ADDITIONAL OFFICES

7 TAC §75.37

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

The Finance Commission of Texas (the "Commission") proposes to repeal Subchapter C, §75.37, concerning remote service units, in conjunction with the Commission's review of Chapter 75. The Commission is proposing revisions to §§75.1, 75.3, 75.32, 75.33, 75.41, and 75.121, which are published elsewhere in this issue of the *Texas Register.*

The purpose of the repeal of this rule is to eliminate an obsolete procedure that is no longer used by any other similar banking regulatory agency.

Douglas B. Foster, Savings and Mortgage Lending Commissioner, has determined that for the first five-year period the repealed rule is in effect, there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Foster also has determined that for each year of the first five years the repealed rule is in effect, the public benefit anticipated as a result of the proposed amendments will be that the Department's rules will conform to current practice, will be more easily understood by savings banks required to comply with the rules, and will be more easily enforced. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

Comments on the proposed repeal may be submitted in writing to Caroline C. Jones, Chief Thrift Attorney, Texas Department of Savings and Mortgage Lending, 2601 North Lamar, Suite 201, Austin, Texas 78705, or by email to cjones@sml.state.tx.us.

The repeal is proposed under Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed repealed rule are contained in Texas Finance Code, Chapter 92.

§75.37. Remote Service Units.

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

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804169
Douglas B. Foster
Commissioner
Texas Department of Savings and Mortgage Lending
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 475-1350

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CHAPTER 77. LOANS, INVESTMENTS, SAVINGS, AND DEPOSITS

The Finance Commission of Texas (the "Commission") proposes amendments to Subchapter A, §77.1, concerning loans authorized, §77.31, concerning loan policies and documentation, §77.72, concerning liquidity, §77.74, concerning local service area investment requirement, and §77.94, concerning subsidiary operations; and Subchapter B, §77.115, concerning user safety at unmanned teller machines, in conjunction with the Commission's review of Chapter 77. The Commission is proposing the repeal of §77.32, 77.101 - 77.104 and 77.106 - 77.113 which is published elsewhere in this issue of the *Texas Register.*

In general, the purpose of the amendments is to conform the rules to the Department's current practice, to eliminate obsolete provisions, and to add clarification. Sections 77.1, 77.31, 77.72, 77.74, and 77.94 have been revised to clarify current practice. Section 77.115 has been revised to correct the Department's name.

Douglas B. Foster, Savings and Mortgage Lending Commissioner, has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Foster also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of the proposed amendments will be that the Department's rules will conform to current practice, will be more easily understood by savings banks required to comply with the rules, and will be more easily enforced. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

Comments on the proposed amendments may be submitted in writing to Caroline C. Jones, Chief Thrift Attorney, Texas Department of Savings and Mortgage Lending, 2601 North Lamar, Suite 201, Austin, Texas 78705, or by email to cjones@sml.state.tx.us.

SUBCHAPTER A. AUTHORIZED LOANS AND INVESTMENTS

7 TAC §§77.1, 77.31, 77.72, 77.74, 77.94

The amendments are proposed under Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapters 94 and 95.

§77.1. Loans Authorized.

(a) A savings bank may originate, invest in, sell, purchase, service, participate, or otherwise deal in (including brokerage or warehousing) the following types of loans or participations, subject to the limitations of this subchapter:

(1) - (9) (No change.)

(10) unsecured loans, in accordance with §77.11 of this title (relating to Unsecured Loans); [and]

(11) local consumer installment loans which are made for personal, family, or household purposes, including loans fully secured by savings accounts owned or otherwise pledged for or by the borrower; and

(12) [(11)] loans which are insured or guaranteed by the United States or any instrumentality thereof.

(b) (No change.)

§77.31. Loan Policies and Documentation.

(a) Each savings bank shall establish written policies approved by its board of directors establishing prudent credit underwriting and loan documentation standards. Such standards must be designed to identify potential safety and soundness concerns and ensure that action is taken to address those concerns before they pose a risk to the association's capital. Credit underwriting standards should consider the nature of the markets in which loans will be made; provide for consideration, prior to credit commitment, of the borrower's overall financial condition and resources, the financial stability of any guarantor, the nature and value of underlying collateral, and the borrower's character and willingness to repay as agreed; establish a system of independent, ongoing credit review and appropriate communication to senior management and the board of directors; take adequate account of concentration of credit risk; and are appropriate to the size of the savings bank and the scope of its lending activities. Loan documentation standards should be established and maintained to enable the savings bank to make informed lending decisions and assess risk, as necessary, on an ongoing basis; identify the purpose of the loan and source of repayment, and assess the ability of the borrower to repay the indebtedness in a timely manner; ensure that any claim against a borrower is legally enforceable; demonstrate appropriate administration and monitoring of a loan; and consider the size and complexity of a loan. The following documents are generally appropriate and can be used as a guideline for prudent lending; however, unless such documents are specifically required by other state and federal statutes or regulations, there may be alternative documents equally suitable in satisfying the safety and soundness intent of this section which the savings bank may substitute and still address the safety and soundness concern:

(1) an application for the loan, signed and dated by the borrower or his agent (and if the borrower is a corporation, a board of directors' resolution authorizing the loan), which discloses the purpose for which the loan is sought, the identity of the security property, and the source of funds which will be used to repay the loan;

(2) - (14) (No change.)

(b) - (h) (No change.)

§77.72. Liquidity.

A savings bank shall maintain liquidity in an amount not less than 10% of an amount equal to its average daily deposits for the most recently completed calendar quarter in cash or [and] readily marketable investments. The term "cash" shall include unpledged demand accounts in other federally insured depository institutions, a Federal Home Loan or Federal Reserve Bank. Whether a security is readily marketable must be determined on an individual security basis; however, to be eligible for inclusion in "readily marketable investments" category:

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

§77.74. Local Service Area Investment Requirement.

(a) A savings bank shall maintain an amount equal to at least 15% of its local service area deposits invested in the following categories of assets and investments:

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

(4) mortgage-backed securities secured by loans from within the savings bank's local service area; [and]

(5) loans for community reinvestment purposes; and[.]

(6) local consumer installment loans.

(b) - (d) (No change.)

§77.94. Subsidiary Operations.

(a) The savings bank shall obtain prior written approval of the commissioner for the establishment and location of the main office, and any branch office, agency office, or any other office or facility of the corporation, and for any change of name of the subsidiary.

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

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

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Douglas B. Foster
Commissioner
Texas Department of Savings and Mortgage Lending
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For further information, please call: (512) 475-1350

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SUBCHAPTER B. SAVINGS AND DEPOSITS

7 TAC §77.115

The amendments are proposed under Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapters 94 and 95.

§77.115. User Safety at Unmanned Teller Machines.

(a) Definitions. Words and terms used in this section [undesignated head] that are defined in the ATM User Safety Act, §1, have the same meanings as defined in the ATM User Safety Act. The following words and terms when used in this section [undesignated head] shall have the following meanings, unless the context clearly indicates otherwise.

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

(5) Department--The Texas [Savings and Loan] Department of Savings and Mortgage Lending.

(b) - (i) (No change.)

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

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SUBCHAPTER A. AUTHORIZED LOANS AND INVESTMENTS

7 TAC §77.32

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

The Finance Commission of Texas (the "Commission") proposes to repeal Subchapter A, §77.32, concerning restrictions on loan procurement fees, in conjunction with the Commission's review of Chapter 77. The Commission is proposing revisions to §§77.1, 77.31, 77.72, 77.74, 77.94, and 77.115, and the repeal of §§77.101 - 77.104 and 77.106 - 77.113, which are published elsewhere in this issue of the *Texas Register.*

The purpose of the repeal of this rule is to eliminate an obsolete requirement.

Douglas B. Foster, Savings and Mortgage Lending Commissioner, has determined that for the first five-year period the repealed rule is in effect, there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Foster also has determined that for each year of the first five years the repealed rule is in effect, the public benefit anticipated as a result of the proposed amendments will be that the Department's rules will conform to current practice, will be more easily understood by savings banks required to comply with the rules, and will be more easily enforced. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

Comments on the proposed repeal may be submitted in writing to Caroline C. Jones, Chief Thrift Attorney, Texas Department of Savings and Mortgage Lending, 2601 North Lamar, Suite 201, Austin, Texas 78705, or by email to cjones@sml.state.tx.us.

The repeal is proposed under Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed repealed rule are contained in Texas Finance Code, Chapter 94.

§77.32. Restriction on Loan Procurement Fees.

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

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Douglas B. Foster
Commissioner
Texas Department of Savings and Mortgage Lending
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SUBCHAPTER B. SAVINGS AND DEPOSITS

7 TAC §§77.101 - 77.104, 77.106 - 77.113

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

The Finance Commission of Texas (the "Commission") proposes to repeal Subchapter B, §77.101, concerning the distribution or payment of dividends or interest, §77.102, concerning account balance to which dividends or interest are applied, §77.103, concerning the method of computing dividends, §77.104, concerning advertisements or public representations of account earnings, §77.106, concerning provisions for distribution of earnings on other than regular accounts, §77.107, concerning notice prior to withdrawal, §77.108, concerning deposit accounts, §77.109, concerning NOW accounts, §77.110, concerning checking accounts, §77.111, concerning approval of the commissioner, §77.112, concerning noninterest-bearing deposit accounts, and §77.113, concerning overdraft protection--credit and debit cards, in conjunction with the Commission's review of Chapter 77. The Commission is proposing revisions to §§77.1, 77.31, 77.72, 77.74, 77.94, and 77.115, which are published elsewhere in this issue of the *Texas Register.*

The purpose of the repeal of these rules is to eliminate obsolete requirements.

Douglas B. Foster, Savings and Mortgage Lending Commissioner, has determined that for the first five-year period the repealed rule is in effect, there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Foster also has determined that for each year of the first five years the repealed rule is in effect, the public benefit anticipated as a result of the proposed amendments will be that the department's rules will conform to current practice, will be more easily understood by savings banks required to comply with the rules, and will be more easily enforced. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed repeals.

Comments on the proposed repeal may be submitted in writing to Caroline C. Jones, Chief Thrift Attorney, Texas Department of Savings and Mortgage Lending, 2601 North Lamar, Suite 201, Austin, Texas 78705, or by email to cjones@sml.state.tx.us.

The repeal is proposed under Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed repealed rule are contained in Texas Finance Code, Chapter 95.

§77.101. Distribution or Payment of Dividends or Interest.

§77.102. Account Balance to Which Dividends or Interest Are Applied.

§77.103. Method of Computing Dividends.

§77.104. Advertisements or Public Representations of Account Earnings.

§77.106. Provisions for Distribution of Earnings on Other Than Regular Accounts.

§77.107. Notice Prior to Withdrawal.

§77.108. Deposit Accounts.

§77.109. NOW Accounts.

§77.110. Checking Accounts.

§77.111. Approval of the Commissioner.

§77.112. Noninterest-Bearing Deposit Accounts.

§77.113. Overdraft Protection--Credit and Debit Cards.

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

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CHAPTER 79. MISCELLANEOUS

The Finance Commission of Texas (the "Commission") proposes amendments to Subchapter A, §79.4, concerning financial statements, annual reports, and audits, §79.7, concerning examinations; Subchapter E, §79.71, concerning hearings officer; and Subchapter H, §79.122, concerning consumer complaint procedures, in conjunction with the Commission's review of Chapter 79.

In general, the purpose of the amendments is to conform the rules to the Department's current practice, to eliminate obsolete provisions, and to add clarification. Section 79.4 has been revised to remove the option of not having independent audits and to correct the numbering scheme. Section 79.7 has been revised for clarification. Sections 79.71 and 79.122 have been revised to correct the Department's name and contact information.

Douglas B. Foster, Savings and Mortgage Lending Commissioner, has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Foster also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of the proposed amendments will be that the Department's rules will conform to current practice, will be more easily understood by savings banks required to comply with the rules, and will be more easily enforced. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

Comments on the proposed amendments may be submitted in writing to Caroline C. Jones, Chief Thrift Attorney, Texas Department of Savings and Mortgage Lending, 2601 North Lamar, Suite 201, Austin, Texas 78705, or by email to cjones@sml.state.tx.us.

SUBCHAPTER A. BOOKS, RECORDS, ACCOUNTING PRACTICES, FINANCIAL STATEMENTS AND RESERVES

7 TAC §79.4, §79.7

The amendments are proposed under Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapters 11, 13, and 96.

§79.4. Financial Statements; Annual Reports; Audits.

(a) Before March 1 [~~January 31~~] of each year, each savings bank shall submit a statement of condition (balance sheet) as of the last business day of December of the preceding year to the commissioner, upon a form to be prescribed and furnished by the commissioner.

(b) For safety and soundness purposes, within [~~Within~~] 90 days of its fiscal year end, [~~each savings bank shall submit an annual written report of its affairs and operations to the commissioner. The report shall include a complete statement of its financial condition, including a balance sheet as of the last day of its fiscal year, and statements of income and expense, cash flows, and changes in its capital accounts for the 12 months ending on the last business day of its previous fiscal year. The report should be prepared on a comparative basis with the most recently completed prior fiscal year in accordance with generally accepted accounting principles including such notes to the financial statements as are necessary to make such statements not misleading. Every such report shall be signed by the president, and chief financial officer and sworn by them under oath to be complete and correct to the best of their knowledge and belief. Every savings bank shall also make such other reports as the commissioner may from time to time require, which reports shall be in such form and filed on such dates as he may prescribe and shall, if required by him, be signed in the same manner as the annual report.~~]

[~~(c)~~] [~~For safety and soundness purposes,~~] each savings bank is required to have an independent audit of its [~~the~~] financial statements. [~~required by subsection (b) of this section if the institution:~~]

[~~(1) received a composite rating of 3, 4 or 5 on the Uniform Financial Institutions' Rating System (CAMEL) as of its most recent report of examination; or~~]

[~~(2)~~] [~~had total assets at the beginning of its fiscal year of over $500 million. The commissioner may waive the independent audit requirement for an institution with a composite 3, 4 or 5 CAMEL rating if the commissioner determines that the audit procedures would not address the safety and soundness issues that caused the examination rating.~~] The audit is to be performed in accordance with generally accepted auditing standards and the provisions of 12 Code of Regulations Part 363 Federal Deposit Insurance Corporation Regulations regarding annual independent audits and reporting requirements are incorporated herein, with the exception of any matters specifically addressed by the Act or its related rules.

(c) A copy of the independent audit and all correspondence reasonably related to the audit shall be provided to the Commissioner upon completion.

§79.7. Examinations.

(a) (No change.)

(b) An examination under this [the] section may be performed jointly or in conjunction with an examination by the Federal Deposit Insurance Corporation or any other federal depository institutions regulatory agency having jurisdiction over a savings bank, and/or the commissioner may accept an examination made by such banking agency in lieu of an examination pursuant to this section.

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

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SUBCHAPTER E. HEARINGS

7 TAC §79.71

The amendments are proposed under Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapters 11, 13, and 96.

§79.71. Hearings Officer.

The Texas Banking Act, §1.011(b), House Bill 1543, Acts, 74th Legislature, provides that the Finance Commission may employ a hearings [hearing] officer, who for purposes of Texas Civil Statutes, Government Code, §2003.21, is an employee of the Texas [Savings and Loan] Department of Savings and Mortgage Lending, Department of Banking and the Office of the Consumer Credit Commissioner. The Finance Commission hearings [hearing] officer shall conduct hearings under provisions of the Act.

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

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SUBCHAPTER H. CONSUMER COMPLAINT PROCEDURES

7 TAC §79.122

The amendments are proposed under Texas Finance Code §11.302, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapters 11, 13, and 96.

§79.122. Consumer Complaint Procedures.

(a) (No change.)

(b) Notice of how to file complaints

(1) In [n] order to let its consumers know how to file complaints, state savings banks must use the following notice: The (name of state savings bank) is chartered under the laws of the State of Texas and by state law is subject to regulatory oversight by the Texas [Savings and Loan] Department of Savings and Mortgage Lending. Any consumer wishing to file a complaint against the (name of state savings bank) should contact the Texas [Savings and Loan] Department of Savings and Mortgage Lending through one of the means indicated below: In Person or by U.S. Mail: 2601 North Lamar Boulevard, Suite 201, Austin, Texas 78705-4294, Telephone No.: (877) 276-5550, Fax No.: (512) 475-1505 [1360], E-mail: smlinfo@sml.state.tx.us [TSLD@tsld.state.tx.us].

(2) (No change.)

(3) Regardless of whether a state savings bank is required by any state or federal law to give privacy notices, each state savings bank must take appropriate steps to let its consumers know how to file complaints by giving them the required notice in compliance with subsection (b) [paragraph] (1) of this section [subsection].

(4) The following measures are deemed to be appropriate steps to give the required notice:

(A) In each area where a state savings bank conducts business on a face-to-face basis, the required notice, in the form specified in subsection (b) [paragraph] (1) of this section [subsection], must be conspicuously posted. A notice is deemed to be conspicuously posted if a customer with 20/20 vision can read it from the place where he or she would typically conduct business or if it is included on a bulletin board, in plain view, on which all required notices to the general public (such as equal housing posters, licenses, Community Reinvestment Act notices, etc.) are posted.

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

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

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CHAPTER 80. MORTGAGE BROKER AND LOAN OFFICER LICENSING

The Finance Commission of Texas (the "Commission") proposes amendments to Subchapter A, §80.2, concerning definitions, §80.3, concerning licensing - general, §80.5, concerning renewals, and §80.6, concerning sponsorship and termination thereof; Subchapter B, §80.10, concerning prohibition on false, misleading, or deceptive practices and improper dealings; Subchapter C, §80.12, concerning display of license verification and license record changes, and §80.13, concerning books and records; Subchapter G, §80.18, concerning enforceability of

liens; and, Subchapter K, §80.23, concerning annual reports, in conjunction with the Commission's review of Chapter 80.

In general, the purpose of the amendments is to conform the rules to the Department's current practice, to eliminate obsolete provisions, and to add clarification. Sections 80.2 and 80.3 have been revised to add clarification. Section 80.5 has been revised to remove obsolete language. Section 80.6 adds language to clarify a current practice. Section 80.10 has been revised to improve consumer awareness and clarify procedures. Sections 80.12 and 80.13 have been revised to clarify procedures. Section 80.18 has been revised to delete a form that does not pertain to the Section, and that already appropriately exists in Section 80.9. Section 80.23 has been revised for clarification.

Douglas B. Foster, Savings and Mortgage Lending Commissioner, has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Foster also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of the proposed amendments will be that the Department's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

Comments on the proposed amendments may be submitted in writing to Jane Black, General Counsel, Texas Department of Savings and Mortgage Lending, 2601 North Lamar, Suite 201, Austin, Texas 78705, or by email to jblack@sml.state.tx.us.

SUBCHAPTER A. LICENSING

7 TAC §§80.2, 80.3, 80.5, 80.6

The amendments are proposed under Texas Finance Code §11.306, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 156.

§80.2. Definitions.

As used in this Chapter, the following terms have the meanings indicated:

(1) - (12) (No change.)

(13) "Criminal Offense" means any violation of any state or federal criminal statute which:

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

(C) involves the solicitation of, the giving of, or the taking of bribes, kickbacks, or other illegal compensation;

(D) - (H) (No change.)

§80.3. Licensing - General.

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

(c) Inactive Licenses

(1) New loan officer applicants. A loan officer applicant may be issued an inactive license if the applicant completes the promulgated application form and complies with all requirements of the license with the exception of having an active mortgage broker sponsor. The license can be converted to an active license within the license period following the submission and processing of information regarding an active mortgage broker sponsor. If the inactive license is not renewed within the statutory timeframes, the license will expire.

(2) Renewing loan officer licensees. A loan officer may renew his/her license while inactive and may either provide sponsorship information to convert the license to an active license or may continue to be licensed as "inactive".

(3) Mortgage broker licensees. A mortgage broker may place his/her license inactive at any time during the license period. The license will remain inactive until the mortgage broker notifies the department in writing to convert the license to an active license or until the license expires. While in an inactive status, a mortgage broker must continue to meet the statutory requirements of the license including, but not limited to, meeting financial requirements, filing of annual reports as required by §80.23(a) of this title (relating to Annual Reports), and notifying the department of the location of his/her books and records as required by §80.13 of this title (relating to Books and Records).

(d) [~~(c)~~] The fees for the application or for the renewal of a mortgage broker license or loan officer license shall be established by the Commissioner. The amount of the fees may be modified upon not less than 30 days advance notice posted on the Department's website. Fees are nonrefundable and nontransferable.

§80.5. Renewals.

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

[~~(c) THIS SUBSECTION APPLIES ONLY TO ENTITY LICENSES ISSUED UNDER §80.4(c) THAT EXPIRE DURING THE PERIOD OF DECEMBER 1, 2009 THROUGH MARCH 31, 2010. Pursuant to §156.208(f) of the Act, these licenses will be assigned a different expiration date in order to spread more evenly license renewals throughout the year. The initial renewal for an entity mortgage broker license to which this subsection applies will be for a term which expires on the expiration date of the license of the mortgage broker who is the designated representative of the entity on the date of renewal. For instance, if the entity license expires on December 15, 2009, and the license of the designated representative expires on May 15, 2010, the initial renewal license shall be for a period beginning on the renewal date and expiring on May 15, 2010. If the license of the designated representative expires during the period covered in this subsection, the licenses may be renewed simultaneously and the renewal will be for a full two-year term. The renewal fee for a renewal term of less than two years shall be prorated by multiplying the renewal fee times a fraction, the numerator of which shall be the number of months during the renewal term (rounded to the next highest number of months with respect to a partial month), and the denominator shall be 24. If the prorated amount calculated in this subsection is other than a whole dollar amount, the renewal fee shall be rounded to the closest whole dollar.~~]

§80.6. Sponsorship and Termination Thereof.

(a) An applicant for a Loan Officer license must be sponsored by a licensed Mortgage Broker otherwise the license will be issued as inactive. A Loan Officer may not be sponsored by or act for more than one Mortgage Broker at any given time. The Mortgage Broker must acknowledge and accept the responsibilities set forth in the Act, including responsibility for the actions of the Loan Officer, by executing and providing to the Commissioner a Loan Officer Sponsor Certification form.

(b) If a Loan Officer's license is approved as active, it will be issued to and must be held by the Sponsoring Mortgage Broker and displayed at the office of the sponsoring Mortgage Broker as specified on the Mortgage Broker's license.

(c) If sponsorship of a Loan Officer is terminated by the sponsoring Mortgage Broker, the Mortgage Broker shall immediately notify the Commissioner that the sponsorship has terminated. If sponsorship is terminated by the Loan Officer, the Loan Officer shall immediately notify the Commissioner that the sponsorship has ended. The license will become inactive. [~~terminates, the sponsoring Mortgage Broker and the Loan Officer shall immediately notify the Commissioner, and the sponsoring Mortgage Broker shall return the Loan Officer's license to the Commissioner or the Commissioner's Designee, whereupon that license will become inactive.~~] Sponsorship of a Loan Officer remains in effect until the Commissioner has been notified in writing of the termination of sponsorship. Prior to its scheduled expiration, an inactive Loan Officer's license may be reactivated upon designation of a new sponsoring Mortgage Broker, as evidenced by execution and providing to the Commissioner of a Loan Officer Sponsor Certification form.

(d) (No change.)

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

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Douglas B. Foster
Commissioner
Texas Department of Savings and Mortgage Lending
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SUBCHAPTER B. PROFESSIONAL CONDUCT

7 TAC §80.10

The amendments are proposed under Texas Finance Code §11.306, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 156.

§80.10. Prohibition on False, Misleading, or Deceptive Practices and Improper Dealings.

(a) No Mortgage Broker or Loan Officer may:

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

(7) induce or attempt to induce a party to a contract to breach the contract so the person may make a Mortgage; [~~or~~]

(8) alter any document produced or issued by the Department; or

(9) [~~(8)~~] engage in any other practice which the Commissioner, by published interpretation, has determined to be false, misleading, or deceptive.

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

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

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SUBCHAPTER C. ADMINISTRATION AND RECORDS

7 TAC §80.12, §80.13

The amendments are proposed under Texas Finance Code §11.306, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 156.

§80.12. Display of License Verification; License Record Changes.

(a) - (d) (No change.)

(e) Before the tenth day preceding the effective date of a new or changed corporate or assumed name [~~or DBA~~], a licensee shall notify the Commissioner in writing of the new name. The request shall be on the form promulgated by the Commissioner and include supporting documentation as well as a $25 processing fee. Prior to conducting business using the new or amended assumed name, the licensee must confirm that the assumed name has been processed, and must download from the Department's website, print and post the amended Verification of Licensure for each licensee using the new or amended assumed name.

§80.13. Books and Records.

In order to assure that each licensee will have all records necessary to enable the Commissioner or the Commissioner's designee to investigate complaints and discharge their responsibilities under the Act and this Chapter, each Mortgage Broker and Loan Officer shall maintain records as set forth below. The particular format of records to be maintained is not specified. However, they must be complete, current, legible, readily accessible, and readily sortable. Records maintained for other purposes, such as compliance with other state and federal laws, will be deemed to satisfy these requirements if they include the same information.

(1) Mortgage Application Records. Each Mortgage Broker and each Loan Officer is required to maintain, at the location specified in his or her application, the following books and records:

(A) A Mortgage Loan file for each Mortgage Loan application received; each such file shall contain at least the following:

(i) a copy of the signed and dated Mortgage Loan application (including any attachments, supplements, or addenda thereto);

(ii) - (v) (No change.)

(B) Mortgage Transaction Log. A mortgage transaction log, maintained on a current basis (which means that all entries must be made within no more than seven days from the date on which the matters they relate to occurred), setting forth, at a minimum:

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

(iii) a description of the disposition of the application for a Mortgage Loan; [~~and~~]

(iv) the identity of the person or entity who initially funded and/or acquired the Mortgage Loan and information as to how to contact them; and, [.]

(v) the name of the originator.

(C) (No change.)

(2) - (7) (No change.)

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

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SUBCHAPTER G. ENFORCEMENT OF LIENS

7 TAC §80.18

The amendments are proposed under Texas Finance Code §11.306, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 156.

§80.18. Enforceability of Liens.
A violation of this Chapter shall not render an otherwise lawfully taken lien unenforceable.
[~~Figure: 7 TAC §80.18~~]

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804258
Douglas B. Foster
Commissioner
Texas Department of Savings and Mortgage Lending
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 475-1350

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SUBCHAPTER K. ANNUAL REPORTS

7 TAC §80.23

The amendments are proposed under Texas Finance Code §11.306, which authorizes the Commission to adopt rules to enforce Title 3 of the Texas Finance Code.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 156.

§80.23. Annual Reports.

(a) A mortgage broker who held a license anytime during the reporting year shall file an annual report containing such information regarding the mortgage broker activity of the licensee and each sponsored loan officer as the Commissioner may require. The annual report shall be submitted on a form promulgated by the Commissioner. The annual report must be filed before March 1 of each year and shall cover the mortgage broker activities for the calendar year immediately preceding the year in which the report is due.

(b) (No change.)

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

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Douglas B. Foster
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PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 84. MOTOR VEHICLE INSTALLMENT SALES

SUBCHAPTER G. EXAMINATIONS

7 TAC §§84.707 - 84.709

The Finance Commission of Texas (commission) re-proposes new §§84.707 - 84.709 concerning Examinations, with regard to recordkeeping requirements for motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner. As a result of informal comments received, the commission withdraws the original proposal of new 7 TAC §§84.707 - 84.709 that appeared in the *Texas Register* on July 4, 2008 (33 TexReg 5185).

Following the original proposal of these rules, the agency received informal comments from industry stakeholders. The industry provided valuable feedback regarding all three rules. A review of the industry's comments led the agency to the determination that the re-publication of a revised proposal of rules §§84.707 - 84.709 would be beneficial to the industry, consumers, and the agency. This resulting re-proposal incorporates the industry's input and presents the industry with more efficient means of complying with the statutory requirements and to demonstrate that compliance.

The purpose of the new recordkeeping rules is to conform the commission's rules to current practice, to provide clarification for licensees required to comply with the rules, and to provide more specific guidance for the examination process. The following paragraphs outline the individual purposes of each proposed rule.

Section 84.707 specifies the records that must be maintained or reports that must be accessed for retail sellers assigning motor vehicle retail installment sales contracts. The regulation requires the following records or reports: a retail installment sales transaction report, a retail installment sales transaction file for each retail installment sales transaction, an assignment report, general business and accounting records supporting each disbursement made by the licensee in connection with a retail installment

sales transaction, and adverse action records. The rule is necessary to ensure that the licensee will be able to comply with the statutory requirement to maintain sufficient documentation for licensed retail sellers who assign their retail installment sales contracts.

Section 84.708 specifies the records that must be maintained or reports that must be accessed for retail sellers collecting installments on motor vehicle retail installment sales contracts. The regulation requires the following records or reports: a retail installment sales transaction report, a retail installment sales transaction file for each retail installment sales transaction, an account record for each retail installment sales contract (including payment and collection contact history), an assignment report, general business and accounting records supporting each disbursement made by the licensee in connection with a retail installment sales transaction, insurance loss records (if the licensee negotiates or facilitates insurance claims on behalf of the retail buyer), adverse action records, and repossession records. Additionally, a licensee must have the ability to search its files to access a list of open retail installment sales transactions and a list of retail buyers in alphabetical order. The rule is necessary to ensure that the licensee will be able to comply with the statutory requirement to maintain sufficient documentation for licensed retail sellers who collect on retail installment sales contracts.

Section 84.709 specifies the records that must be maintained or reports that must be accessed for holders who are not retail sellers that service or collect installments on motor vehicle retail installment sales contracts. The regulation requires the following records or reports: a retail installment sales transaction report, a retail installment sales transaction file for each retail installment sales transaction, an account record for each retail installment sales contract (including payment and collection contact history), an assignment report, general business and accounting records supporting each disbursement made by the licensee in connection with a retail installment sales transaction, insurance loss records (if the licensee negotiates or facilitates insurance claims on behalf of the retail buyer), adverse action records, and repossession records. Additionally, a licensee must have the ability to search its files to access a list of open retail installment sales transactions and a list of retail buyers in alphabetical order. The rule is necessary to ensure that the licensee will be able to comply with the statutory requirement to maintain sufficient documentation for licensed holders who are not retail sellers that service or collect on retail installment sales contracts.

In addition, all three recordkeeping regulations grant considerable flexibility by permitting the licensee to maintain the required records by using one of the following systems, or a combination of these systems: a legible paper or manual recordkeeping system, an electronic recordkeeping system, or an optically imaged recordkeeping system unless otherwise specified by statute or regulation.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Pettijohn has determined that for each year of the first five years the new operational rules are in effect the public benefit anticipated will be that the commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced.

The Texas Legislature amended the Texas Finance Code in 2002 to require the licensure of motor vehicle dealers who accept cash for the sale of motor vehicles over time. The Office of Consumer Credit Commissioner, as part of the regulation, is directed to perform routine examinations of the licensees. Section 348.517 of the Texas Finance Code states: "A license holder *shall maintain a record of each retail installment transaction* made under this chapter *as is necessary to enable the commissioner to determine* whether the license holder is *complying with this chapter*." (emphasis added). The proposed new rules provide guidance and clarification to the motor vehicle industry on how to conduct business and maintain records within the limits of the Texas Finance Code.

The records or information required by §§84.707 - 84.709 are already required by statute in order to demonstrate compliance with Chapter 348. These recordkeeping rules merely implement the statute by providing guidance for fulfilling the necessary compliance with §348.517. In other words, any costs are imposed by the Texas Finance Code and are not a result of the re-proposed new rules.

Accordingly, in reference to all three rules, there may be some anticipated economic costs incurred by a person required to comply with Chapter 348 whose operation is not within statutory compliance. The overall potential cost to each licensee is not predictable due to several variable factors, including the type of recordkeeping system currently used and whether the licensee presently maintains records in compliance with Chapter 348. It follows that any licensees who are currently operating outside the statutory parameters may experience some implied costs in order to bring their operations within the statutory requirements as delineated by these rules.

For retail sellers assigning motor vehicle retail installment sales contracts, the agency received a representative list of records typically maintained. The resulting rule in re-proposed §84.707 incorporates this and other input and provides more efficient methods of complying with Chapter 348. The rule as re-proposed eliminates the retention of some records which contain duplicate information and recognizes that certain records are maintained by other holders and therefore are not required to be retained under this rule. Section 84.707 as re-proposed adds further flexibility by not requiring the licensee to maintain certain reports on an ongoing basis, but only that the licensee be able to produce the information in report form when requested.

Thus, re-proposed §84.707 does not present any anticipated costs to persons whose operations are currently in compliance with the provisions of Chapter 348. As stated earlier, the overall potential cost to each licensee who is not in compliance is not predictable due to several variable factors. There will be no adverse economic effect on small or micro-businesses whose operations are in compliance with Chapter 348. Aside from the potential costs to those currently operating outside the statute, there will be no effect on individuals required to comply with §84.707 as re-proposed.

For retail sellers collecting installments on motor vehicle retail installment sales contracts, the resulting rule in §84.708 as re-proposed incorporates industry input and provides more efficient methods of complying with Chapter 348. Section 84.708 as re-proposed refines a number of provisions and adds further flexibility by not requiring the licensee to maintain certain reports on an ongoing basis, but only that the licensee be able to produce the information in report form when requested.

Therefore, §84.708 as re-proposed does not present any anticipated costs to persons whose operations are currently in compliance with the provisions of Chapter 348. Regarding compliance with §84.708, there may be some limited anticipated economic costs incurred by persons whose operations are not in compliance with Chapter 348. The agency has learned through the examination process that some small licensees who use manual recordkeeping systems do not have sufficient storage capacity to maintain information that is required by Chapter 348 and this rule. These small licensees will be obligated to acquire additional storage containers (e.g., one two-drawer locking file cabinet, $150 each) to bring their operations into compliance with Chapter 348 and this rule.

For licensees under §84.708 who utilize an electronic or optically imaged recordkeeping system, some training may be necessary to teach employees how to use existing software to produce the reports contemplated by the rule. The amount of training necessary for each licensee is impossible to predict due to several variable factors, such as number of employees, amount of previous training conducted, and current knowledge of employees. There will be no adverse economic effect on small or micro-businesses whose operations are in compliance with Chapter 348. Aside from the potential costs to those currently operating outside the statute, there will be no effect on individuals required to comply with §84.708 as re-proposed.

For holders who are not retail sellers that service or collect installments on motor vehicle retail installment sales contracts, the resulting rule in §84.709 as re-proposed incorporates industry input and provides more efficient methods of complying with Chapter 348. Section 84.709 as re-proposed refines a number of provisions and adds further flexibility by not requiring the licensee to maintain certain reports on an ongoing basis, but only that the licensee be able to produce the information in report form when requested.

Thus, §84.709 as re-proposed does not present any anticipated costs to persons whose operations are currently in compliance with the provisions of Chapter 348. Regarding compliance with §84.709, there may be some limited anticipated economic costs incurred by persons whose operations are not in compliance with Chapter 348. The agency has learned through the examination process that licensees who utilize an electronic or optically imaged recordkeeping system may need to perform some training to teach employees how to use existing software to produce the reports contemplated by the rule. It is anticipated that some training may also be needed regarding verification that statutorily required information has been received by the holder from the dealer, and concerning proper internal communication between collection staff and data entry staff. The amount of training necessary for each licensee is impossible to predict due to several variable factors, such as number of employees, amount of previous training conducted, and current knowledge of employees. There will be no adverse economic effect on small or micro-businesses whose operations are in compliance with Chapter 348. Aside from the potential costs to those currently operating outside the statute, there will be no effect on individuals required to comply with §84.709 as re-proposed.

It is estimated that between 3,500 and 4,500 small businesses may be subject to these proposed new rules. The projected economic impact of these rules, in implementing the underlying statute, will overall be neutral. Persons who are required to comply with these rules are also statutorily obligated to comply with Chapter 348 and retain records in a manner to demonstrate that compliance. Compliance with these rules will reduce potential liability from private litigation by retail buyers. Furthermore, compliance with these rules will reduce the amount of time examiners from the Office of Consumer Credit Commissioner will spend in each location; consequently, more time efficient examinations will reduce the licensee's staff time dedicated to the agency's examination process.

The agency believes it would not be protective of the economic welfare of the state and its consumers to propose different recordkeeping requirements for small businesses. The agency further believes that the proposed new rules are necessary to comply with legislative mandates issued by the Texas Legislature. The agency is not aware of a more economic way to implement the statutory requirements. The agency invites comments from interested stakeholders and the public on any adverse economic impacts on small businesses and on any more efficient or alternative methods of achieving compliance with Chapter 348 than is contained in these rules.

The agency has attempted to lessen any potential costs by providing flexibility in the recordkeeping rules, which allow paper, electronic, or optically imaged systems. Furthermore, this re-proposal incorporates the ability to access several items, or produce the information in the form of a report or list, which if generated from an electronic system, does not have to be maintained as a separate file or record.

Comments on the proposed new rules may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed rules are published in the *Texas Register*. At the conclusion of the 31st day after the proposed rules are published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

These new sections are proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

These rules affect Texas Finance Code, Chapter 348.

§84.707. Files and Records Required (Retail Sellers Assigning Retail Installment Sales Contracts).

(a) Applicability. The recordkeeping requirements of this section apply to retail sellers that immediately assign or transfer all retail installment sales contracts to another authorized creditor. If a retail seller collects any installments, excluding downpayments, on a retail installment sales contract, the retail seller must comply with the recordkeeping requirements established under §84.708 of this title (relating to Files and Records Required (Retail Sellers Collecting Installments on Retail Installment Sales Contracts)).

(b) Records required for each retail installment sales transaction. Each licensee must maintain records with respect to each motor vehicle retail installment sales contract made, acquired, serviced, or held under Texas Finance Code, Chapter 348 and make those records available for examination.

(c) Recordkeeping systems. The records required by this section may be maintained by using either a legible paper or manual recordkeeping system, electronic recordkeeping system, optically

imaged recordkeeping system, or a combination of the preceding types of systems, unless otherwise specified by statute or regulation.

(d) Records required.

(1) Retail installment sales transaction report. Each licensee must maintain records sufficient to produce a retail installment sales transaction report that contains a listing of each Texas Finance Code, Chapter 348 retail installment sales contract entered into by the licensee. The report is only required to include those retail installment sales contracts that are subject to the record retention period of paragraph (6) of this subsection. The retail installment sales transaction report can be maintained either as a paper record or may be generated from an electronic system. If the retail installment sales transaction report is maintained under a manual recordkeeping system, the retail installment sales transaction report must be updated within a reasonable time from the date the contract is entered into by the licensee. A retail installment sales transaction report must contain the following information:

(A) the date of contract (day, month, and year);

(B) the retail buyer's name(s);

(C) a method of identifying the vehicle, such as the last six (6) digits of the vehicle identification number or the stock number; and

(D) the account number, if the retail seller assigns an account number.

(2) Retail installment sales transaction file. A licensee must maintain a retail installment sales transaction file for each individual retail installment sales contract. The retail installment sales transaction file must contain records and documents to evidence the licensee's compliance with applicable state and federal laws and regulations, including the Equal Credit Opportunity Act and the Truth in Lending Act. If a substantially equivalent electronic record for any of the following records exists, a paper copy of the record does not have to be included in the retail installment sales transaction file if the electronic record can be accessed upon request. The retail installment sales transaction file must include copies of the following records or documents:

(A) for all retail installment sales transactions:

(i) the retail installment sales contract signed by the retail buyer and the retail seller as required by Texas Finance Code, §348.101;

(ii) the purchase or buyer's order reflecting a written computation of any additional amounts that may be included in the cash price of the vehicle and itemized charges, a description of the motor vehicle being purchased, and a description of each motor vehicle being traded in;

(iii) the credit application and any other written or recorded information used in evaluating the application;

(iv) the Texas Department of Transportation's Title Application Receipt (Form VTR-500-RTS), Tax Assessor's Tax Collector's Receipt for Title Application/Registration/Motor Vehicle Tax handwritten receipt (Form 31-RTS), or similar document evidencing the disbursement of the sales tax, and fees for license, title, and registration of the vehicle;

(v) copies of other agreements or disclosures signed by the retail buyer applicable to the retail installment sales transaction; and

(vi) any records applicable to the retail installment transaction outlined by subparagraphs (B) - (J) of this paragraph.

(B) for a vehicle titled in Texas, a copy of the completed Texas Department of Transportation/Comptroller of Public Accounts' Application for Texas Certificate of Title (Form 130-U) signed by the retail buyer and seller that was filed with the appropriate county tax assessor-collector.

(C) for a vehicle titled outside of Texas, a copy of the application for certificate of title for the buyer or the properly assigned evidence of ownership to the buyer including the Comptroller of Public Accounts' Texas Motor Vehicle Sales Tax Exemption Certificate (Form 14-312).

(D) for a retail installment sales transaction in which a power of attorney is necessary to transfer title to the buyer, a copy of the Texas Department of Transportation's Power of Attorney to Transfer a Motor Vehicle (Form VTR-271) or any other similar document used as a power of attorney.

(E) for a retail installment sales transaction in which the retail buyer elects to have the vehicle registered in another county as permitted by Texas Transportation Code, §501.0234, a completed copy of the Texas Department of Transportation's County of Title Issuance form (Form VTR-136) signed by the retail buyer.

(F) for a retail installment sales transaction involving a downpayment, a copy of any document relating to the downpayment including:

(i) receipts for cash downpayments;

(ii) promissory notes or other documents evidencing the retail buyer's agreement to pay the cash downpayment over time;

(iii) documents or forms signed by the retail buyer relating to a manufacturer's or distributor's rebate as permitted by the Texas Finance Code, §348.404(a); and

(iv) documents or forms evidencing the payoff of any trade-in vehicle shown on the retail installment sales contract.

(G) for a retail installment sales transaction involving the disbursement of funds for money advanced pursuant to Texas Finance Code, §348.404(b) and (c), a copy of any document relating to the disbursement of funds for money advanced.

(H) for a retail installment sales transaction in which the licensee issues a certificate of insurance regarding insurance policies issued by or through the licensee in connection with the retail installment sales transaction, copies of the certificates of insurance.

(I) for a retail installment sales transaction in which the licensee issues a certificate of coverage regarding ancillary products issued by or through the licensee in connection with the retail installment sales transaction, records of the ancillary products (motor vehicle theft protection plans, service contracts, maintenance agreements, etc.) including all certificates of coverage.

(J) for a retail installment sales transaction where separate disclosures are required by federal or state law including the following:

(i) a transaction where disclosures required by the Truth in Lending Act are not incorporated into the text of the retail installment sales contract and the credit was extended for primarily for personal, family, or household purposes, a copy of the Truth in Lending statement required by Regulation Z, Truth in Lending, 12 C.F.R. §226.18, *et seq.*;

(ii) a transaction involving a cosigner, the notice to cosigner required by the Federal Trade Commission's Credit Practices Trade regulation, 16 C.F.R. §444.3;

(iii) a transaction where a used vehicle is sold and the vehicle was purchased primarily for personal, family or household purposes, a copy of the signed Buyers Guide, if:

(I) the retail seller has included the optional signature line; or

(II) language has been added to the Buyers Guide constituting a warranty agreement.

(3) Assignment report. A licensee must maintain or produce an assignment report, whether paper or electronic, including any Texas Finance Code, Chapter 348 retail installment sales contract made by or acquired by the licensee that is assigned from its licensed or registered location. The assignment report must show the name of the retail buyer, the account number or other unique number given to the retail buyer, the date of assignment, and the name and address to which the accounts are assigned.

(4) General business and accounting records. General business and accounting records concerning retail installment sales transactions must be maintained. The business and accounting records must include receipts, documents, or other records for each disbursement made by the licensee at the retail buyer's direction or request, on his behalf, or for his benefit, that is charged to the retail buyer, including:

(A) Comptroller of Public Accounts' Dealer Motor Vehicle Inventory Tax Statement (Form 50-246); and

(B) Comptroller of Public Accounts' Texas Motor Vehicle Seller-Financed Sales Tax Report (Form 14-117).

(5) Adverse action records. Each licensee must maintain adverse action records regarding all applications relating to Texas Finance Code, Chapter 348 retail installment sales transactions where the applicant was denied credit. The adverse action records must include those records and documents required by Regulation B, Equal Credit Opportunity Act, 12 C.F.R. §202.1 *et seq.*, including the credit application; any written or recorded information used in evaluating the application; the adverse action notice (if required); notice of incompleteness, if applicable; and counteroffer notice, if applicable. Adverse action records must be maintained according to the record retention requirements under federal law.

(6) Retention and availability of records. All books and records required by this subsection must be available for inspection at any time by Office of Consumer Credit Commissioner staff, and must be retained for a period of four years from the date of the contract, two years from the date of the final entry made thereon by the licensee, whichever is later, or a different period of time if required by federal law. Upon notification of an examination pursuant to Texas Finance Code, §348.514(f), the licensee must have the required books and records at the licensed location or registered office specified on the license. The records required by this subsection must be kept at an office in the state designated by the licensee except when the retail installment sales transactions are transferred under an agreement which gives the commissioner access to the documents. Documents may be maintained out of state if the licensee has in writing acknowledged responsibility for either making the records available within the state for examination or by acknowledging responsibility for additional examination costs associated with examinations conducted out of state.

§84.708. Files and Records Required (Retail Sellers Collecting Installments on Retail Installment Sales Contracts).

(a) Applicability. The recordkeeping requirements of this section apply to retail sellers that service or collect installments on retail installment sales contracts.

(b) Records required for each retail installment sales transaction. Each licensee must maintain records with respect to each motor vehicle retail installment sales contract made, acquired, serviced, or held under Texas Finance Code, Chapter 348 and make those records available for examination.

(c) Recordkeeping systems. The records required by this section may be maintained by using either a legible paper or manual recordkeeping system, electronic recordkeeping system, optically imaged recordkeeping system, or a combination of the preceding types of systems, unless otherwise specified by statute or regulation.

(d) Record search requirements.

(1) Open retail installment sales transactions. A licensee must be able to access or produce a list of all open retail installment sales transactions. If the list of open transactions is accessed through an electronic system, the licensee must be able to generate a separate report of open transactions. Alternatively, a licensee may provide a list containing open and closed retail installment sales transactions as long as the open transactions are designated as "open."

(2) Alphabetical search. A licensee must be able to access records in alphabetical order by retail buyer name for open and closed transactions during the record retention period required by subsection (e)(8) of this section.

(e) Records required.

(1) Retail installment sales transaction report. Each licensee must maintain records sufficient to produce a retail installment sales transaction report that contains a listing of each Texas Finance Code, Chapter 348 retail installment sales contract made or acquired by the licensee. The report is only required to include those retail installment sales contracts that are subject to the record retention period of paragraph (8) of this subsection. The retail installment sales transaction report can be maintained either as a paper record or may be generated from an electronic system. If the retail installment sales transaction report is maintained under a manual recordkeeping system, the retail installment sales transaction report must be updated within a reasonable time from the date the contract is made or acquired. A retail installment sales transaction report must contain the following information:

(A) the date of contract (day, month, and year);

(B) the retail buyer's name(s);

(C) a method of identifying the vehicle, such as the last six (6) digits of the vehicle identification number or the stock number; and

(D) the account number.

(2) Retail installment sales transaction file. A licensee must maintain a retail installment sales transaction file for each individual retail installment sales contract. The retail installment sales transaction file must contain records and documents to evidence the licensee's compliance with applicable state and federal laws and regulations, including the Equal Credit Opportunity Act and the Truth in Lending Act. If a substantially equivalent electronic record for any of the following records exists, a paper copy of the record does not have to be included in the retail installment sales transaction file if the electronic record can be accessed upon request. The retail installment sales transaction file must include copies of the following records or documents:

(A) for all retail installment sales transactions:

(i) the retail installment sales contract signed by the retail buyer and the retail seller as required by Texas Finance Code, §348.101;

(ii) the purchase or buyer's order reflecting a written computation of any additional amounts that may be included in the cash price of the vehicle and itemized charges, a description of the motor vehicle being purchased, and a description of each motor vehicle being traded in;

(iii) the credit application and any other written or recorded information used in evaluating the application;

(iv) the original certificate of title to the vehicle, a certified copy of the negotiable certificate of title, or a copy of the front and back of either the original or certified copy of the title;

(v) the Texas Department of Transportation's Title Application Receipt (Form VTR-500-RTS), Tax Assessor's Tax Collector's Receipt for Title Application/Registration/Motor Vehicle Tax handwritten receipt (Form 31-RTS), or similar document evidencing the disbursement of the sales tax, and fees for license, title, and registration of the vehicle;

(vi) copies of other agreements or disclosures signed by the retail buyer applicable to the retail installment sales transaction; and

(vii) any records applicable to the retail installment transaction outlined by subparagraphs (B) - (N) of this paragraph.

(B) for a vehicle titled in Texas, a copy of the completed Texas Department of Transportation/Comptroller of Public Accounts' Application for Texas Certificate of Title (Form 130-U) signed by the retail buyer and seller that was filed with the appropriate county tax assessor-collector.

(C) for a vehicle titled outside of Texas, a copy of the application for certificate of title for the buyer or the properly assigned evidence of ownership to the buyer including the Comptroller of Public Accounts' Texas Motor Vehicle Sales Tax Exemption Certificate (Form 14-312).

(D) for a retail installment sales transaction in which a power of attorney is necessary to transfer title to the buyer, a copy of the Texas Department of Transportation's Power of Attorney to Transfer a Motor Vehicle (Form VTR-271) or any other similar document used as a power of attorney.

(E) for a retail installment sales transaction in which the retail buyer elects to have the vehicle registered in another county as permitted by Texas Transportation Code, §501.0234, a completed copy of the Texas Department of Transportation's County of Title Issuance form (Form VTR-136) signed by the retail buyer.

(F) for a retail installment sales transaction involving a downpayment, a copy of any record or document relating to the downpayment including:

(i) receipts for cash downpayments;

(ii) promissory notes or other documents evidencing the retail buyer's agreement to pay the cash downpayment over time;

(iii) documents or forms signed by the retail buyer relating to a manufacturer's or distributor's rebate as permitted by the Texas Finance Code, §348.404(a); and

(iv) documents or forms evidencing the payoff of any trade-in vehicle shown on the retail installment sales contract.

(G) for a retail installment sales contract that has an itemized charge for the inspection of the vehicle, a copy of the work order, inspection receipt, or other verifiable evidence that reflects that the inspection was performed including the date and cost of the inspection.

(H) for a retail installment sales transaction involving the disbursement of funds for money advanced pursuant to Texas Finance Code, §348.404(b) and (c), a copy of any document, form, or agreement relating to the disbursement of funds for money advanced.

(I) for a retail installment sales transaction in which the licensee issues a certificate of insurance regarding insurance policies issued by or through the licensee in connection with the retail installment sales transaction, copies of the certificates of insurance.

(J) for a retail installment sales transaction in which the licensee issues a certificate of coverage regarding ancillary products issued by or through the licensee in connection with the retail installment sales transaction, records of the ancillary products (motor vehicle theft protection plans, service contracts, maintenance agreements, etc.) including all certificates of coverage.

(K) for a retail installment sales transaction involving insurance claims:

(i) if the licensee does not negotiate or facilitate insurance claims on behalf of the retail buyer, records are not required to be maintained under this subparagraph.

(ii) if the licensee negotiates or facilitates insurance claims on behalf of the retail buyer, supplemental insurance records supporting the settlement or denials of claims reported in the insurance loss records provided by paragraph (6) of this subsection including:

(I) Credit life insurance claims. The supplemental insurance records for credit life insurance claims must include the death certificate or other written records relating to the death of the retail buyer; proof of loss or claim form that discloses the amount of indebtedness at the time of death; check copies or electronic payment receipts that reflect the gross amount of the claim paid, including the amount of insurance benefits paid to beneficiaries other than the licensee which is in excess of the net amount necessary to pay the indebtedness; and the amount that is paid to beneficiaries other than the licensee.

(II) Credit accident and health insurance claims. The supplemental insurance records for credit accident and health insurance claims must include any written records relating to the disability, including statements from the physician, employer, and retail buyer; the proof of loss or claim form filed by the retail buyer; and copies of the checks or electronic payment receipts reflecting disability payments paid by the insurance carrier.

(III) Credit involuntary unemployment insurance claims. The supplemental insurance records for credit involuntary unemployment insurance claims must include any written document relating to the termination, layoff, or dismissal of the retail buyer; the proof of loss or claim form filed by the retail buyer; copies of the checks or electronic payment receipts reflecting the payment of the claim by the insurance carrier; and any other pertinent written record relating to the involuntary unemployment insurance claim.

(IV) Collateral protection insurance claims. The supplemental insurance records for collateral protection insurance claims must include the law enforcement report, fire department report, or other written record reflecting the loss or destruction of any covered motor vehicle; the proof of loss or claim form filed by the retail buyer; copies of the checks or electronic payment receipts reflecting the

payment of the claim by the insurance carrier; and any other pertinent written record relating to the collateral protection insurance claim.

(V) Credit gap insurance claims. The supplemental insurance records for credit gap insurance claims must include the gap insurance claim form; proof of loss and settlement check from the retail buyer's basic comprehensive, collision, or uninsured/underinsured policy or other parties' liability insurance policy for the settlement of the insured total loss of the motor vehicle; documents that provide verification of the retail buyer's primary insurance deductible; if the accident was investigated by a law enforcement officer, a copy of the offense or police report filed in connection with the total loss of the motor vehicle; if the accident was not investigated by a law enforcement officer, a copy of the Texas Department of Public Safety's "Driver's Accident Report" (Form ST-2) filed in connection with the total loss of the motor vehicle; and copies of the checks reflecting the settlement amount paid by the licensee for the gap insurance claim.

(L) for a retail installment sales transaction where separate disclosures are required by federal or state law including the following:

(i) a transaction where disclosures required by the Truth in Lending Act are not incorporated into the text of the retail installment sales contract and the credit was extended for primarily for personal, family, or household purposes, a copy of the Truth in Lending statement required by Regulation Z, Truth in Lending, 12 C.F.R. §226.18, *et seq.*;

(ii) a transaction involving a cosigner, the notice to cosigner required by the Federal Trade Commission's Credit Practices Trade regulation, 16 C.F.R. §444.3;

(iii) a transaction where a used vehicle is sold and the vehicle was purchased primarily for personal, family or household purposes, a copy of the signed Buyers Guide, if:

(I) the retail seller has included the optional signature line; or

(II) language has been added to the Buyers Guide constituting a warranty agreement.

(M) for a retail installment sales transaction that has been repaid in full, copies of any documents or records evidencing the discharge or release of lien as prescribed by 43 TAC, §17.3(h) (relating to Motor Vehicle Certificates of Title).

(N) for a retail installment sales transaction involving a repossession, the records required by subsection (f) of this section.

(3) Account record for each retail installment sales contract (including payment and collection contact history). A separate paper or electronic record must be maintained for each retail installment sales contract. The paper or electronic account record must be readily available by reference to either a retail buyer's name or account number.

(A) Required information. The account record for each retail installment sales contract must contain at least the following information, unless stated otherwise:

(i) account number as recorded in the retail installment sales transaction report;

(ii) retail installment sales contract payment schedule and terms itemized to show:

(I) date of contract;

(II) number of installments;

(III) due date of installments;

(IV) amount of each installment; and

(V) maturity date;

(iii) name, address, and telephone number of retail buyer;

(iv) names and addresses of co-retail buyer or other obligors, if any;

(v) amount financed;

(vi) total time price differential charge;

(vii) total of payments;

(viii) amount of premium charges for insurance products;

(ix) payment history information:

(I) itemized payment entries showing date payment received; dual postings are acceptable if date of posting is other than date of receipt;

(II) if requested during an examination or investigation, a payoff amount that denotes amounts applied to principal, time price differential, default, deferment, or other authorized charges;

(x) for a retail installment sales contract where the licensee receives a refund of insurance charges or authorized ancillary products, a licensee is responsible for substantiating final entries and ensuring that refunds were paid to the retail buyer or applied to the retail buyer's account. Refund amounts must be itemized to show:

(I) time price differential refunded, if any;

(II) the amount of any insurance charges refunded;

(III) the amount of any authorized ancillary products charges refunded;

(xi) collection contact history, including a written record of:

(I) all collection contacts made by a licensee with the retail buyer or any other person related to the retail installment sales transaction;

(II) all collection contacts made by the retail buyer with the licensee;

(III) for the collection contacts in subclauses (I) and (II) of this clause, the written record must include the date, method of contact, contacted party, person initiating the contact, and a summary of the contact;

(IV) copies of individual collection notices or letters or references to standard collection letters sent to the retail buyer.

(B) Corrective entries. A licensee may make corrective entries to the account record for each retail installment sales contract if the corrective entry is justified. A licensee must maintain the reason and supporting documentation for each corrective entry made to the account record. The reason for the corrective entry may be recorded in the collection contact history of the account record. The supporting documentation justifying the corrective entry can be maintained in the individual account record for each retail installment sales contract or properly stored and indexed in a licensee's optically imaged record-keeping system. If a licensee manually maintains the account record, the licensee must properly correct an improper entry by drawing a single line through the improper entry and entering the correct information above or below the improper entry. No erasures or other obliterations

may be made on the payments received or collection contact history section of the manual account record for each retail installment sales contract.

(4) Assignment report. A licensee must maintain or produce an assignment report, whether paper or electronic, including any Texas Finance Code, Chapter 348 retail installment sales contract made by or acquired by the licensee that is assigned from its licensed or registered location. The assignment report must show the name of the retail buyer, the account number or other unique number given to the retail buyer, the date of assignment, and the name and address to which the accounts are assigned.

(5) General business and accounting records. General business and accounting records concerning retail installment sales transactions must be maintained. The business and accounting records must include receipts, documents, or other records for each disbursement made by the licensee at the retail buyer's direction or request, on his behalf, or for his benefit, that is charged to the retail buyer, including:

(A) Comptroller of Public Accounts' Dealer Motor Vehicle Inventory Tax Statement (Form 50-246);

(B) Comptroller of Public Accounts' Texas Motor Vehicle Seller-Financed Sales Tax Report (Form 14-117); and

(C) repossession, sequestration, disposition, or legal fees relating to repossession, sequestration, or disposition.

(6) Insurance loss records. Each licensee who negotiates or facilitates the filing of insurance claims must maintain a register or be able to generate a report, paper or electronic, reflecting information on credit life, credit accident and health, credit property, credit involuntary unemployment, and single-interest insurance claims whether paid or denied by the insurance carrier. If the reason for the denial of a credit life insurance or credit accident and health insurance claim is based upon the medical records of the retail buyer, supplemental records supporting the denial of the claim must be made available upon request.

(A) Credit life insurance claims. The register or report pertaining to credit life insurance claims must show the name of the retail buyer, the account number, and the date of death.

(B) Credit accident and health insurance claims. The register or report pertaining to credit accident and health insurance claims must show the name of the retail buyer, the account number, and the date of the initial filing of a claim for any continuous period of disability.

(C) Credit involuntary unemployment insurance claims. The register or report pertaining to credit involuntary unemployment insurance claims must show the name of the retail buyer, the account number, and the date of the initial filing of the claim.

(D) Credit gap insurance claims. The register or report pertaining to credit gap insurance claims must show the name of the retail buyer, the account number, and the date of the claim.

(E) Collateral protection insurance claims. The register or report pertaining to collateral protection insurance claims must show the name of the retail buyer, the account number, and the amount of the insurance written on the motor vehicle.

(7) Adverse action records. Each licensee must maintain adverse action records regarding all applications relating to Texas Finance Code, Chapter 348 retail installment sales transactions where the applicant was denied credit. The adverse action records must include those records and documents required by Regulation B, Equal Credit Opportunity Act, 12 C.F.R. §202.1 *et seq.*, including the credit application; any written or recorded information used in evaluating the application; the adverse action notice (if required); notice of incompleteness, if applicable; and counteroffer notice, if applicable. Adverse action records must be maintained according to the record retention requirements under federal law.

(8) Retention and availability of records. All books and records required by this subsection must be available for inspection at any time by Office of Consumer Credit Commissioner staff, and must be retained for a period of four years from the date of the contract, two years from the date of the final entry made thereon, whichever is later, or a different period of time if required by federal law. Upon notification of an examination pursuant to Texas Finance Code, §348.514(f), the licensee must have the required books and records at the licensed location or registered office specified on the license. The records required by this subsection must be kept at an office in the state designated by the licensee except when the retail installment sales transactions are transferred under an agreement which gives the commissioner access to the documents. Documents may be maintained out of state if the licensee has in writing acknowledged responsibility for either making the records available within the state for examination or by acknowledging responsibility for additional examination costs associated with examinations conducted out of state.

(f) Repossession records.

(1) Repossession report. A licensee must be able to access or produce a list of all retail installment sales transactions involving repossession by the licensee. If the list of repossessions is accessed through an electronic system, the licensee must be able to generate a separate report of repossessions. If the repossession report is maintained under a manual recordkeeping system, the licensee must maintain a current list of accounts in repossession. A manual repossession report must be updated within a reasonable time from the date of repossession. The repossession report must include the retail buyer's name, account number, and date of repossession. If accounts have been subsequently assigned, the assignment must be noted in the repossession report as well as on the record of assigned accounts as prescribed in subsection (e)(4) of this section.

(2) Required information. For a retail installment sales transaction involving the repossession of the vehicle, the following records must be maintained, including:

(A) a condition report indicating the condition of the collateral;

(B) any invoices or receipts for any reasonable and authorized out-of-pocket expenses that are assessed to the buyer and incurred in connection with the repossession or sequestration of the vehicle including cost of storing, reconditioning, and reselling the vehicle;

(C) for a vehicle disposed of in a public or private sale as permitted by the Texas Business & Commerce Code, §9.610, the following documents:

(i) one of the three following notices:

(I) for a transaction not involving consumer goods, a copy of any Notification of Disposition of Collateral letter sent to the retail buyer and other obligors as required by Texas Business & Commerce Code, §9.613;

(II) for a transaction involving consumer goods, a copy of any Notice of Our Plan to Sell Property as sent to the retail buyer and other obligors as required by Texas Business & Commerce Code, §9.614; or

(III) a copy of the waiver of the notice of intended disposition prescribed by subclause (I) or (II) of this clause, as applicable, signed by the retail buyer and other obligors after default;

(ii) copies of any evidence of a fair private sale or the commercial reasonableness of the private sale;

(iii) copies of the auction receipts or documentation of the date, place, manner of sale of the vehicle, and amounts received for disposition of the vehicle reflecting the commercial reasonableness of the sale if the vehicle's disposition is by a public sale or a dealer-only auction;

(iv) the bill of sale showing the name and address of the purchaser of the repossessed collateral and the purchase price of the vehicle;

(v) for a disposition or sale of collateral creating a surplus balance, a copy of the check representing the payment of the surplus balance paid to the retail buyer or other obligors;

(vi) for a disposition or sale of collateral resulting in a surplus or deficiency, a copy of the explanation of calculation of surplus or deficiency as required by Texas Business & Commerce Code, §9.616, if applicable;

(vii) a copy of the waiver of the deficiency letter if the retail seller elects to waive the deficiency balance in lieu of sending the explanation of calculation of surplus or deficiency form;

(D) for a vehicle disposed of using the strict foreclosure method as permitted by the Texas Business & Commerce Code, §9.620 and §9.621, the following documents:

(i) one of the three following notices;

(I) for a transaction not involving consumer goods and where less than 60% of the cash price of the vehicle has been paid, a copy of the notice of proposal to accept collateral in full or partial satisfaction of the obligation;

(II) for a transaction involving consumer goods, a copy of the notice of proposal to accept collateral in full satisfaction of the obligation; or

(III) for a transaction where more than 60% of the cash price of the vehicle has been paid, a copy of the debtor or obligor's waiver of compulsory disposition of collateral signed by the retail buyers and other obligors after default;

(ii) for a transaction where the retail buyer rejects the offer under clause (i)(I) or (II) of this subparagraph, a copy of the retail buyer's signed objection to retention of the collateral;

(iii) copies of the records reflecting the partial or total satisfaction of the obligation; and

(E) for a vehicle disposed by another authorized method pursuant to the Texas Business & Commerce Code, Chapter 9, a copy of any and all records or documents relating to the disposition of the collateral.

§84.709. Files and Records Required (Holders Taking Assignment of Retail Installment Sales Contracts).

(a) Applicability. The recordkeeping requirements of this section apply to holders who are not retail sellers that service or collect installments on retail installment sales contracts.

(b) Records required for each retail installment sales transaction. Each licensee must maintain records with respect to each motor vehicle retail installment sales contract made, acquired, serviced, or held under Texas Finance Code, Chapter 348 and make those records available for examination.

(c) Recordkeeping systems. The records required by this section may be maintained by using either a legible paper or manual recordkeeping system, electronic recordkeeping system, optically imaged recordkeeping system, or a combination of the preceding types of systems, unless otherwise specified by statute or regulation.

(d) Record search requirements.

(1) Open retail installment sales transactions. A licensee must be able to access or produce a list of all open retail installment sales transactions. If the list of open transactions is accessed through an electronic system, the licensee must be able to generate a separate report of open transactions. Alternatively, a licensee may provide a list containing open and closed retail installment sales transactions as long as the open transactions are designated as "open."

(2) Alphabetical search. A licensee must be able to access records in alphabetical order by retail buyer name for open and closed transactions during the record retention period required by subsection (e)(8) of this section.

(e) Records required.

(1) Retail installment sales transaction report. Each licensee must maintain records sufficient to produce a retail installment sales transaction report that contains a listing of each Texas Finance Code, Chapter 348 retail installment sales contract acquired by the licensee. The report is only required to include those retail installment sales contracts that are subject to the record retention period of paragraph (8) of this subsection. The retail installment sales transaction report can be maintained either as a paper record or may be generated from an electronic system. If the retail installment sales transaction report is maintained under a manual recordkeeping system, the retail installment sales transaction report must be updated within a reasonable time from the date the contract is acquired. A retail installment sales transaction report must contain the following information:

(A) the date of contract (day, month, and year);

(B) the retail buyer's name(s);

(C) a method of identifying the vehicle, such as the last six (6) digits of the vehicle identification number or the stock number; and

(D) the account number.

(2) Retail installment sales transaction file. A licensee must maintain a retail installment sales transaction file for each individual retail installment sales contract. The retail installment sales transaction file must contain records and documents to evidence the licensee's compliance with applicable state and federal laws and regulations, including the Equal Credit Opportunity Act and the Truth in Lending Act. If a substantially equivalent electronic record for any of the following records exists, a paper copy of the record does not have to be included in the retail installment sales transaction file if the electronic record can be accessed upon request. The retail installment sales transaction file must include copies of the following records or documents:

(A) for all retail installment sales transactions:

(i) the retail installment sales contract signed by the retail buyer and the retail seller as required by Texas Finance Code, §348.101;

(ii) the credit application and any other written or recorded information used in evaluating the application;

(iii) the original certificate of title to the vehicle, a certified copy of the negotiable certificate of title, or a copy of the front and back of either the original or certified copy of the title; and

(iv) any records applicable to the retail installment transaction outlined by subparagraphs (B) - (I) of this paragraph.

(B) for a vehicle titled in Texas, a copy of the completed Texas Department of Transportation/Comptroller of Public Accounts' Application for Texas Certificate of Title (Form 130-U) signed by the retail buyer and seller that was filed with the appropriate county tax assessor-collector.

(C) for a vehicle titled outside of Texas, a copy of the application for certificate of title for the buyer or the properly assigned evidence of ownership to the buyer including the Comptroller of Public Accounts' Texas Motor Vehicle Sales Tax Exemption Certificate (Form 14-312).

(D) for a retail installment sales contract that has an itemized charge for the inspection of the vehicle, a copy of the work order, inspection receipt, or other verifiable evidence that reflects that the inspection was performed including the date and cost of the inspection.

(E) for a retail installment sales transaction in which insurance policies are issued by or through the licensee in connection with the retail installment sales transaction, copies of the certificates of insurance.

(F) for a retail installment sales transaction involving insurance claims:

(i) if the licensee does not negotiate or facilitate insurance claims on behalf of the retail buyer, records are not required to be maintained under this subparagraph.

(ii) if the licensee negotiates or facilitates insurance claims on behalf of the retail buyer, supplemental insurance records supporting the settlement or denials of claims reported in the insurance loss records provided by paragraph (6) of this subsection including:

(I) Credit life insurance claims. The supplemental insurance records for credit life insurance claims must include the death certificate or other written records relating to the death of the retail buyer; proof of loss or claim form that discloses the amount of indebtedness at the time of death; check copies or electronic payment receipts that reflect the gross amount of the claim paid, including the amount of insurance benefits paid to beneficiaries other than the licensee which is in excess of the net amount necessary to pay the indebtedness; and the amount that is paid to beneficiaries other than the licensee.

(II) Credit accident and health insurance claims. The supplemental insurance records for credit accident and health insurance claims must include any written records relating to the disability, including statements from the physician, employer, and retail buyer; the proof of loss or claim form filed by the retail buyer; and copies of the checks or electronic payment receipts reflecting disability payments paid by the insurance carrier.

(III) Credit involuntary unemployment insurance claims. The supplemental insurance records for credit involuntary unemployment insurance claims must include any written document relating to the termination, layoff, or dismissal of the retail buyer; the proof of loss or claim form filed by the retail buyer; copies of the checks or electronic payment receipts reflecting the payment of the claim by the insurance carrier; and any other pertinent written record relating to the involuntary unemployment insurance claim.

(IV) Collateral protection insurance claims. The supplemental insurance records for collateral protection insurance claims must include the law enforcement report, fire department report, or other written record reflecting the loss or destruction of any covered motor vehicle; the proof of loss or claim form filed by the retail buyer; copies of the checks or electronic payment receipts reflecting the payment of the claim by the insurance carrier; and any other pertinent written record relating to the collateral protection insurance claim.

(V) Credit gap insurance claims. The supplemental insurance records for credit gap insurance claims must include the gap insurance claim form; proof of loss and settlement check from the retail buyer's basic comprehensive, collision, or uninsured/underinsured policy or other parties' liability insurance policy for the settlement of the insured total loss of the motor vehicle; documents that provide verification of the retail buyer's primary insurance deductible; if the accident was investigated by a law enforcement officer, a copy of the offense or police report filed in connection with the total loss of the motor vehicle; if the accident was not investigated by a law enforcement officer, a copy of the Texas Department of Public Safety's "Driver's Accident Report" (Form ST-2) filed in connection with the total loss of the motor vehicle; and copies of the checks reflecting the settlement amount paid by the licensee for the gap insurance claim.

(G) for a retail installment sales transaction where separate disclosures are required by federal or state law including the following:

(i) a transaction where disclosures required by the Truth in Lending Act are not incorporated into the text of the retail installment sales contract and the credit was extended for primarily for personal, family, or household purposes, a copy of the Truth in Lending statement required by Regulation Z, Truth in Lending, 12 C.F.R. §226.18, *et seq.*;

(ii) a transaction involving a cosigner, the notice to cosigner required by the Federal Trade Commission's Credit Practices Trade regulation, 16 C.F.R. §444.3.

(H) for a retail installment sales transaction that has been repaid in full, copies of any documents or records evidencing the discharge or release of lien as prescribed by 43 TAC §17.3(h) (relating to motor Vehicle Certificates of Title).

(I) for a retail installment sales transaction involving repossession, the records required by subsection (f) of this section.

(3) Account record for each retail installment sales contract (including payment and collection contact history). A separate paper or electronic record must be maintained for each retail installment sales contract. The paper or electronic account record must be readily available by reference to either a retail buyer's name or account number.

(A) Required information. The account record for each retail installment sales contract must contain at least the following information, unless stated otherwise:

(i) account number as recorded in the retail installment sales transaction report;

(ii) retail installment sales contract payment schedule and terms itemized to show:

(I) date of contract;

(II) number of installments;

(III) due date of installments;

(IV) amount of each installment; and

(V) maturity date;

(iii) name, address, and telephone number of retail buyer;

(iv) names and addresses of co-retail buyer or other obligors, if any;

(v) amount financed;

(vi) total time price differential charge;

(vii) total of payments;

(viii) amount of premium charges for insurance products;

(ix) payment history information:

(I) itemized payment entries showing date payment received; dual postings are acceptable if date of posting is other than date of receipt;

(II) if requested during an examination or investigation, a payoff amount that denotes amounts applied to principal, time price differential, default, deferment, or other authorized charges;

(x) for a retail installment sales contract where the licensee receives a refund of insurance charges or authorized ancillary products, a licensee is responsible for substantiating final entries and ensuring that refunds were paid to the retail buyer or applied to the retail buyer's account. Refund amounts must be itemized to show:

(I) time price differential refunded, if any;

(II) the amount of any insurance charges refunded;

(III) the amount of any authorized ancillary products charges refunded;

(xi) collection contact history, including a written record of:

(I) all collection contacts made by a licensee with the retail buyer or any other person related to the retail installment sales transaction;

(II) all collection contacts made by the retail buyer with the licensee;

(III) for the collection contacts in subclauses (I) and (II) of this clause, the written record must include the date, method of contact, contacted party, person initiating the contact, and a summary of the contact;

(IV) copies of individual collection notices or letters or references to standard collection letters sent to the retail buyer.

(B) Corrective entries. A licensee may make corrective entries to the account record for each retail installment sales contract if the corrective entry is justified. A licensee must maintain the reason and supporting documentation for each corrective entry made to the account record. The reason for the corrective entry may be recorded in the collection contact history of the account record. The supporting documentation justifying the corrective entry can be maintained in the individual account record for each retail installment sales contract or properly stored and indexed in a licensee's optically imaged recordkeeping system. If a licensee manually maintains the account record, the licensee must properly correct an improper entry by drawing a single line through the improper entry and entering the correct information above or below the improper entry. No erasures or other obliterations may be made on the payments received or collection contact history section of the manual account record for each retail installment sales contract.

(4) Assignment report. A licensee must maintain or produce an assignment report, whether paper or electronic, including any Texas Finance Code, Chapter 348 retail installment sales contract made by or acquired by the licensee that is assigned from its licensed or registered location. The assignment report must show the name of the retail buyer, the account number or other unique number given to the retail buyer, the date of assignment, and the name and address to which the accounts are assigned.

(5) General business and accounting records. General business and accounting records concerning retail installment sales transactions must be maintained. The business and accounting records must include receipts, documents, or other records for each disbursement made by the licensee at the retail buyer's direction or request, on his behalf, or for his benefit, that is charged to the retail buyer, including repossession, sequestration, disposition, or legal fees relating to repossession, sequestration, or disposition.

(6) Insurance loss records. Each licensee who negotiates or facilitates the filing of insurance claims must maintain a register or be able to generate a report, paper or electronic, reflecting information on credit life, credit accident and health, credit property, credit involuntary unemployment, and single-interest insurance claims whether paid or denied by the insurance carrier. If the reason for the denial of a credit life insurance or credit accident and health insurance claim is based upon the medical records of the retail buyer, supplemental records supporting the denial of the claim must be made available upon request.

(A) Credit life insurance claims. The register or report pertaining to credit life insurance claims must show the name of the retail buyer, the account number, and the date of death.

(B) Credit accident and health insurance claims. The register or report pertaining to credit accident and health insurance claims must show the name of the retail buyer, the account number, and the date of the initial filing of a claim for any continuous period of disability.

(C) Credit involuntary unemployment insurance claims. The register or report pertaining to credit involuntary unemployment insurance claims must show the name of the retail buyer, the account number, and the date of the initial filing of the claim.

(D) Credit gap insurance claims. The register or report pertaining to credit gap insurance claims must show the name of the retail buyer, the account number, and the date of the claim.

(E) Collateral protection insurance claims. The register or report pertaining to collateral protection insurance claims must show the name of the retail buyer, the account number, and the amount of the insurance written on the motor vehicle.

(7) Adverse action records. Each licensee must maintain adverse action records regarding all applications relating to Texas Finance Code, Chapter 348 retail installment sales transactions where the applicant was denied credit. The adverse action records must include those records and documents required by Regulation B, Equal Credit Opportunity Act, 12 C.F.R. §202.1 *et seq.*, including the credit application; any written or recorded information used in evaluating the application; the adverse action notice (if required); notice of incompleteness, if applicable; and counteroffer notice, if applicable. Adverse action records must be maintained according to the record retention requirements under federal law.

(8) Retention and availability of records. All books and records required by this subsection must be available for inspection at any time by Office of Consumer Credit Commissioner staff, and must be retained for a period of four years from the date of the contract, two years from the date of the final entry made thereon, whichever is later,

or a different period of time if required by federal law. Upon notification of an examination pursuant to Texas Finance Code, §348.514(f), the licensee must have the required books and records at the licensed location or registered office specified on the license. The records required by this subsection must be kept at an office in the state designated by the licensee except when the retail installment sales transactions are transferred under an agreement which gives the commissioner access to the documents. Documents may be maintained out of state if the licensee has in writing acknowledged responsibility for either making the records available within the state for examination or by acknowledging responsibility for additional examination costs associated with examinations conducted out of state.

(f) Repossession records.

(1) Repossession report. A licensee must be able to access or produce a list of all retail installment sales transactions involving repossession by the licensee. If the list of repossessions is accessed through an electronic system, the licensee must be able to generate a separate report of repossessions. If the repossession report is maintained under a manual recordkeeping system, the licensee must maintain a current list of accounts in repossession. A manual repossession report must be updated within a reasonable time from the date of repossession. The repossession report must include the retail buyer's name, account number, and date of repossession. If accounts have been subsequently assigned, the assignment must be noted in the repossession report as well as on the record of assigned accounts as prescribed in subsection (e)(4) of this section.

(2) Required information. For a retail installment sales transaction involving the repossession of the vehicle, the following records must be maintained, including:

(A) a condition report indicating the condition of the collateral;

(B) any invoices or receipts for any reasonable and authorized out-of-pocket expenses that are assessed to the buyer and incurred in connection with the repossession or sequestration of the vehicle including cost of storing, reconditioning, and reselling the vehicle;

(C) for a vehicle disposed of in a public or private sale as permitted by the Texas Business & Commerce Code, §9.610, the following documents:

(i) one of the three following notices:

(I) for a transaction not involving consumer goods, a copy of any Notification of Disposition of Collateral letter sent to the retail buyer and other obligors as required by Texas Business & Commerce Code, §9.613;

(II) for a transaction involving consumer goods, a copy of any Notice of Our Plan to Sell Property as sent to the retail buyer and other obligors as required by Texas Business & Commerce Code, §9.614; or

(III) a copy of the waiver of the notice of intended disposition prescribed by subclause (I) or (II) of this clause, as applicable, signed by the retail buyer and other obligors after default;

(ii) copies of any evidence of a fair private sale or the commercial reasonableness of the private sale;

(iii) copies of the auction receipts or documentation of the date, place, manner of sale of the vehicle, and amounts received for disposition of the vehicle reflecting the commercial reasonableness of the sale if the vehicle's disposition is by a public sale or a dealer-only auction;

(iv) the bill of sale showing the name and address of the purchaser of the repossessed collateral and the purchase price of the vehicle;

(v) for a disposition or sale of collateral creating a surplus balance, a copy of the check representing the payment of the surplus balance paid to the retail buyer or other obligors;

(vi) for a disposition or sale of collateral resulting in a surplus or deficiency, a copy of the explanation of calculation of surplus or deficiency as required by Texas Business & Commerce Code, §9.616, if applicable;

(vii) a copy of the waiver of the deficiency letter if the retail seller elects to waive the deficiency balance in lieu of sending the explanation of calculation of surplus or deficiency form;

(D) for a vehicle disposed of using the strict foreclosure method as permitted by the Texas Business & Commerce Code, §9.620 and §9.621, the following documents:

(i) one of the three following notices;

(I) for a transaction not involving consumer goods and where less than 60% of the cash price of the vehicle has been paid, a copy of the notice of proposal to accept collateral in full or partial satisfaction of the obligation;

(II) for a transaction involving consumer goods, a copy of the notice of proposal to accept collateral in full satisfaction of the obligation; or

(III) for a transaction where more than 60% of the cash price of the vehicle has been paid, a copy of the debtor or obligor's waiver of compulsory disposition of collateral signed by the retail buyers and other obligors after default;

(ii) for a transaction where the retail buyer rejects the offer under clause (i)(I) or (II) of this subparagraph, a copy of the retail buyer's signed objection to retention of the collateral;

(iii) copies of the records reflecting the partial or total satisfaction of the obligation; and

(E) for a vehicle disposed by another authorized method pursuant to the Texas Business & Commerce Code, Chapter 9, a copy of any and all records or documents relating to the disposition of the collateral.

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

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804219
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 936-7621

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PART 7. STATE SECURITIES BOARD

CHAPTER 115. SECURITIES DEALERS AND AGENTS

7 TAC §115.16

The Texas State Securities Board proposes new §115.16, concerning use of senior-specific certifications and professional designations. The proposed new rule would prohibit the misleading use of designations that imply that the registered dealer or agent has special training in providing brokerage services to senior citizens or retirees. While prohibiting the use of misleading designations, the proposed rule would provide a means by which an accredited designating or certifying organization could be recognized so that persons who meet the qualifications set by the organization may use a recognized designation.

The proposal is based on the model rule adopted in March 2008 by the North American Securities Administrators Association, Inc. that represents the culmination of a multi-state effort to focus national attention on unscrupulous behavior targeting senior investors.

Micheal Northcutt, Director, Registration Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Northcutt and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefits anticipated as a result of enforcing the rule will be that senior investors will be afforded protection from persons using misleading designations that imply special training or expertise in providing brokerage or other financial services to seniors and registered persons will be placed on notice that their use of misleading designations is administratively actionable.

There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

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

The proposal affects Texas Civil Statutes, Article 581-14.

§115.16. Use of Senior-Specific Certifications and Professional Designations.

(a) The use of a senior specific certification or designation by any person in connection with the offer, sale, or purchase of securities, that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees, in such a way as to mislead any person shall be an inequitable practice within the meaning of the Texas Securities Act, §14.A(3). The prohibited use of such certifications or professional designation includes, but is not limited to, the following:

(1) use of a certification or professional designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation;

(2) use of a nonexistent or self-conferred certification or professional designation;

(3) use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have; and

(4) use of a certification or professional designation that was obtained from a designating or certifying organization that:

(A) is primarily engaged in the business of instruction in sales and/or marketing;

(B) does not have reasonable standards or procedures for assuring the competency of its designees or certificants;

(C) does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or

(D) does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.

(b) There is a rebuttable presumption that a designating or certifying organization is not disqualified solely for purposes of subsection (a)(4) of this section when the organization has been accredited by:

(1) The American National Standards Institute;

(2) The National Commission for Certifying Agencies; or

(3) an organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" and the designation or credential issued therefrom does not primarily apply to sales and/or marketing.

(c) In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing senior citizens or retirees, factors to be considered shall include:

(1) use of one or more words such as "senior," "retirement," "elder," or like words, combined with one or more words such as "certified," "registered," "chartered," "adviser," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

(2) the manner in which those words are combined.

(d) For purposes of this rule, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency, when that job title:

(1) indicates seniority or standing within the organization; or

(2) specifies an individual's area of specialization within the organization.

(e) For purposes of subsection (d) of this section, "financial services regulatory agency" includes, but is not limited to, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under the Investment Company Act of 1940.

(f) Nothing in this rule shall limit the Securities Commissioner's authority to enforce existing provisions of law.

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

Filed with the Office of the Secretary of State on August 6, 2008.

TRD-200804114
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 305-8303

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CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §116.16

The Texas State Securities Board proposes new §116.16, concerning use of senior-specific certifications and professional designations. The proposed new rule would prohibit the misleading use of designations that imply that the registered investment adviser or investment adviser representative has special training in advising senior citizens or retirees about their investments. While prohibiting the use of misleading designations, the proposed rule would provide a means by which an accredited designating or certifying organization could be recognized so that persons who meet the qualifications set by the organization may use a recognized designation.

The proposal is based on the model rule adopted in March 2008 by the North American Securities Administrators Association, Inc. that represents the culmination of a multi-state effort to focus national attention on unscrupulous behavior targeting senior investors.

Micheal Northcutt, Director, Registration Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Northcutt and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefits anticipated as a result of enforcing the rule will be that senior investors will be afforded protection from persons using misleading designations that imply special training or expertise in advising senior citizens or retirees about investing and registered persons will be placed on notice that their use of misleading designations is administratively actionable.

There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

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

The proposal affects Texas Civil Statutes, Article 581-14.

§116.16. Use of Senior-Specific Certifications and Professional Designations.

(a) The use of a senior specific certification or designation by any person in connection with the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, either directly or indirectly or through publications or writings, or by issuing or promulgating analyses or reports relating to securities, that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees, in such a way as to mislead any person shall be an inequitable practice within the meaning of the Texas Securities Act, §14.A(3). The prohibited use of such certifications or professional designation includes, but is not limited to, the following:

(1) use of a certification or professional designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation;

(2) use of a nonexistent or self-conferred certification or professional designation;

(3) use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have; and

(4) use of a certification or professional designation that was obtained from a designating or certifying organization that:

(A) is primarily engaged in the business of instruction in sales and/or marketing;

(B) does not have reasonable standards or procedures for assuring the competency of its designees or certificants;

(C) does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or

(D) does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.

(b) There is a rebuttable presumption that a designating or certifying organization is not disqualified solely for purposes of subsection (a)(4) of this section when the organization has been accredited by:

(1) The American National Standards Institute;

(2) The National Commission for Certifying Agencies; or

(3) an organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" and the designation or credential issued therefrom does not primarily apply to sales and/or marketing.

(c) In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing senior citizens or retirees, factors to be considered shall include:

(1) use of one or more words such as "senior," "retirement," "elder," or like words, combined with one or more words such as "certified," "registered," "chartered," "adviser," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

(2) the manner in which those words are combined.

(d) For purposes of this rule, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency, when that job title:

(1) indicates seniority or standing within the organization; or

(2) specifies an individual's area of specialization within the organization.

(e) For purposes of subsection (d) of this section, "financial services regulatory agency" includes, but is not limited to, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under the Investment Company Act of 1940.

(f) Nothing in this rule shall limit the Securities Commissioner's authority to enforce existing provisions of law.

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

Filed with the Office of the Secretary of State on August 6, 2008.

TRD-200804115
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 305-8303

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CHAPTER 133. FORMS

7 TAC §133.21

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

The Texas State Securities Board proposes the repeal of §133.21, a form concerning minimum bookkeeping records for securities dealers registered in Texas. The proposed repeal will eliminate an outdated form.

Micheal Northcutt, Director, Registration Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the repeal is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Northcutt and Mr. Zivley also have determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be the elimination of an obsolete form. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposal in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

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

Statutes and codes affected: none applicable.

§133.21. Minimum Bookkeeping Records for Securities Dealers Registered in Texas.

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

Filed with the Office of the Secretary of State on August 6, 2008.

TRD-200804117
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 305-8303

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7 TAC §133.22

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

The Texas State Securities Board proposes the repeal of §133.22, a form concerning memorandum to securities dealers. The proposed repeal will eliminate an outdated form.

Micheal Northcutt, Director, Registration Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the repeal is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Northcutt and Mr. Zivley also have determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be the elimination of an obsolete form. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposal in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

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

Statutes and codes affected: none applicable.

§133.22. Memorandum to Securities Dealers.

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

Filed with the Office of the Secretary of State on August 6, 2008.

TRD-200804116
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 305-8303

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TITLE 10. COMMUNITY DEVELOPMENT

PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 305. PRACTICES AND PROCEDURES FOR HEARINGS AND DISCIPLINARY ACTIONS

SUBCHAPTER D. POST-SETTLEMENT AND POST-HEARING MATTERS

10 TAC §305.41

The Texas Residential Construction Commission proposes amendments to 10 Texas Administrative Code §305.41 regarding motions for rehearing. The amendments are proposed to clarify the process by which rulings on motions for rehearing are made. The amendments also delegate authority to the Executive Director to grant an extension of time for a decision on the motion if one or more commissioners elects to grant the motion for rehearing, or fails to respond to notice of receipt of a motion and the next regularly scheduled meeting of the commission is more than 45 days after the date a party has been notified of the commission's order.

Ms. Susan K. Durso, General Counsel for the commission, has determined that for each year of the first five-year period that the proposed amendments are in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for state or local government as a result of enforcing or administering the section.

Ms. Durso has also determined that for the first five years the amendments are in effect the public will benefit from having a clearer understanding of the rehearing process. There is no anticipated economic cost to small businesses or persons who are required to comply with the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the amendments are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there will be no adverse economic effect on small businesses. Accordingly, no regulatory flexibility analysis is necessary.

Comments on the proposed amendments may be submitted to Susan K. Durso, General Counsel, Texas Residential Construction Commission, 311 E. 14th Street, Austin, Texas 78701 or by fax to (512) 475-2453. Comments may also be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Motions for Rehearing" in the subject line. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed rule in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the rule under consideration. Comments submitted after the deadline for submittal, submitted to a different address, or submitted electronically without "Motions for Rehearing" in the subject line, may not be accepted.

The amendments are proposed pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 of the Property Code and Government Code §2001.146, regarding the procedures for ruling on a motion for rehearing.

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

§305.41. Motions for Rehearing.

(a) Filing times. A motion for rehearing must be filed with the commission within 20 days after a party has been notified, either in person or by mail, of the order of the commission, pursuant to §305.40 of this chapter.

(b) Commission action.

(1) The commission may rule on a motion for rehearing at a meeting or by mail, telephone, telegraph, or another suitable means of communication.

(2) Staff will notify commission of the receipt of a timely filed motion for rehearing, any reply filed, and the dates by which commission action must be taken before a motion for rehearing is overruled by operation of law.

(3) Commission action on the motion for rehearing must be taken within 45 days after the date a party has been notified of the commission's order pursuant to subsection (a) of this section. If commission action is not taken within the 45-day period, the motion for rehearing is overruled by operation of law.

(4) The commission may by written order extend the period of time for filing the motions and replies and taking commission action, except that an extension may not extend the period for commission action beyond 90 days from the date the party was notified pursuant to §305.40 of this chapter.

(5) In response to notice under paragraph (2) of this subsection each commissioner shall notify staff of the commissioner's decision on whether to grant or deny the motion for rehearing.

(A) If one or more commissioner's elects to grant the motion for rehearing and the next regularly scheduled meeting of the commission is more than 45 days after the date a party has been notified of the commission's order pursuant to subsection (a) of this section, the Executive Director is delegated authority to execute an order on behalf of the commission extending the time to consider the motion until the date of the next regularly scheduled commission meeting; or

(B) If one or more of the commissioners does not expressly communicate to staff the commissioner's decision on whether to grant or deny a timely filed motion for rehearing, the Executive Director is delegated authority to execute an order on behalf of the commission extending the time to consider the motion until the date of the next regularly scheduled commission meeting.

(6) In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date the party was notified pursuant to §305.40 of this chapter. [~~The parties may by agreement, with the approval of the commission, provide for a modification of the times provided in this section.~~]

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

Filed with the Office of the Secretary of State on August 7, 2008.

TRD-200804120
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 463-2886

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 2. GENERAL POLICIES AND PROCEDURES

SUBCHAPTER A. PRINCIPLES AND PROCEDURES OF THE COMMISSION

13 TAC §§2.40, 2.42, 2.46, 2.48

The Texas State Library and Archives Commission proposes new 13 TAC §§2.40, 2.42, 2.46, and 2.48 concerning alternative dispute resolution, negotiation and mediation of certain contract disputes, negotiated rulemaking, and petitions for adoption of rule changes. Adding these was part of the recent Sunset Commission's review of the agency.

Edward Seidenberg, Assistant State Librarian, has determined that for the first five years the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Mr. Seidenberg also has determined that for each of the first five years the rules are in effect the public benefits anticipated as a result of enforcing the new section will be to articulate the agency's policy regarding alternative dispute resolution, negotiation and mediation of certain contract disputes, negotiated rulemaking, and petitions for adoption of rule changes. There are no cost implications to either small businesses or persons required to comply with the revised rule.

Comments on the rules may be submitted in writing to Edward Seidenberg, Texas State Library, Box 12927, Austin, Texas 78711-2927.

The new rules are proposed under Government Code §441.020, Government Code, Chapter 2260, Government Code, Chapter 2008, and Government Code, §2001.021.

The proposed rules affect Government Code §441.020, Government Code, Chapter 2260, Government Code, Chapter 2008, and Government Code, §2001.021.

§2.40. Alternative Dispute Resolution.

(a) The agency's policy is to enable the resolution and early settlement of internal and external disputes, including contested cases, through voluntary settlement processes, which may include a procedure or combination of procedures described by Chapter 154, Civil Practice and Remedies Code. Any Alternative Dispute Resolution (ADR) procedure used to resolve disputes before the commission shall comply with the requirements of Chapter 2009, Government Code, and any model guidelines for the use of ADR issued by the State Office of Administrative Hearings.

(b) The agency's deputy director or his designee shall be the agency's dispute resolution coordinator (DRC). The DRC shall perform the following functions, as required:

(1) coordinate the implementation of the policy set out in subsection (a) of this section;

(2) serve as a resource for any staff training or education needed to implement the ADR procedures; and

(3) collect data to evaluate the effectiveness of ADR procedures implemented by the agency.

(c) Any costs associated with retaining an impartial third party mediator, moderator, facilitator, or arbitrator, shall be borne by the party requesting ADR.

(d) Agreements of the parties to ADR must be in writing and are enforceable in the same manner as any other written contract. Confidentiality of records and communications related to the subject matter of an ADR proceeding shall be governed by §154.073 of the Civil Practice and Remedies Code.

(e) If the ADR process does not result in an agreement, the matter may be referred to the commission for other appropriate disposition.

§2.42. Negotiation and Mediation of Certain Contract Disputes.

The commission adopts by reference the rules of the Office of the Attorney General in Texas Administrative Code, Title 1, Part 3, Chapter 68 relating to Negotiation and Mediation of Certain Contract Disputes to comply with the requirements of Government Code, Chapter 2260, §2260.052(c). The rules set forth a process to permit parties to structure a negotiation or mediation in a manner that is most appropriate for a particular dispute regardless of the contract's complexity, subject matter, dollar amount, or method and time of performance.

§2.46. Negotiated Rulemaking.

(a) It is the agency's policy to enable the use of negotiated rulemaking procedures when appropriate. In situations where proposed rules could be complex, controversial, or to affect disparate groups, negotiated rulemaking may be considered by the agency.

(b) When negotiated rulemaking is considered, the deputy director, or designee, shall be the agency's negotiated rulemaking coordinator to assist it in determining whether it is advisable to proceed. The coordinator shall have the duties described in Government Code, Chapter 2008, and shall make a recommendation to the commission to proceed or to defer negotiated rulemaking. The recommendation shall be made after the coordinator, at a minimum, has considered all of the items enumerated in Government Code, §2008.052(c). The coordinator shall perform the following functions, as required:

(1) coordinate the implementation of the policy set out in subsection (a) of this section, and in accordance with the Negotiated Rulemaking Act, Chapter 2008, Government Code;

(2) serve as a resource for any staff training or education needed to implement negotiated rulemaking procedures; and,

(3) collect data to evaluate the effectiveness of negotiated rulemaking procedures implemented by the agency.

(c) Upon the coordinator's recommendation to proceed, the agency may initiate negotiated rulemaking according to the provisions of Government Code, Chapter 2008.

§2.48. Petition for Adoption of Rule Changes.

(a) In accordance with Government Code, §2001.021, an interested person may petition for the adoption, amendment, or repeal of a rule of the commissioner.

(b) A petition under this section must be in writing and contain the following minimum requirements:

(1) It must specify or otherwise make clear that the petition is made pursuant to the provisions of the Administrative Procedure Act.

(2) It must clearly state the body or substance of the rule requested for adoption, and, if appropriate, relate the requested rule to an adopted rule or rules of the commission.

(3) It must contain the petitioner's full name, address, telephone number, and signature.

(4) It must be signed by the petitioner with the date the petition is submitted.

(5) It must include the chapter and subchapter in which, in the petitioner's opinion, the rule belongs, and the proposed rule text of a new rule or the text of the proposed rule change prepared in a manner to indicate the words to be added or deleted from the current text, if any.

(6) It must include a statement of statutory or other authority under which the rule is to be promulgated; and a brief explanation of why the rule action is necessary or desirable.

(c) The commission staff shall evaluate the merits of the proposal.

(d) In accordance with the Government Code, §2001.021, the commission staff shall respond to the petitioner within 60 days of receipt of the petition. The response shall:

(1) advise that rulemaking proceedings will be initiated; or,

(2) deny the petition, stating the reasons for its denial.

(e) If rulemaking procedures are initiated under this section, the version of the rule which the commission staff proposes may differ from the version proposed by the petitioner.

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

Filed with the Office of the Secretary of State on August 5, 2008.

TRD-200804096
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 463-5459

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TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER A. RACETRACK LICENSES

16 TAC §309.3

The Texas Racing Commission proposes amendments to 16 TAC §309.3, concerning Racetrack License Application Procedure. Section 309.3 relates to the process by which the Commission opens an application period for accepting applications for racetrack licenses.

The changes to §309.3 allow the Commission to open an application period for a recently active pari-mutuel racetrack and limit applications to requests to operate that particular facility. The proposal is limited to tracks that have conducted live pari-mutuel racing within the previous two calendar years.

Charla Ann King, Executive Director for the Texas Racing Commission, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Ms. King has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to support the financing of racetrack facilities. This proposal provides a racetrack facility owner with the option to promptly seek a new license for the facility if the original racing license moves, becomes inactive, or is revoked.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Mark Fenner, General Counsel, Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The amendment implements Texas Civil Statutes, Article 179e.

§309.3. Racetrack License Application Procedure.

(a) (No change.)

(b) Application Process.

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

(3) The Commission may open an application period that is limited to applications for a license to conduct racing at a racetrack facility that conducted live pari-mutuel racing within the prior two calendar years. In the case of an application period opened under this paragraph, the Commission shall specify the class of license and the specific racetrack facility for which it is accepting applications. The Commission may place any conditions on the applications that facilitate the expeditious resumption of live racing while remaining consistent with the Act, the Rules, and the Commission's duty to ensure the integrity of pari-mutuel racing.

(4) [~~(3)~~] The Commission shall publish in the *Texas Register* an announcement of the beginning of the application process at least 30 days before the first day of the application period.

(5) [~~(4)~~] While an application for a particular class of racetrack in a geographic region is pending before the Commission, the Commission may not designate an additional application period nor accept additional applications for the same class and geographic region.

(6) [~~(5)~~] When deciding whether to open an application period, the Commission shall consider the availability of racing and wagering opportunities in the proposed geographical region, the availability of competitive race animals for the class of racetrack, and the workload and budget status of the Commission.

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

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804272
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 833-6699

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CHAPTER 311. OTHER LICENSES
SUBCHAPTER A. LICENSING PROVISIONS
DIVISION 1. OCCUPATIONAL LICENSES

16 TAC §311.3

The Texas Racing Commission proposes amendments to 16 TAC §311.3, concerning Information for Background Investigation. Section 311.3 relates to the requirement for the Commission to examine the criminal history records of licensees.

The changes to §311.3 establish a $12.00 fee that an applicant for an occupational license must pay whenever the individual submits fingerprints so that the Commission may obtain a criminal history record.

Charla Ann King, Executive Director for the Texas Racing Commission, has determined that during the first five year period the amendment is in effect the fiscal implications for the state as a result of enforcing the amendment will be an increase in revenue of $320,000. The additional revenue will be used to pay the $9.95 fee per fingerprint submission charged by the vendor, pay approximately $0.50 per fingerprint submission for credit card costs, and absorb miscellaneous charges for equipment and supplies. There will be no fiscal implications to local government as a result of enforcing the amendment.

Ms. King has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to allow the Commission to submit fingerprints electronically and receive the criminal histories more promptly. This will allow the Commission to more quickly identify those who are not eligible for licensure due to a disqualifying criminal violation.

The rule will have an adverse economic effect on small or micro-businesses. The Commission has approximately 16,000 licensees, each of who must submit fingerprints at least once every three years in order to remain licensed. Many of these licensees qualify as small or micro-businesses. The projected impact economic impact of this rule amendment on these small businesses will be minimal, in that the average annual cost of the fee will be $4.00 per licensee. The Commission considered absorbing the cost of the fee within its regular budget, but the total cost of submitting fingerprints electronically is too high to absorb without increasing other fees. The Commission considered increasing the fees to the racetracks to cover the costs, but §7.05 of the Texas Racing Act provides that the occupational licensee fee schedule shall include the costs of criminal history checks. In addition, the Commission recently imposed new annual fees on racetracks, while occupational fees have not been adjusted in several years.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Mark Fenner, General Counsel, Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The amendment implements Texas Civil Statutes, Article 179e.

§311.3. Information for Background Investigation.

(a) Fingerprint Requirements and Procedure.

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

(6) If an applicant for a license is required to submit fingerprints under this section, the applicant must also submit a fingerprinting fee of $12.00.

(b) (No change.)

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804273
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §1.16

The Texas Higher Education Coordinating Board proposes amendments to §1.16, concerning contracts for materials and services.

Specifically, these amendments will provide: that the Chief Operating Officer, as well as the Commissioner, may approve contracts for materials and services of up to one hundred thousand dollars in value; and that the Commissioner and Chief Operating Officer may approve contract cost increases of up to ten per cent for contracts previously approved by either the Board or the Agency Operations Committee without resubmitting the contracts for approval.

Mr. William M. Franz, General Counsel has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rule.

Mr. Franz has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the increased efficiency of agency contracting operations. There is no effect on small businesses. There is no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to William M. Franz, General Counsel, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under the Texas Education Code, §61.067, which provides the Coordinating Board with the authority to make contracts.

The amendment affects Texas Education Code, §61.067.

§1.16. Contracts for Materials and Services.

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

(c) The Commissioner and the Deputy Commissioner for Business and Finance/Chief Operating Officer shall approve all contracts for the purchase of materials or services if the contract amount is less than or equal to $100,000.00. The Commissioner may delegate his approval authority to a deputy, associate, or assistant commissioner if:

(1) The contract amount is less than or equal to $5,000; or

(2) The Commissioner and the Deputy Commissioner for Business and Finance/Chief Operating Officer will be away from the agency and unavailable to approve contracts for more than one business day.

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

(g) In the event that a contract for a given amount has been approved by either the Board or the Agency Operations Committee, as applicable, and circumstances alter such that the expenditure necessary under the contract increases by not more than ten per cent, the Commissioner or the Deputy Commissioner for Business and Finance/Chief Operating Officer may approve such an increase. Should the increase in expenditure exceed ten per cent, the contract must be resubmitted for approval by the Board or Agency Operations Committee, as appropriate.

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804271
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 23, 2008
For further information, please call: (512) 427-6114

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CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER G. EARLY COLLEGE HIGH SCHOOLS AND MIDDLE COLLEGES

19 TAC §§4.153 - 4.155, 4.159, 4.161

The Texas Higher Education Coordinating Board proposes amendments to §§4.153 - 4.155, 4.159, and 4.161, concerning Early College High Schools and Middle Colleges. Specifically, these amendments will clarify the distinctions between Early College High Schools and Middle College, expand the notification process to include approval of these entities by the Commissioner, clarify student eligibility, add a reporting requirement for evaluation purposes, and clarify that the exemption from dual credit restrictions is dependent on approval of the entity.

Dr. Judith Loredo, Assistant Commissioner, P-16 Initiatives, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Dr. Loredo has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering these sections will be a greater assurance of quality of the programs and services offered by these entities. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Dr. Kristen Kramer, Program Director, College Readiness, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711, or Kristen.kramer@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §§29.908, 61.076, 130.001(b)(3), and 130.090, which provide the Coordinating Board with the authority to regulate courses and programs offered by public institutions of higher education in cooperation with secondary schools.

The amendments affect Texas Education Code, §29.908.

§4.153. Definitions.

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

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

(5) Early College High School [~~or Middle College,~~] or ECHS[~~/MC~~]--The institution or entity that provides the outreach, curricula, and student learning and support programs that enable the participating student to combine high school courses and college-level

courses during grade levels 9 through 12 and to [~~for students who~~] attain the Recommended or Advanced High School Program diploma and earn up to60 semester credit hours toward an associate or baccalaureate degree by the fifth anniversary of the student's first day of high school [~~two years of college credit simultaneously~~].

(6) Middle College or MC--The institution or entity that provides the outreach, a course of study, and student learning and support programs that enable a participating student to combine high school courses and college-level courses during grade levels 11 through 12 and to attain the Recommended or Advanced High School Program diploma and a significant number of semester credit hours toward an associate or baccalaureate degree.

(7) [~~(6)~~] Recommended or Advanced High School Program--The curriculum specified in the Texas Education Code, §28.025, and the rules promulgated there under by the State Board of Education.

§4.154. Notification of Institutional Intent and Approval to Develop an Early College High School or Middle [~~School/Middle~~] College Entity.

Texas public colleges and universities (C/U) are eligible to enter into agreements with Texas public schools to create an ECHS or MC [~~ECHS/MC~~]. Any C/U that participates in the creation of an ECHS or MC [~~ECHS/MC~~] shall notify the Commissioner and petition for approval to operate the ECHS or MC [~~Board~~] in accordance with provisions and schedules determined by the Commissioner.

§4.155. Student Eligibility.

(a) (No change.)

(b) For this assessment, an ECHS/MC may use any instrument otherwise approved by the Board for Texas Success Initiative purposes in accordance with §4.54 (relating to Exemptions/Exceptions), [~~and~~] §4.56 (relating to Assessment Instrument), and §4.57 (relating to Minimum Passing Standards) of this title [~~including, but not limited to, Texas Assessment of Knowledge and Skills (TAKS) scores, ACT scores, and SAT scores~~].

(c) (No change.)

§4.159. Evaluation and Accountability.

(a) Each ECHS or MC [~~ECHS/MC~~] and sponsoring C/U shall be responsible for the development and implementation of an evaluation process to determine the effectiveness of the ECHS or MC [~~ECHS/MC~~]. Measures of effectiveness shall include, but are not limited to, student results on the K-12 accountability assessments [~~(e.g., TAKS)~~] and success indicators of graduates at Texas public institutions of higher education [~~(e.g., participation rates, grade point average, retention rates, and graduation rates)~~].

(b) The sponsoring C/U shall report regularly to the Board according to provisions and schedules determined by the Commissioner. The C/U shall identify students enrolled in the ECHS or MC and provide other data as requested.

(c) Revocation of Approval. The Commissioner may revoke the approval of an ECHS or MC based on the following factors:

(1) Noncompliance with provisions and schedules determined by the Commissioner;

(2) Lack of program success as evidenced by reports on measures of effectiveness as outlined under subsection (a) of this section;

(3) Failure to provide accurate, timely, and complete information as required by the Board.

§4.161. Exemption from Certain Dual Credit Restrictions.

An ECHS or MC that has notified the Board and received approval from the Commissioner or his designee in accordance with §4.154 (relating to Notification of Institutional Intent and Approval to Develop an Early College High School or Middle College Entity) may allow its eligible students to enroll in more than two dual credit courses per semester. An approved ECHS may allow its eligible students to enroll in dual credit coursework with freshman, sophomore, junior, or senior high school standing. [~~A student enrolled in ECHS/MC may enroll in more than two dual credit courses per semester, and may enroll in dual credit coursework with freshman, sophomore, junior, or senior high school standing.~~]

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804284
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 23, 2008
For further information, please call: (512) 427-6114

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CHAPTER 5. RULES APPLYING TO PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND/OR SELECTED PUBLIC COLLEGES OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER F. MATH, SCIENCE, AND TECHNOLOGY TEACHER PREPARATION ACADEMIES

19 TAC §5.114, §5.115

The Texas Higher Education Coordinating Board proposes amendments to §5.114 and §5.115, concerning Mathematics, Science, and Technology Teacher Preparation Academies. Specifically, these amendments will clarify the role of the Board in selection of the Academies based on specific policies outlined in §1.16 of this title concerning Contracts for Materials and Services.

Dr. Judith Loredo, Assistant Commissioner of P-16 Initiatives, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Dr. Loredo has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering these sections will be increased efficiency and a reduction in the time it takes to select institutions of higher education and award funds to selected institutions to offer a Mathematics, Science, and Technology Teacher Preparation Academy. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Dr. Susan Barnes, Senior Director, Educator Quality, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711, or susan.barnes@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

These amendments are proposed under the Texas Education Code, §21.462, which provides the Coordinating Board with the authority to adopt rules to establish mathematics, science, and technology teacher preparation academies at institutions of higher education that have a State Board for Educator Certification approved teacher preparation program or are affiliated with a program approved by the Board.

These amendments affects Texas Education Code, §21.462.

§5.114. Institutional Eligibility.

Under a competitive process and in accordance with Board procedures outlined under §1.16 of this title (relating to Contracts for Materials and Services), an eligible institution or institutions shall be selected [~~by the Board~~] to establish an Academy or Academies under procedures outlined by the Commissioner and in accordance with Texas Education Code, §21.462.

§5.115. Funding.

(a) The amount and use of funding awarded to each institution [~~approved by the Board~~] to offer an Academy or Academies shall be determined by the Commissioner in accordance with Board procedures outlined under §1.16 of this title (relating to Contracts for Materials and Services).

(b) The funds shall be distributed to each institution [~~approved by the Board~~] to offer an Academy or Academies in a manner and time to be prescribed by the Commissioner.

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804283
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 23, 2008
For further information, please call: (512) 427-6114

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CHAPTER 17. RESOURCE PLANNING
SUBCHAPTER B. BOARD APPROVAL

19 TAC §17.12

The Texas Higher Education Coordinating Board proposes amendments to §17.12 concerning Campus Planning Board Approval. Specifically the proposed amendments will add the Commissioner to the approval authority for projects.

Ms. Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be more efficient Board operations relating to institution facility project approvals. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary W. Johnstone, Deputy Assistant Commissioner, Planning and Accountability, 1200 East Anderson Lane, Austin, Texas 78752, gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §§61.027, 61.0572, 61.058, and 51.927.

The amendment affects Texas Education Code, §§61.0572, 61.058, and 51.927.

§17.12. Delegation of Approval Authority.

(a) (No change.)

(b) Assistant Commissioner. The Board authorizes the Assistant Commissioner and the Deputy Assistant Commissioner for Planning and Accountability when acting on behalf of the Assistant Commissioner, to approve the following types of projects, upon certification of authority by the proposing institution's governing board that the project meets all of the specified Board standards for that project type:

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

(8) Projects previously reviewed or approved by the Board, Committee, Commissioner, Deputy Commissioner for Academic Planning and Policy, or Assistant Commissioner that require reconsideration under the provisions of §17.14 of this title (relating to Re-approval of Projects) relating to any change in the funding source of an approved project with a total projected cost less than $25 million; and

(9) (No change.)

(c) - (d) (No change.)

(e) The Commissioner may refer projects to the Committee or the Board. The Committee may refer projects to the Board. The Assistant Commissioner may refer projects to the Deputy Commissioner for Academic Planning and Policy, or the Commissioner [~~Committee~~].

(f) (No change.)

(g) Decisions of the Assistant Commissioner may be appealed to the Deputy Commissioner for Academic Planning and Policy, or the Commissioner [~~Committee~~].

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804266
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 23, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER C. RULES APPLYING TO ALL PROJECTS

19 TAC §17.21

The Texas Higher Education Coordinating Board proposes amendments to §17.21 concerning Campus Planning Board Approval. Specifically the proposed amendments will add the Commissioner for consideration of approval for projects.

Ms. Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be more efficient Board operations relating to institution facility project approvals. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment

Comments on the proposal may be submitted to Gary W. Johnstone, Deputy Assistant Commissioner, Planning and Accountability, 1200 East Anderson Lane, Austin, Texas 78752, gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §§61.027, 61.0572, 61.058, and 51.927.

The amendment affects Texas Education Code, §§61.0572, 61.058, and 51.927.

§17.21. Application Procedures.

(a) (No change.)

(b) Institutions shall submit the following materials for the consideration of projects by the Assistant Commissioner, Deputy Commissioner for Academic Planning and Policy, Commissioner, Committee on Strategic Planning, or Board:

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

(c) (No change.)

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804267
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 23, 2008
For further information, please call: (512) 427-6114

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CHAPTER 21. STUDENT SERVICES
SUBCHAPTER II. EDUCATIONAL AIDE EXEMPTION PROGRAM

19 TAC §21.1088

The Texas Higher Education Coordinating Board proposes an amendment to §21.1088 concerning the Educational Aide Exemption Program. Specifically the deletion of §21.1088(c) eliminates redundancy with §21.1088(a).

Ms. Lois Hollis, Senior Assistant to the Deputy Commissioner for Business and Finance/Chief Operating Officer, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be more clarity in program operations. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6465, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §54.214(e), which provides the Coordinating Board with the authority to adopt rules to implement this section.

The amendments affect §54.214.

§21.1088. Exemption from Student Teaching.

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

~~[(c) A person who receives a bachelor's degree required for a teaching certificate on the basis of higher education coursework completed while receiving an exemption from tuition and fees under this subchapter may not be required to participate in any field experience or internship consisting of student teaching to receive a teaching certificate.]~~

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

Filed with the Office of the Secretary of State on August 11, 2008.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 23, 2008
For further information, please call: (512) 427-6114

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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS
SUBCHAPTER B. PROVISIONS FOR THE TUITION EQUALIZATION GRANT PROGRAM

19 TAC §22.23

The Texas Higher Education Coordinating Board proposes amendments to §22.23 concerning Provisions for the Tuition Equalization Grant Program. Specifically the proposed amendment to §22.23, Institutions, clarifies that institutions must submit their annual audit reports by April 15 following the end of the relevant fiscal year. In the past, some institutions performed their audits on a biannual basis, but this is no longer true.

Ms. Lois Hollis, Senior Assistant to the Deputy Commissioner for Business and Finance/Chief Operating Officer, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be more clarity for and consistency among institutions administering the program. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6465, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §61.229, which provides the Coordinating Board with the authority to adopt rules to implement the program.

The amendments affect §§61.221 - 61.230.

§22.23. Institutions.

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

(c) Responsibilities.

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

(3) Reporting.

(A) Requirements/Deadlines. All institutions must meet Board reporting requirements in a timely fashion.

(i) Such reporting requirements shall include reports specific to allocation and reallocation of grant funds (including the Financial Aid Database Report) as well as progress and year-end reports of program activities.

(ii) Each participating institution shall have its TEG Program operations audited on a regular basis by an independent auditor or by an internal audit office that is independent of the financial aid and disbursing offices. Reports on findings and corrective action plans (if necessary) are due to the Board by April 15 each year [~~for institutions on annual audit schedules, and every other April 15 for institutions on biannual audit cycles. Biannual reports must cover operations for the prior two years~~].

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

(4) (No change.)

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804269
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 23, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER S. PROFESSIONAL NURSING SHORTAGE REDUCTION PROGRAM

19 TAC §22.507, §22.508

The Texas Higher Education Coordinating Board proposes amendments to §22.507 and §22.508, concerning Professional Nursing Shortage Reduction Program.

Specifically, these amendments will provide rules regarding the disbursement of funds for the Professional Nursing Shortage Reduction Program.

Ms. Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Brown has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be an equitable disbursement of funds for the program. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary W. Johnstone, Deputy Assistant Commissioner, Planning and Accountability, 1200 East Anderson Lane, Austin, Texas 78752 or gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt rules, and Texas Education Code, §61.9624 which authorizes the Coordinating Board to adopt rules to administer this program.

The amendment affects Texas Education Code, §61.9624.

§22.507. Required Reporting of Award Expenditures.

(a) (No change.)

(b) Any award funds remaining unspent at the end of four fiscal years after the fiscal year of the award must be returned to the Coordinating Board within sixty days.

(c) [~~(b)~~] The program report shall be in a format and with the specific content prescribed by the Commissioner.

§22.508. Expenditure Restrictions, Accounting Requirements, and Audit Provisions.

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

(c) Audit Provisions--Any awards made under this program or data submitted under this program are subject to audit by internal and/or external auditors, including Coordinating Board staff. Institutions that receive an award of $500,000 or more shall submit an independent audit report to the Coordinating Board within six months after the end of the award fiscal year. Institutions that receive an award of less than $500,000 shall have their internal auditor include the award as a part of its annual risk assessment for audit review. If the award is selected for further review, the internal auditor shall provide the Coordinating Board a copy of its audit report. Audits should determine if awards were expended in compliance with allowable award expenditures.

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804270
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 23, 2008
For further information, please call: (512) 427-6114

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PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 227. PROVISIONS FOR EDUCATOR PREPARATION CANDIDATES

The State Board for Educator Certification (SBEC) proposes amendments to §§227.1, 227.10, and 227.20, new §227.5 and §227.15, and the repeal of §§227.30, 227.32, 227.34, 227.36, 227.38, 227.40, 227.42, 227.44, 227.46, 227.48, 227.50, 227.52, 227.54, 227.56, and 227.58, concerning provisions for educator preparation candidates. The proposed amendments, new sections, and repeals would update the rules to reflect current law, add minimum standards for all educator preparation programs, while still allowing flexibility, and ensure consistency among educator preparation programs in the state. The proposed amendments, new sections, and repeals result from the SBEC's rule review conducted in accordance with Texas Government Code, §2001.039.

The SBEC rules in 19 TAC Chapter 227 are currently organized as follows: Subchapter A, Admission to an Educator Preparation Program, and Subchapter B, Teach for Texas Pilot Program. These subchapters establish requirements for admission to an educator preparation program and the Teach for Texas Pilot Program. The Texas Education Code (TEC), §21.049, authorizes the SBEC to adopt rules providing for educator certification programs as an alternative to traditional educator preparation programs. The TEC, §21.031, states that the SBEC is established to oversee all aspects of the certification and continuing education of public school educators, and to ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state.

The proposed revisions to 19 TAC Chapter 227 would update the rules to reflect current law and provide minimum standards with flexibility for all educator program candidates. These proposed revisions reflect discussions held during the January 9, 2008, Educator Preparation Advisory Committee meeting and the January 24, 2008, and June 12, 2008, stakeholder meetings. Additional changes also reflect public input received at the March 2008 and May 2008 SBEC meetings and comments received on the rule review of Chapter 227.

General Provisions

Language in §227.1 would be amended in subsection (a) to clarify "candidates for certification" as "educator preparation candidates." Also, in subsection (b) language would be updated to reflect TEC, §22.083.

Definitions

Proposed new §227.5 would add definitions for words and terms used in Chapter 227.

Language has been added in proposed new §227.5(3), (6), and (9) to specify that clinical teaching, internship, or student teaching would occur at a public school accredited by the Texas Education Agency (TEA) or a TEA-recognized private school.

Admission Criteria

The proposed amendment to §227.10 would include amending language in subsection (a) that would ensure that all candidates accepted into an educator preparation program meet the same minimum requirements for admission. Language would be added to specify the minimum requirements for admission to an educator preparation program. Specifically, the proposed revisions would allow an exception from minimum admission criteria for career and technology education certification candidates in subsection (a); add minimum standards for undergraduates in a university educator preparation program and include the regional accrediting agencies recognized by the Texas Higher Education Coordinating Board in proposed new subsection (a)(1); and add minimum standards for an alternative certification program or post-baccalaureate program in proposed new subsection (a)(2). Subsection (b) would be amended to clarify preparation programs as educator preparation programs. Proposed new subsection (c) would specify that an educator preparation program may not admit a candidate who has either completed another educator preparation program in the same certification field or who has been employed for three years in a public school under a specified certificate. Proposed new subsection (d) would provide that the admission criteria for career and technology education candidates are specified in 19 TAC Chapter 230 and Chapter 233. Also, proposed new subsection (e) would specify requirements for educator preparation program candidates who have transcripts from outside the United States.

As a result of public input received at the May 2008 SBEC meeting and a June 12, 2008, stakeholder meeting, language in §227.10 has been modified to specify in proposed new subsection (a)(3) a minimum grade point average (GPA) requirement, a provision for waiver of the GPA requirement, and a minimum of 12 semester credit hours in the subject-specific content area or a passing score on a content examination for all educator preparation programs. Language has also been modified in subsection (a)(3) to allow a candidate to take a content certification examination before graduation or full acceptance into an educator preparation program. In subsection (a)(4), language has been modified to specify the Texas Academic Skills Program® (TASP®) test in rule since it was the former name of the Texas Higher Education Assessment® (THEA®). In proposed new subsection (a)(5), the requirement of an oral communication skills test would be added because oral communication would not be covered in the basic skills assessment referenced in proposed new subsection (a)(4). In proposed new subsection (a)(6), a screening requirement to determine the educator preparation candidate's appropriateness for the certification sought would be added. In proposed new subsection (c), language has been modified to clarify that a candidate who has been employed for three years in a public school would possess a "permit."

Contingency Admission

Proposed new §227.15 would provide flexibility to alternative certification program or post-baccalaureate program candidates who are in the final semester of their degree plan and who have met all other program requirements. These program candidates could be admitted into a program to begin training pending degree conferred or having met all degree requirements. The con-

tingency would be valid only for the semester for which the application was submitted.

As a result of public input received at the June 12, 2008, stakeholder meeting, language in proposed new §227.15(b) has been modified to allow a candidate admitted on a contingency basis to be approved to take a certification examination but not be recommended for a probationary certificate until the candidate has been awarded a baccalaureate degree.

Implementation Date

Language would be revised in §227.20 to specify an implementation date of the 2009-2010 school year.

Teach for Texas Pilot Program

The rules for the Teach for Texas Pilot Program found in Chapter 227, Subchapter B, are proposed for repeal since the program no longer exists.

Technical Changes

Cross references to the SBEC rules would be updated to comply with *Texas Register* formatting requirements.

Regarding procedural and reporting implications for the proposed rule actions, educator preparation programs would be responsible for tracking the admission requirements of educator preparation candidates. The proposed rule actions would not include any additional locally maintained paperwork requirements.

Dr. Karen Loonam, deputy associate commissioner for educator certification and standards, has determined that for the first five-year period the proposed amendments, new sections, and repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule actions. The proposed amendments, new sections, and repeals will have no fiscal implications for educator preparation programs as a result of enforcing or administering the proposed rule actions, because the proposed rule actions merely set out the types of tests and qualifications that programs must use in admitting candidates.

Dr. Loonam has determined that for the first five-year period the proposed amendments, new sections, and repeals are in effect the public benefit anticipated as a result of the proposed rule actions would be the development of clear, minimum educator preparation program admission criteria that would ensure educators are prepared to positively impact the performance of the diverse student population of this state. There may be an unknown economic cost to persons required to comply with the proposed rule actions, but it is impossible to estimate the cost since many, if not most, of such educator preparation program candidates will have already taken examinations that meet the minimum standards.

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.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *sbecrules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed amendments, new sections, and repeals submitted under the Administrative Procedure Act must be received by the Department of Educator Quality and Standards, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Dr. Karen Loonam, not more than 15 calendar days after notice of the proposal has been published in the *Texas Register.*

19 TAC §§227.1, 227.5, 227.10, 227.15, 227.20

The amendments and new sections are proposed under the TEC, §21.031, which states that the SBEC shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators, and states that in proposing rules under the TEC, Chapter 21, Subchapter B, the SBEC shall ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state; §21.044, which authorizes the SBEC to propose rules establishing the training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program and specify the minimum academic qualifications required for a certificate; §21.045(a), which authorizes the SBEC to propose rules establishing standards to govern the approval and continuing accountability of all educator preparation programs based on information that is disaggregated with respect to sex and ethnicity and that includes results of the certification examinations prescribed under TEC, §21.048(a), and performance based on the appraisal system for beginning teachers adopted by the SBEC; §21.049, which authorizes the SBEC to adopt rules providing for educator certification programs as an alternative to traditional educator preparation programs; §21.050(a), which specifies that a person who applies for a teaching certificate for which SBEC rules require a bachelor's degree must possess a bachelor's degree received with an academic major or interdisciplinary academic major, including reading, other than education, that is related to the curriculum as prescribed under TEC, Chapter 28, Subchapter A; and §21.051, which authorizes the SBEC to propose rules providing flexible options for persons for any field experience or internship required for certification.

The proposed amendments and new sections implement the TEC, §§21.031; 21.044; 21.045(a); 21.049; 21.050(a); and 21.051.

§227.1. General Provisions.

(a) It is the responsibility of the education profession as a whole to attract candidates and to retain educators [~~candidates for certification~~] who demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state.

(b) Educator preparation programs should collaborate with local school districts [~~and education service centers~~] pursuant to the Texas Education Code, §22.083, to examine the criminal history of all educator preparation candidates [~~students~~] prior to participation in educator preparation activities that occur in a school [~~field-based setting~~].

§227.5. Definitions.

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

(1) Alternative certification program--An approved educator preparation program, delivered by entities described in §228.20(a) of this title (relating to Governance of Educator Preparation Programs), specifically designed as an alternative to a traditional undergraduate certification program, for individuals already holding at least a baccalaureate degree.

(2) Candidate--A participant in an educator preparation program seeking certification.

(3) Clinical teaching--A 12-week full-day teaching practicum in an alternative certification program at a public school accredited by the Texas Education Agency (TEA) or a TEA-recognized private school that may lead to completion of a standard certificate.

(4) Contingency admission--Conditional admission to an educator preparation program, pending graduation and degree conferred from a recognized regional accrediting organization as specified in Chapter 230, Subchapter Y, of this title (relating to Definitions); or an accrediting organization recognized by the Texas Higher Education Coordinating Board.

(5) Educator preparation program--An entity approved by the State Board for Educator Certification to recommend candidates in one or more educator certification fields.

(6) Internship--A one-year supervised professional assignment at a public school accredited by the TEA or a TEA-recognized private school that may lead to completion of a standard certificate.

(7) Practicum--Practical work in a particular field; refers to student teaching, clinical teaching, internship, or practicum for a professional certificate that is in the school setting.

(8) Semester credit hour--One semester credit hour is equal to 15 clock-hours at an accredited university.

(9) Student teaching--A 12-week full-day teaching practicum in a program provided by an accredited university at a public school accredited by the TEA or a TEA-recognized private school that may lead to completion of a standard certificate.

§227.10. Admission Criteria.

(a) The educator preparation program [~~entity~~] delivering educator preparation shall require the following minimum criteria of all candidates prior to admission to the program, except candidates for career and technology education certification [~~establish policies for the following~~]:

(1) for an undergraduate university program, a candidate shall be enrolled in an educator preparation program from an institution of higher education that is recognized by one of the following regional accrediting agencies by the Texas Higher Education Coordinating Board (THECB):

(A) Middle States Association of Colleges and Schools, Commission on Higher Education (MSA-CHE);

(B) New England Association of Schools and Colleges, Commission on Institutions of Higher Education (NEASC-CIHE);

(C) North Central Association of Colleges and Schools, Higher Learning Commission (NCA-HLC);

(D) Northwest Commission on Colleges and Universities (NWCCU);

(E) Southern Association of Colleges and Schools (SACS);

(F) Western Association of Schools and Colleges, Accrediting Commission for Community and Junior Colleges (WASC-ACCJC);

(G) Western Association of Schools and Colleges, Accrediting Commission for Senior Colleges and Universities (WASC-ACSCU);

(H) Association for Biblical Higher Education (ABHE); and

(I) Association of Theological Schools in the United States and Canada (ATS);

(2) for an alternative certification program or post-baccalaureate program, a candidate shall have a baccalaureate degree earned from and conferred by an institution of higher education that is recognized by one of the regional accrediting agencies by the THECB, specified in paragraph (1) of this subsection;

(3) for an undergraduate university program, alternative certification program, or post-baccalaureate program, a candidate shall meet the following criteria in order to be eligible to enter an educator preparation program:

(A) an overall grade point average (GPA) of at least 2.5 or at least 2.5 in the last 60 semester credit hours; or

(B) documentation and certification from the program director that a candidate's work, business, or career experience demonstrates achievement equivalent to the academic achievement represented by the GPA requirement. This exception to the minimum GPA requirement will be granted by the program director only in extraordinary circumstances and may not be used by a program to admit more than 10% of any cohort of candidates; and

(C) for a program candidate who will be seeking an initial certificate, a minimum of 12 semester credit hours in the subject-specific content area for the certification sought, a passing score on a content certification examination, or a passing score on a content examination administered by a vendor on the Texas Education Agency (TEA)-approved vendor list published by the commissioner of education for the calendar year during which the candidate seeks admission;

(4) for a program candidate who will be seeking an initial certificate, the candidate shall pass the basic skills test in reading, written communication, and mathematics or demonstrate equivalent performance, using one of the following:

(A) the Texas Academic Skills Program® (TASP®) test or the Texas Higher Education Assessment® (THEA®) with a minimum score of 230 in reading, 230 in mathematics, and 220 in writing;

(B) the Accuplacer® test with a minimum score of 78 on Reading Comprehension, 63 on Elementary Algebra, 80 on Sentence Skills, and 6 on the Written Essay;

(C) the SAT® test with a minimum score of 500 on the verbal test and 500 on the mathematics test; or

(D) the ACT® test with a minimum score of 19 on the English test and 19 on the mathematics test;

(5) for a program candidate who will be seeking an initial certificate, the candidate shall demonstrate oral communication skills as specified in §230.413 of this title (relating to General Requirements);

(6) an application and either an interview or other screening instrument to determine the educator preparation candidate's appropriateness for the certification sought; and

[~~(1) screening activities to determine the candidate's appropriateness for the certification sought.~~]

[~~(2) screening for admission to include but not limited to college level skills in reading, oral and written communication, critical thinking, and mathematics.~~]

(7) [~~(3)~~] any other academic criteria for admission that are published and applied consistently to all educator preparation candidates.

(b) An educator preparation program [~~Preparation programs~~] may adopt requirements in addition to those explicitly required in this section.

(c) An educator preparation program may not admit a candidate who has completed another educator preparation program in the same certification field or who has been employed for three years in a public school under a permit or probationary certificate as specified in Chapter 232, Subchapter A, of this title (relating to Types and Classes of Certificates Issued).

(d) An educator preparation program may admit a candidate for career and technology education certification who has met the experience and preparation requirements specified in Chapter 230 of this title (relating to Professional Educator Preparation and Certification) and Chapter 233 of this title (relating to Categories of Classroom Teaching Certificates).

(e) An educator preparation program may admit a candidate who has met the minimum academic criteria through credentials from outside the United States that are determined to be equivalent to those required by this section using the procedures and standards specified in Chapter 245 of this title (relating to Certification of Educators from Other Countries).

[~~(c) Each preparation program must develop and implement specific criteria and procedures that allow admitted individuals to substitute experience and/or professional training directly related to the certificate being sought for part of the preparation requirements.~~]

§227.15. Contingency Admission.

(a) A candidate may be accepted into an alternative certification program or post-baccalaureate program on a contingency basis pending receipt of an official transcript showing degree conferred, as specified in §227.10(a)(2) of this title (relating to Admission Criteria), provided that:

(1) the candidate is currently enrolled in and expects to complete the courses and other requirements for obtaining a baccalaureate degree at the end of the semester in which admission to the program is sought; and

(2) all other program admission requirements have been met.

(b) A candidate admitted on a contingency basis may begin program training and may be approved to take a certification examination, but shall not be recommended for a probationary certificate until the candidate has been awarded a baccalaureate degree.

(c) The contingency admission will be valid for only the semester for which the contingency admission was granted and may not be extended for another semester.

§227.20. Implementation Date.

All educator preparation programs must implement this chapter for all candidates participating in clinical teaching, student teaching, internship, or practicum for the 2009-2010 school year [~~no later than Fall Semester 2000~~].

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804277

Karen Loonam

Deputy Associate Commissioner, Educator Certification and Standards, Texas Education Agency

State Board for Educator Certification

Earliest possible date of adoption: September 21, 2008

For further information, please call: (512) 475-1497

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CHAPTER 227. PROVISIONS FOR EDUCATOR PREPARATION STUDENTS

SUBCHAPTER B. TEACH FOR TEXAS PILOT PROGRAM

19 TAC §§227.30, 227.32, 227.34, 227.36, 227.38, 227.40, 227.42, 227.44, 227.46, 227.48, 227.50, 227.52, 227.54, 227.56, 227.58

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

The repeals are proposed under the Texas Education Code (TEC), §21.031, which states that the SBEC shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators, and states that in proposing rules under the TEC, Chapter 21, Subchapter B, the SBEC shall ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state; §21.044, which authorizes the SBEC to propose rules establishing the training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program and specify the minimum academic qualifications required for a certificate; §21.045(a), which authorizes the SBEC to propose rules establishing standards to govern the approval and continuing accountability of all educator preparation programs based on information that is disaggregated with respect to sex and ethnicity and that includes results of the certification examinations prescribed under TEC, §21.048(a), and performance based on the appraisal system for beginning teachers adopted by the SBEC; §21.049, which authorizes the SBEC to adopt rules providing for educator certification programs as an alternative to traditional educator preparation programs; §21.050(a), which specifies that a person who applies for a teaching certificate for which SBEC rules require a bachelor's degree must possess a bachelor's degree received with an academic major or interdisciplinary academic major, including reading, other than education, that is related to the curriculum as prescribed under TEC, Chapter 28, Subchapter A; and §21.051, which authorizes the SBEC to propose rules providing flexible options for persons for any field experience or internship required for certification.

The proposed repeals implement the TEC, §§21.031; 21.044; 21.045(a); 21.049; 21.050(a); and 21.051.

§227.30. Purposes.
§227.32. Definitions.
§227.34. Available Funds.
§227.36. Authorized Entity and Funding Officer.
§227.38. Eligible Participants; Preferences.
§227.40. Hardship and Other Good Cause.
§227.42. Amount of Basic Financial Incentive.

§227.44. Participant Obligations for Basic Financial Incentive.

§227.46. Special Financial Incentives for Teaching in Underserved Areas.

§227.48. Conversion of Financial Incentive Award to Loan.

§227.50. Loan Interest.

§227.52. Repayment of Loans.

§227.54. Enforcement of Collection.

§227.56. Provisions for Disability and Death.

§227.58. Dissemination of Information.

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804278

Karen Loonam

Deputy Associate Commissioner, Educator Certification and Standards, Texas Education Agency

State Board for Educator Certification

Earliest possible date of adoption: September 21, 2008

For further information, please call: (512) 475-1497

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CHAPTER 228. REQUIREMENTS FOR EDUCATOR PREPARATION PROGRAMS

19 TAC §§228.1, 228.2, 228.10, 228.20, 228.30, 228.35, 228.40, 228.50, 228.60

The State Board for Educator Certification (SBEC) proposes amendments to §§228.1, 228.2, 228.10, 228.20, 228.30, 228.40, 228.50, and 228.60, and new §228.35, concerning requirements for educator preparation programs. The proposed revisions would update the rules to reflect current law, add minimum standards for all educator preparation programs, while still allowing flexibility, and ensure consistency among the educator preparation programs in the state. The proposed amendments and new section result from the SBEC's rule review conducted in accordance with Texas Government Code, §2001.039.

The SBEC rules in 19 TAC Chapter 228 establish requirements for educator preparation programs. The Texas Education Code (TEC), §21.049, authorizes the SBEC to adopt rules providing for educator certification programs as an alternative to traditional educator preparation programs. The TEC, §21.031, states that the SBEC is established to oversee all aspects of the certification and continuing education of public school educators and to ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state.

The proposed revisions to 19 TAC Chapter 228 would update the rules to reflect current law and provide minimum standards with flexibility for all educator program candidates. These proposed revisions reflect discussions held during the November 9, 2007, Educator Preparation Advisory Committee meeting and the January 24-25, 2008, and June 12, 2008, stakeholder meetings. Additional changes also reflect public input received at the March 2008 and May 2008 SBEC meetings.

General Provisions

Language in §228.1 would be amended to update the term "prekindergarten" to "early childhood" and delete the references to the "Centers for the Professional Development of Teachers," as they no longer exist. The reference to "alternative routes to certification" would also be deleted, as the rules apply to all educator preparation programs in the state.

Definitions

The proposed amendment to §228.2 would update terms to be used by all programs in the state to ensure effective communication among and with all educators and stakeholders in the state. Specifically, the proposed amendment would specify in new paragraphs (4), (12) and (17) that clinical teaching, internship, or student teaching would occur at a public school accredited by the Texas Education Agency (TEA) or a TEA-recognized private school; specify in proposed new paragraph (9) that field-based experiences must be conducted face-to-face in order to provide interaction with students and faculty; modify paragraph (18) to specify that instruction would occur for the majority of the instructional day instead of at least one class period; and clarify in proposed new paragraph (20) that the state curriculum is for Kindergarten-Grade 12.

As a result of public input received at the May 2008 SBEC meeting and a June 12, 2008, stakeholder meeting, language in §228.2 has been modified to specify in proposed new paragraph (13) that "a late hire" would refer to an individual who has been accepted into an educator preparation program and hired for a teaching assignment by a school after June 15 or after the school's academic year has begun to allow the individual time to complete the 30 clock-hours of field-based experiences while school is still in session.

Approval Process

The proposed changes to §228.10 would clarify in new subsection (a) that public university programs must have an approved degree plan from the Texas Higher Education Coordinating Board prior to applying to be an approved educator preparation program. Language would be added in subsection (b) to specify the program components to be incorporated into a proposal. Subsection (c) would be modified to delete the reference to the Texas State Partnership since it is a voluntary national accreditation process with standards that are not the same as the state. In addition, language would be added to specify that an entity approved by the SBEC before September 1, 2008, would be required to submit a status report and be reviewed at least once every five years, and that an entity approved after August 31, 2008, would be approved only for a term of 10 years and must reapply every 10 years thereafter. Proposed new subsection (d) would incorporate into rule the process for alternative certification programs to add a clinical teaching component. Language in subsection (e) would be amended to specify the requirements for adding additional certification fields and new classes of certificates. Proposed new subsection (f) would be added to require SBEC approval for new program locations. Also, current subsection (e) would be repealed since this provision is incorporated in proposed changes to §228.10.

As a result of public input received at the May 2008 SBEC meeting and a June 12, 2008, stakeholder meeting, language in §228.10 has been modified to allow in subsection (e)(1) that an "accredited" educator preparation program may submit a modified curriculum matrix for adding a certification field when

the SBEC changes the grade level of a certificate if the educator preparation program was previously approved by the SBEC for the certification field of a similar grade level.

Governance of Educator Preparation Programs

Language in §228.20 would be amended in subsection (a) to allow an educator preparation program to be delivered by identified providers. Language in subsection (b) would be amended to specify a minimum requirement of at least two advisory meetings during the academic year to promote collaboration with the school districts that the educator preparation programs serve. In proposed new subsections (d) and (e), language would be added to ensure communication, clarity, and intent of programs.

As a result of public input received at the May 2008 SBEC meeting and a June 12, 2008, stakeholder meeting, language in §228.20 has been modified to add the word "or" in subsection (b) for clarification, and also provide in subsection (b) that the advisory committee must include members representing as many as possible of the groups identified as collaborators in that subsection.

Educator Preparation Curriculum

The proposed amendment to §228.30 would include reorganizing provisions in current subsections (a), (b), and (c) to other sections for clarification. Also, proposed new subsection (b) would be added to specify that the curriculum listed refers to programs for candidates seeking initial certification, and add language to provide specificity to the rule to ensure more consistency among the programs in the state.

Preparation Program Coursework and/or Training

Proposed new §228.35 would establish minimum preparation program coursework and/or training requirements. Language is proposed in new subsection (a) that would clarify coursework and/or training requirements for initial teacher certification and specify that all educator preparation programs in the state require a minimum of 300 clock-hours of training. Language in proposed new subsection (b) would be added to set out the coursework and/or training requirements for professional certification. In proposed new subsection (c), language would be added to allow for greater flexibility by permitting the required training to be done within a reasonable time in order to allow the district to hire a candidate on short notice, and language would be added to clarify that "late hire" refers to a candidate for a teaching position. Proposed new subsection (d) would set out the different types of field experiences that may be available through a program and establish the expectations for each type of experience. Proposed new subsection (e) would add the requirement that each new educator preparation program candidate be assigned a campus mentor and the requirement that a program provide training for the mentor. In proposed new subsection (f), language would be added to provide specificity for program supervision with minimum formal observations each semester to ensure support and instructional feedback.

As a result of public input received at the May 2008 SBEC meeting and a June 12, 2008, stakeholder meeting, language in proposed new §228.35 has been modified in proposed new subsection (a)(5) to specify 50 clock-hours of training may be provided by a school district; to add in proposed new subsection (c)the phrase, "within 90 school days," for clarification; and to clarify in proposed new subsection (d)(2)(C)(i)(III) that authorized internships or teaching experiences completed through Head Start programs must be affiliated with a public school. Language has also been modified in proposed new subsection (f) to specify that two formal observations must be completed during the first semester and one formal observation must be completed during the second semester since a campus administrator also conducts at least one observation.

Assessment and Evaluation of Candidates for Certification and Program Improvement

The proposed amendment to §228.40 would update terminology and specify that programs shall not grant test approval until after a candidate has been fully accepted into the program. Also, current subsections (c) and (e) would be removed since these provisions are included in other SBEC rules. In addition, language has been added in proposed new subsection (d) to specify a five-year record retention requirement for documents that evidence a candidate's completion of all program requirements.

Implementation Date

Language in §228.60 would be amended to specify that all educator preparation programs must implement the changes for all candidates entering into student teaching, clinical teaching, an internship, or practicum for the 2009-2010 school year.

In response to public comment received on the amendment to 19 TAC §232.5, Temporary Teacher Certificates, language has been added to §228.60 that would specify that provisions in 19 TAC Chapter 228, Requirements for Educator Preparation Programs, shall apply to §232.5, upon the effective date of the rule actions adopted in Chapter 228.

As a result of public input received at the May 2008 SBEC meeting and a June 12, 2008, stakeholder meeting, language in §228.60 has been modified to specify in proposed new subsection (b) that 380 clock-hours of training would be required as included in the amendment to §232.5, Temporary Teacher Certificates.

Technical Changes

Throughout Chapter 228, numerous grammatical and technical changes are proposed, such as the term "Board" would be replaced by the term "State Board for Educator Certification." Also, statutory citation references would be updated and standardized to reflect current law and *Texas Register* formatting requirements. Sections would also be restructured for consistency and readability.

Regarding procedural and reporting implications for the proposed rule actions, educator preparation programs would be responsible for tracking the educator preparation program requirements for each educator preparation program candidate. The proposed rule actions would include an additional locally maintained paperwork requirement. Specifically, the proposed amendment to §228.40 would require in new subsection (d) that an educator preparation program retain documents relating to a candidate's completion of all program requirements for a period of five years after program completion.

Dr. Karen Loonam, deputy associate commissioner for educator certification and standards, has determined that for the first five-year period the proposed amendments and new section are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule actions.

Dr. Loonam has determined that for the first five-year period the proposed amendments and new section are in effect the public benefit anticipated as a result of the proposed rule actions would

be the development of clear, minimum educator preparation program requirements that would ensure educators are prepared to positively impact the performance of the diverse student population of this state. There is no anticipated economic cost to persons who are required to comply with the proposed amendments and new section.

The proposed amendments and new section may have an unknown economic cost for some educator preparation programs as a result of enforcing or administering the proposed rule actions. Educator preparation programs that are not already meeting the proposed new minimum preparation standards may have additional costs, such as an increase in staffing for supervision of program candidates and costs related to additional training hour requirements. The majority of educator preparation programs already meet the proposed new minimum standards and would have no additional economic costs as a result of the proposed rule actions.

There may be an anticipated economic impact for small businesses and microbusinesses that serve as educator preparation entities with alternative certification programs. It is estimated that the proposed rule actions will affect between 1-100 small businesses and 1-100 microbusinesses (businesses with 20 or fewer employees). The projected economic impact will be for compliance costs, such as an increase in staffing for supervision of program candidates and additional training hour requirements.

Minimizing the economic impact on small businesses and/or microbusinesses is not a viable option since it would cause the health, safety, and environmental and economic welfare of the state to not be protected; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *sbecrules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed amendments and new section submitted under the Administrative Procedure Act must be received by the Department of Educator Quality and Standards, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Dr. Karen Loonam, not more than 15 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendments and new section are proposed under the TEC, §21.031(a), which states that the SBEC shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.044, which authorizes the SBEC to propose rules establishing the training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program and specify the minimum academic qualifications required for a certificate; §21.045(a), which authorizes the SBEC to propose rules establishing standards to govern the approval and continuing accountability of all educator preparation programs based on information that is disaggregated with respect to sex and ethnicity and that includes results of the certification examinations prescribed under TEC, §21.048(a), and performance based on the appraisal system for beginning teachers adopted by the SBEC; §21.050(a), which specifies that a person who applies for a teaching certificate for which SBEC rules require a bachelor's degree must possess a bachelor's degree received with an academic major or interdisciplinary academic major, including reading, other than education, that is related to the curriculum as prescribed under TEC, Chapter 28, Subchapter A; and §21.051, which authorizes the SBEC to propose rules providing flexible options for persons for any field experience or internship required for certification.

The proposed amendments and new section implement the TEC, §§21.031(a); 21.044; 21.045(a); 21.050(a); and 21.051.

§228.1. General Provisions.

(a) To ensure the highest level of educator preparation and practice, the State Board for Educator Certification (SBEC) recognizes that the preparation of educators must be the joint responsibility of [~~both~~] educator preparation programs and the Early Childhood [~~Prekindergarten~~]-Grade 12 public and private schools of Texas. Collaboration in the development, delivery, and evaluation of educator preparation is [~~will be~~] required.

(b) Consistent with the Texas Education Code, [~~(TEC) §21.047 and~~] §21.049, the SBEC's rules governing educator preparation are designed to promote flexibility and creativity in the design of educator preparation programs[~~, including Centers for the Professional Development of Teachers and alternative routes to certification,~~] to accommodate the unique characteristics and needs of different regions of the state [~~State~~] as well as the diverse population of potential educators.

(c) All educator preparation programs are [~~will be~~] subject to the same standards of accountability [~~performance~~], as required under Chapter 229 of this title (relating to [~~the~~] Accountability System for Educator Preparation).

§228.2. Definitions.

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

(1) Academic year--If not referring to the academic year of a particular public, private, or charter school or institution of higher education, September 1 through August 31.

[~~(1) Ongoing experiences--experiences that are continued and built upon throughout the entire preparation program of study.~~]

[~~(2) Relevant experiences--experiences that directly relate to the certificate sought.~~]

[~~(3) Field-based experiences--experiences in which the primary activity of a candidate for certification is the performance of professional educator activities while interacting with pre-kindergarten-Grade 12 students and teachers and entity faculty/staff members in a school-related setting. The professional activities include more than observation within a classroom. The interaction with students, teachers, and entity faculty/staff must be ongoing and relevant.~~]

[~~(4) Teaching practicum--supervised student teaching or internship with related duties and responsibilities.~~]

(2) [~~(5)~~] Alternative certification program--An [~~an~~] approved educator preparation program, delivered by entities described in §228.20(a) of this title (relating to Governance of Educator Preparation Programs) [~~chapter~~], specifically designed as an alternative to a traditional undergraduate certification program, for individuals already holding at least a baccalaureate degree.

(3) Candidate--A participant in an educator preparation program seeking certification.

(4) Clinical teaching--A 12-week full-day teaching practicum in an alternative certification program at a public school ac-

credited by the Texas Education Agency (TEA) or a TEA-recognized private school that may lead to completion of a standard certificate.

(5) Clock-hours--Fifteen clock-hours at an accredited university is equal to one semester credit hour.

(6) Cooperating teacher--The campus-based mentor teacher for the student teacher or clinical teacher.

(7) Educator preparation program--An entity approved by the State Board for Educator Certification (SBEC) to recommend candidates in one or more educator certification fields.

(8) Entity--The legal entity that is approved to deliver an educator preparation program.

(9) Field-based experiences--Face-to-face experiences in which the primary activity of a candidate for certification is the performance of professional educator activities while interacting with Early Childhood-Grade 12 students, teachers, and faculty/staff members in a school setting that is part of regular classroom instruction. The professional activities include more than observation within a classroom. The interaction with students, teachers, and entity faculty/staff must be ongoing and relevant.

(10) Field supervisor--A certified educator, hired by the educator preparation program, who preferably has advanced credentials, to observe candidates, monitor his or her performance, and provide constructive feedback to improve his or her professional performance.

(11) Head Start Program--The federal program established under the Head Start Act (42 United States Code, §9801 et seq.) and its subsequent amendments.

(12) Internship--A one-year supervised professional assignment at a public school accredited by the TEA or a TEA-recognized private school that may lead to completion of a standard certificate.

(13) Late hire--An individual who has been accepted into an educator preparation program and hired for a teaching assignment by a school after June 15 or after the school's academic year has begun.

(14) Mentor--For a classroom teacher, a certified educator assigned by the campus administrator who has completed mentor training; who guides, assists, and supports the beginning teacher in areas such as planning, classroom management, instruction, assessment, working with parents, obtaining materials, district policies; and who reports the beginning teacher's progress to that teacher's educator preparation program.

(15) Pedagogy--The art and science of teaching, incorporating instructional methods that are developed from scientifically-based research.

(16) Practicum--Practical work in a particular field; refers to student teaching, clinical teaching, internship, or practicum for a professional certificate that is in the school setting.

(17) Student teaching--A 12-week full-day teaching practicum in a program provided by an accredited university at a public school accredited by the TEA or a TEA-recognized private school that may lead to completion of a standard certificate.

(18) [~~(6)~~] Teacher of record--An [~~an~~] educator employed by a school district who teaches the majority of the instructional day [~~at least one class period~~] in an academic instructional setting and is responsible for evaluating student achievement and assigning grades.

(19) Texas Education Agency staff--Staff of the TEA assigned by the commissioner of education to perform the SBEC's administrative functions and services.

(20) Texas Essential Knowledge and Skills (TEKS)--The Kindergarten-Grade 12 state curriculum in Texas adopted by the State Board of Education and used as the foundation of all state certification examinations.

§228.10. Approval Process.

(a) Approval to Operate. A public institution of higher education must provide documentation to the Texas Education Agency (TEA) from the Texas Higher Education Coordinating Board (THECB) of approval to operate in Texas prior to submitting a proposal to offer an educator preparation and/or alternative certification program.

(b) [~~(a)~~] New Entity Approval. An entity [~~Entities~~] seeking initial approval to deliver an educator preparation program shall submit an application and [~~a~~] proposal [~~in accordance with guidelines established by the Texas Education Agency (TEA) staff,~~] with evidence indicating the ability to comply with the provisions of this chapter and Chapter 227 of this title (relating to Provisions for Educator Preparation Candidates [~~Students~~]). The proposal shall include the following program approval components: entity commitment to adequate preparation of certification candidates, program standards, and community collaboration; criteria for admission to an educator preparation program; curriculum; program delivery and evaluation; and a plan for ongoing support of the candidates. The proposal must also identify the certificates proposed to be offered by the entity and meet applicable federal statutes or regulations. The proposal will be reviewed [~~under procedures approved~~] by the TEA staff and a pre-approval site visit will be conducted. [~~, and the~~] The TEA staff shall recommend to the State Board for Educator Certification (SBEC) whether the entity should be approved [~~or denied accreditation pursuant to §229.3(c) of this title (relating to The Accreditation Process)~~].

(c) [~~(b)~~] Continuing Entity Approval. An entity [~~Entities~~] approved by the SBEC under this chapter prior to September 1, 2008, shall be reviewed at least once every five years under procedures approved by the TEA staff; however, a review may be conducted at any time at the discretion of the TEA staff. At the time of the review, the entity shall submit to the SBEC a status report regarding its compliance with existing standards for educator preparation programs and the entity's original proposal. An entity approved by the SBEC under this chapter after August 31, 2008, shall be approved for a term of ten years and must reapply every ten years thereafter for approval by the SBEC in the same manner as a new educator preparation program seeking approval. [~~Entities accredited under a Texas State Partnership Agreement with a national accrediting body shall be considered to have met the cyclical review requirements, unless the TEA staff determines that a review is appropriate.~~]

(d) Approval of Clinical Teaching for an Alternative Certification Program. An alternative certification program seeking approval to implement a clinical teaching component shall submit a description of the following elements of the program for approval by the TEA staff:

(1) general clinical teaching program description, including conditions under which clinical teaching may be implemented;

(2) selection criteria for clinical teachers;

(3) selection criteria for mentor teachers;

(4) description of support and communication between candidates, mentors, and the alternative certification program;

(5) description of program supervision; and

(6) description of how candidates are evaluated.

(e) [~~(c)~~] Addition of Certificate Fields.

(1) An educator preparation program that is rated "accredited," as provided in §229.3 of this title (relating to The Accreditation Process), [Preparation programs which are fully accredited] may request additional certificate fields be approved by TEA staff, by submitting [appropriate documentation to meet] the curriculum matrix; a description of how the standards for Texas educators are incorporated into the educator preparation program; and documentation showing that the program has the staff knowledge and expertise to support individuals participating in each certification field being requested [and staff support criteria established by the TEA staff]. The curriculum matrix must include the standards, framework competencies, applicable Texas Essential Knowledge and Skills, course and/or module names, and the benchmarks or assessments used to measure successful program progress. An educator preparation program rated "accredited," as provided in §229.3 of this title, and currently approved to offer a content area certificate for which the SBEC is changing the grade level of the certificate may request to offer the preapproved content field at different grade levels by submitting a modified curriculum matrix that includes the standards, course and/or module names, and the benchmarks or assessments used to measure successful program progress. The requested additional certificate fields must be within the classes of certificates for which the educator preparation program has [entities have] been previously approved by the SBEC. An educator preparation program that is not rated "accredited" may not apply to offer additional certificate fields or classes of certificates.

(2) An educator preparation program that is rated "accredited" [Preparation programs which are fully accredited] may request the addition of certificate fields in a class of certificates that has not been previously approved by the SBEC, but [. Under guidelines established by the TEA staff, the entity] must present a full proposal for consideration and approval by the SBEC.

[(3) For purposes of this section, "TEA staff" means staff of the Texas Education Agency assigned by the commissioner of education to perform the SBEC's administrative functions and services.]

(f) Addition of Program Locations. An educator preparation program that proposes to provide educator preparation in a different geographic location from that contained in its approved proposal shall present a new proposal for consideration and approval by the SBEC that includes provisions for meeting all program requirements at the new location.

(g) [(d)] Contingency of Approval. Approval of all educator preparation programs by the SBEC or by the TEA staff, including each specific certificate field, is contingent upon approval by other lawfully established governing bodies, such as the THECB [Texas Higher Education Coordinating Board], boards of regents, or school district boards of trustees. Continuing educator preparation program approval is contingent upon compliance with superseding state and [or] federal law [or both].

[(e) Denial of Approval. Entities that fail to meet the requirements of this chapter; Chapter 227 of this title; or Chapter 229 of this title (relating to Accountability System for Educator Preparation), will not be approved to deliver educator preparation.]

§228.20. Governance [, Design, and Delivery] of Educator Preparation Programs.

(a) Preparation for the certification of educators may [shall] be delivered by an institution [institutions] of higher education, regional education service center [centers], public school district [districts], or other entity [entities] approved by the State Board for Educator Certification (SBEC) [Board] under §228.10 of this title (relating to Approval Process).

(b) The preparation of educators shall be a collaborative effort among public schools accredited [public schools] by the Texas Education Agency (TEA) and/or TEA-recognized private schools[, as defined by Chapter 230, Subchapter Y of this title (relating to Definitions)]; regional education service centers; institutions of higher education; and/or [and] business and community interests; and shall be delivered in cooperation with public schools accredited by the TEA [public schools] and/or TEA-recognized private schools. An advisory committee with members representing as many as possible of the groups identified as collaborators in this subsection [each of the above] shall assist in the design, delivery, evaluation, and major policy decisions of the educator preparation program. The approved educator preparation program [entity] shall approve the roles and responsibilities of each member of the advisory committee and shall meet a minimum of twice during each academic year.

(c) The governing body and chief operating officer of an entity approved to deliver educator preparation [Executives at the entities' highest levels] shall provide sufficient support [for educator preparation] to enable the educator preparation program [all programs] to meet all standards set by the SBEC, and shall be accountable for the quality of the educator preparation program [programs] and the candidates whom the program recommends [recommended] for certification.

(d) All educator preparation programs must be implemented as approved by the SBEC as specified in §228.10 of this title. An approved educator preparation program may not expand to other geographic locations without prior approval of the SBEC.

(e) Proposed amendments to an educator preparation program shall be submitted to the TEA staff and approved prior to implementation. Significant amendments, related to the five program approval components specified in §228.10(b) of this title, must be approved by the SBEC.

§228.30. Educator Preparation Curriculum.

(a) The educator standards adopted by the State Board for Educator Certification (SBEC) [board] shall be the curricular basis for all educator preparation and, for each certificate, address the relevant Texas Essential Knowledge and Skills (TEKS). [knowledge and skills adopted by the State Board of Education pursuant to the Texas Education Code (TEC) §28.002(c) -(d). In addition, the preparation of all candidates for certification must include the specified requirements for reading instruction adopted by the Board for each certificate. Entities shall ensure that all preparation, including field-based experiences, comply with this subsection.]

(b) The curriculum for each educator preparation program shall rely on scientifically-based research to ensure teacher effectiveness and align to the TEKS. The following subject matter shall be included in the curriculum for candidates seeking initial certification:

(1) the specified requirements for reading instruction adopted by the SBEC for each certificate;

(2) the code of ethics and standard practices for Texas educators, pursuant to Chapter 247 of this title (relating to Educators' Code of Ethics);

(3) child development;

(4) motivation;

(5) learning theories;

(6) TEKS organization, structure, and skills;

(7) TEKS in the content areas;

(8) state assessment of students;

(9) curriculum development and lesson planning;

(10) classroom assessment for instruction/diagnosing learning needs;

(11) classroom management/developing a positive learning environment;

(12) special populations;

(13) parent conferences/communication skills;

(14) instructional technology;

(15) pedagogy/instructional strategies;

(16) differentiated instruction; and

(17) certification test preparation.

~~[(b) Educator preparation entities shall provide evidence of on-going and relevant field-based experiences throughout the program, as determined by the collaborative, in a variety of educational settings with diverse student populations, including observation, modeling, and demonstration of promising practices to improve student learning.]~~

~~[(c) Prior to issuance of the Standard Certificate under Chapter 232, Subchapter A of this title (relating to the Types and Classes of Certificates Issued), the preparation program shall require all candidates for certification to complete a field-based practicum in the area and at the level for which the certificate is sought.]~~

~~[(1) Undergraduate teacher certification candidates, shall complete a minimum of 12 weeks of full-day teaching practicum. Supervision shall be conducted with the structured guidance and regular ongoing support of an experienced educator who has been trained as a mentor.]~~

~~[(2) Alternative routes to teacher certification shall provide a field-based practicum or internship that allows the candidate either to serve as teacher of record on a probationary certificate, in accordance with the conditions and requirements stipulated in §232.4 of this title for at least one school year, or to complete a teaching practicum comparable to that required in an undergraduate teacher certification program as described in this section. The internship shall include high quality professional development that is sustained, intensive, and classroom focused. Supervision shall be conducted with the structured guidance and regular ongoing support of an experienced educator who has been trained as a mentor.]~~

~~[(3) Programs preparing candidates for classes of certificates other than classroom teacher shall provide either a supervised field-based practicum or an internship that allows the candidate to serve as an educator on a probationary certificate in accordance with the conditions and requirements stipulated in §232.4 of this title, for candidates to develop and to demonstrate the knowledge and skills related to the certificate sought.]~~

§228.35. Preparation Program Coursework and/or Training.

(a) Coursework and/or Training for Candidates Seeking Initial Certification.

(1) An educator preparation program shall provide coursework and/or training to ensure the educator is effective in the classroom.

(2) Professional development should be sustained, intensive, and classroom focused.

(3) An educator preparation program shall provide each candidate with a minimum of 300 clock-hours of coursework and/or training that includes the following:

(A) 30 clock-hours of field-based experience to be completed prior to student teaching, clinical teaching, or internship;

(B) 80 clock-hours of training prior to student teaching, clinical teaching, or internship; and

(C) six clock-hours of test preparation.

(4) All coursework and training shall be completed prior to educator preparation program completion and standard certification.

(5) With appropriate documentation, 50 clock-hours of training may be provided by a school district and/or campus that is an approved Texas Education Agency (TEA) continuing professional education provider.

(6) Each educator preparation program must develop and implement specific criteria and procedures that allow candidates to substitute experience and/or professional training directly related to the certificate being sought for part of the educator preparation requirements.

(b) Coursework and/or Training for Professional Certification (i.e. superintendent, principal, school counselor, school librarian, educational diagnostician, reading specialist, and/or master teacher). An educator preparation program shall provide coursework and/or training to ensure that the educator is effective in the professional assignment. An educator preparation program shall provide a candidate with a minimum of 200 clock-hours of coursework and/or training that is directly aligned to the state standards for the applicable certification field.

(c) Late Hires. A late hire for a teaching position shall complete 30 clock-hours of field-based experience as well as 80 clock-hours of initial training within 90 school days of assignment.

(d) Educator Preparation Program Delivery. An educator preparation entity shall provide evidence of on-going and relevant field-based experiences throughout the educator preparation program, as determined by the advisory committee as specified in §228.20 of this title (relating to Governance of Educator Preparation Programs), in a variety of educational settings with diverse student populations, including observation, modeling, and demonstration of effective practices to improve student learning.

(1) For initial certification, each educator preparation program shall provide field-based experience, as defined in §228.2 of this title (relating to Definitions), for a minimum of 30 clock-hours. The field-based experience must be completed prior to assignment in an internship, student teaching, clinical teaching, or practicum.

(2) For initial certification, each educator preparation program shall also provide one of the following:

(A) student teaching, as defined in §228.2 of this title, for a minimum of 12 weeks;

(B) clinical teaching, as defined in §228.2 of this title, for a minimum of 12 weeks; or

(C) internship, as defined in §228.2 of this title, for a minimum of one academic year (or 180 school days) for the assignment that matches the certification field for which the individual is accepted into the educator preparation program. The individual would hold a probationary certificate and be classified as a "teacher" as reported on the campus Public Education Information Management System (PEIMS) data. An educator preparation program may permit an internship of up to 30 school days less than the minimum if due to maternity leave, military leave, illness, or late hire date.

(i) An internship, student teaching, or clinical teaching for an Early Childhood-Grade 4 and Early Childhood-Grade 6 candidate may be completed at a Head Start Program with the following stipulations:

(I) the Head Start program is participating in either the School Readiness Integration (SRI) or the Texas Early Education Model (TEEM);

(II) a certified teacher is available as a trained mentor;

(III) the Head Start program is affiliated with a public school accredited by the TEA;

(IV) the Head Start program teaches three and four-year-old students; and

(V) the state's pre-kindergarten curriculum guidelines are being implemented.

(ii) An internship, student teaching, or clinical teaching experience may not be held in a distance learning lab setting.

(3) For candidates seeking professional certification as a superintendent, principal, school counselor, school librarian, or an educational diagnostician, each educator preparation program shall provide a practicum, as defined in §228.2 of this title, for a minimum of 160 clock-hours.

(e) Campus Mentors and Cooperating Teachers. In order to support a new educator and to increase teacher retention, an educator preparation program shall collaborate with the campus administrator to assign each candidate a campus mentor during his or her internship or assign a cooperating teacher during the candidate's student teaching or clinical teaching experience. The educator preparation program is responsible for providing mentor and/or cooperating teacher training that relies on scientifically-based research, but the program may allow the training to be provided by a school district, if properly documented.

(f) On-Going Educator Preparation Program Support. Supervision of each candidate shall be conducted with the structured guidance and regular ongoing support of an experienced educator who has been trained as a field supervisor. The initial contact with the assigned candidate must occur within the first three weeks of assignment. The program must provide a minimum of two formal observations during the first semester and one formal observation during the second semester. Each observation must be at least 45 minutes in duration and must be conducted by the field supervisor. The first observation must occur within the first six weeks of assignment. The field supervisor shall document instructional practices observed, provide written feedback through an interactive conference with the candidate, and provide a copy of the written feedback to the candidate's campus administrator. Informal observations and coaching shall be provided by the field supervisor as appropriate.

§228.40. Assessment and Evaluation of Candidates for Certification and Program Improvement.

(a) To ensure [~~assure~~] that a candidate for educator [~~candidates for~~] certification is [~~are~~] prepared to receive the standard certificate, the entity [~~Standard Certificate, entities~~] delivering educator preparation shall establish benchmarks and structured assessments of the candidate's progress throughout the educator preparation program.

(b) An [~~Entities delivering~~] educator preparation program shall determine the readiness of each candidate [~~its candidates~~] to take the appropriate certification assessment(s), including assessments of knowledge of content, pedagogy and professional responsibilities [~~development~~], and professional ethics and standards of conduct. An educator preparation program shall not grant test approval until a candidate has met all of the requirements for admission to the program and has been fully accepted into the educator preparation program.

[~~(c) Entities shall not recommend individuals to enter an induction period unless those individuals hold at least the baccalaureate degree, unless specifically exempted in rules adopted by the board.~~]

(c) [~~(d)~~] For the purposes of educator preparation program improvement, an entity [~~entities~~] shall continuously evaluate the design and delivery of the educator preparation curriculum based on performance data, scientifically-based research [~~research-based promising~~] practices, and the results of internal and external assessments.

(d) An educator preparation program shall retain documents that evidence a candidate's eligibility for admission to the program and evidence of completion of all program requirements for a period of five years after program completion.

[~~(e) Entities shall regularly and substantively participate in induction efforts for beginning educators. Observations and results from this participation shall be used in the evaluations conducted under subsection (d) of this section.~~]

§228.50. Professional Conduct.

During the period of preparation, the educator preparation entity shall ensure that the individuals preparing candidates and the candidates themselves demonstrate adherence to Chapter 247 of this title (relating to Educators' Code of Ethics [~~and Standard Practices for Texas Educators~~]).

§228.60. Implementation Date.

(a) All approved educator preparation programs must implement this chapter for all candidates participating in clinical teaching, student teaching, internship, or practicum for the 2009-2010 school year. [~~Not later than January 1, 2000, all approved educator preparation programs shall affirm compliance with the provisions of this chapter under procedures approved by the executive director.~~]

(b) All provisions in this chapter shall apply to §232.5 of this title (relating to Temporary Teacher Certificates) upon the effective date of the rule actions adopted in this chapter, except that a certificate issued under §232.5 of this title shall require 380 total clock-hours of training.

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804279

Karen Loonam

Deputy Associate Commissioner, Educator Certification and Standards, Texas Education Agency

State Board for Educator Certification

Earliest possible date of adoption: September 21, 2008

For further information, please call: (512) 475-1497

CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION

SUBCHAPTER G. CERTIFICATION REQUIREMENT FOR CLASSROOM TEACHERS

19 TAC §230.191

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the

State Board for Educator Certification or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The State Board for Educator Certification (SBEC) proposes the repeal of §230.191, concerning certification requirement for classroom teachers. The section establishes a provision for preparation required in all programs. The proposed repeal would remove this provision for preparation required in all programs from rule.

The Texas Education Code (TEC), §21.031, states that the SBEC is established to oversee all aspects of the certification and continuing education of public school educators and to ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state.

The proposed repeal of 19 TAC Chapter 230, Professional Educator Preparation and Certification, Subchapter G, Certification Requirement for Classroom Teachers, §230.191, Preparation Required in All Programs, is necessary since the program preparation requirements in this rule have been incorporated into the proposed revisions to 19 TAC Chapter 228, Requirements for Educator Preparation Programs, or have an expiration date in rule of September 1, 2007. The proposed revisions to 19 TAC Chapter 228 can be found in the Proposed Rules section of this issue

Dr. Karen Loonam, deputy associate commissioner for educator certification and standards, has determined that for each year of the first five years the proposed repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed repeal.

Dr. Loonam has determined that for the first five-year period the proposed repeal is in effect the public benefit anticipated as a result of the proposed repeal would be the development of clear, minimum educator preparation program admission criteria that would ensure educators are prepared to positively impact the performance of the diverse student population of this state. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *sbecrules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed repeal submitted under the Administrative Procedure Act must be received by the Department of Educator Quality and Standards, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Dr. Karen Loonam, not more than 15 calendar days after notice of the proposal has been published in the *Texas Register.*

The repeal is proposed under the TEC, §21.031(a), which states that the SBEC shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and §21.041(b)(3), which requires the SBEC to propose rules that specify the period for which each class of educator certificate is valid.

The proposed repeal implements the TEC, §21.031(a) and §21.041(b)(1), (2), and (3).

§230.191. Preparation Required in All Programs.

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804280

Karen Loonam

Deputy Associate Commissioner, Educator Certification and Standards, Texas Education Agency

State Board for Educator Certification

Earliest possible date of adoption: September 21, 2008

For further information, please call: (512) 475-1497

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 31. NUTRITION SERVICES

SUBCHAPTER C. SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS, AND CHILDREN (WIC)

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes an amendment to §31.30 and the repeal of §§31.32 - 31.36, concerning the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).

BACKGROUND AND PURPOSE

Under federal and state enabling legislation, the WIC Program is funded entirely by a combination of federal grant funds and by rebates from manufacturers of infant formula and infant cereal that can only be expended to defray WIC food costs. The United States Department of Agriculture (USDA) awards federal grant funds to the department to administer the programs, provided the department does so in accordance with federal law and regulations and in accordance with the department's annual submission of a state plan approved by USDA. USDA deems the following types of changes to be substantive amendments to the state plan that require federal approval: rule or policy changes initiated by legislation, USDA, or the state agency; changes affecting client or vendor services and benefits; changes in the monitoring/oversight of vendors and local agencies; any other operational changes aimed at improving or enhancing program delivery or accountability; and changes in related State procedures.

Revisions to these rules are proposed primarily to comply with federal regulations governing the WIC program in 7 Code of Federal Regulations (CFR), Part 246, and to improve administrative efficiency and effectiveness.

SECTION-BY-SECTION SUMMARY

The amendment to §31.30 conforms to federal regulations governing the WIC Program at 7 CFR, §246.7(h)(2) and §246.12(u)(2)(i), concerning mandatory disqualification of WIC clients for fraud or abuse if no administrative hearing is requested. In addition, the department may authorize the Office of Inspector General, Health and Human Services Commission, to perform recovery actions on its behalf.

Repeal of §§31.32 - 31.36 eliminates redundancy and improves administrative efficiency, because it is not legally necessary to adopt provisions in rule that govern WIC vendors and local agencies since the provisions can be included and enforced by reference in the contracts and agreements executed annually between the department and local agencies and vendors.

FISCAL NOTE

Mike Montgomery, Director, Nutrition Services Section, has determined that for each calendar year of the first five years the section or repeals are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the section or repeals as proposed. All activities required by §31.30 will be performed by existing department staff and with existing funding. Concerning the amendment to §31.30, participant disqualification for alleged fraud or abuse of the WIC Program is mandatory without regard to any final action by the state criminal courts, but the participant retains the right to an administrative hearing in which the participant's rights could be upheld. This change to §31.30 represents the reverse of current practice.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Montgomery has determined that there will be no effect on small businesses or micro-businesses by repeal of §§31.32 - 31.36 because exactly the same provisions now adopted in rule may lawfully be included and enforced by reference in the contracts and agreements executed annually between the department and local agencies and vendors. In addition, small and micro-businesses are not required to provide WIC services. Mr. Montgomery has also determined that the amendment to §31.30, applicable to "Participant Fraud and Abuse" by individual WIC clients, rather than small businesses and micro-businesses, is necessary to comply with federal regulations. There are no anticipated economic costs to persons, including WIC applicants and WIC recipients, who are required to comply with the amendment to §31.30 or repeal of §§31.32 - 31.36 as proposed. There is no anticipated negative impact on local employment.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

Mr. Montgomery has determined that the proposed changes have no adverse economic impact on small businesses. Therefore, an economic impact statement and regulatory flexibility analysis for small businesses are not required.

PUBLIC BENEFIT

Mr. Montgomery has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be assurance that federal funds will be utilized more cost-effectively to deliver services to WIC recipients.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Valerie Wolfe, Nutrition Services Section, Division of Family and Community Health, MC 1933, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, (512) 458-7444, or by email to Valerie.Wolfe@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' legal authority to adopt.

25 TAC §31.30

STATUTORY AUTHORITY

The proposed amendment is authorized under Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed amendment affects Health and Safety Code, Chapter 1001; and Government Code, Chapter 531.

§31.30. Participant Fraud and Abuse.

(a) (No change.)

(b) If the state agency or the Office of Inspector General, Health and Human Services Commission, determines that a participant or parent, guardian, client-designated proxy, state agency-appointed proxy, or caretaker of a participant has received benefits unlawfully due to WIC Program abuse, including but not limited to dual participation, the matter may be referred for criminal prosecution [~~state agency may refer the matter for criminal prosecution~~].

(c) (No change.)

(d) [~~If prosecution is declined by the appropriate jurisdiction, the violation does not involve a violation of criminal law, or final disposition of criminal prosecution has occurred the~~] The state agency, or local agency as directed by the state agency, [~~shall direct the local agency to~~] initiate sanctions which may include disqualification from the Program for up to one year.

(e) Upon a final determination by the Office of the Inspector General, Health and Human Services Commission, that a program violation has occurred [~~and that final disposition of any criminal prosecution has occurred~~], the following mandatory disqualifications shall apply.

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

(f) If after finding that a program violation has occurred, the [~~Upon a final determination by the~~] Office of Inspector General, Health and Human Services Commission, further determines that the [~~a~~] program violation [~~has occurred that~~] does not warrant a one year mandatory disqualification [~~and no appeals from any criminal prosecution remain~~], the following sanctions shall apply.

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

(g) Exceptions to disqualification:

(1) The state agency [~~or the Office of Inspector General, Health and Human Services Commission,~~] may decide not to impose a disqualification if, for violations which resulted in a claim assessed by the state agency against the participant, parent, guardian, client designated proxy, state agency-appointed proxy, or caretaker of a participant, full restitution is made within 30 days of receipt of a letter demanding repayment or a repayment schedule is agreed on.

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

(h) The state agency [~~or the Office of the Inspector General, Health and Human Services Commission, shall~~] may attempt to recover, in cash, the value of the benefits received by a participant or the parent, guardian, client-designated proxy, state agency-appointed proxy or caretaker of a participant as a result of participant abuse. The state agency may request and authorize the Office of the Inspector General, Health and Human Services Commission, to perform this recovery on its behalf.

(1) The state agency or the Office of the Inspector General, Health and Human Services Commission, may [~~shall~~] determine the amount of the benefits improperly received by a participant through an independent review of local agency records and such other procedures as the state agency considers necessary under the specific circumstances. The state agency may request and authorize the Office of the Inspector General, Health and Human Services Commission, to perform this recovery on its behalf.

(2) In cases involving criminal prosecutions for violations of law, repayment of cash value of benefits improperly received, may [~~shall~~] become a part of any restitution agreement with the prosecutor and approved by the court. In such cases, the participant shall not have the right to a fair hearing by the department.

(3) (No change.)

(i) (No change.)

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

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804163
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 458-7111 x6972

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25 TAC §§31.32 - 31.36

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

STATUTORY AUTHORITY

The proposed repeals are authorized under Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed repeals affect Health and Safety Code, Chapter 1001; and Government Code, Chapter 531.

§31.32. Selection of Vendors for WIC Initial Authorization for Participation.

§31.33. Selection of Vendors for Reauthorization for Participation.

§31.34. Calculation and Use of Vendor Competitive Pricing Data.

§31.35. Vendor Agreement with the State Agency.

§31.36. The Right of a Vendor or Local Agency to Appeal.

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

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General Counsel
Department of State Health Services
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CHAPTER 97. COMMUNICABLE DISEASES
SUBCHAPTER B. IMMUNIZATION REQUIREMENTS IN TEXAS ELEMENTARY AND SECONDARY SCHOOLS AND INSTITUTIONS OF HIGHER EDUCATION

25 TAC §§97.61, 97.63 - 97.72

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §97.61 and §§97.63 - 97.72, concerning immunization requirements in Texas elementary and secondary schools and institutions of higher education.

BACKGROUND AND PURPOSE

Government Code, §2001.039, requires that each state agency review and consider for readoption every four years each rule adopted by that agency pursuant to the Government Code, Chapter 2001. Sections 97.61 and 97.63 - 97.72 have been

reviewed and the department has determined that reasons for proposing amendments to §97.61 and §§97.63 - 97.72 continue to exist because rules on this subject are needed. This rule-making proposal would make various clarifying amendments designed to improve the efficiency and readability of these rule sections, and would also make certain substantive changes which the department believes are in the best interest of public health.

The substantive amendments to §97.63 are being proposed in order to update the Texas elementary and secondary school immunization requirements so that they adhere more closely to the current version of the Centers for Disease Control and Prevention (CDC), Advisory Committee on Immunization Practices (ACIP) recommended immunization schedule (see http://www.dshs.state.tx.us/immunize/docs/6-105.pdf). These revisions would amend the frequency of vaccinations and booster shots for diseases already covered in the rule, and would also add vaccinations regarding meningococcal disease (see full discussion in the Section-By-Section Summary). Throughout the rule development process, the following stakeholders were given the opportunity to review the proposed amendments to §97.63 and provide informal feedback: Texas Pediatric Society, Texas Medical Association, various school nurses from the Nurses Alliance, and the San Antonio Metropolitan Health District.

The amendments to §97.64 are being proposed in order to update, simplify and clarify the rule text regarding the vaccines required and the limited exceptions for students enrolled in health-related and veterinary courses. The department intends for the proposed changes to address concerns expressed to the department in the past regarding a perceived lack of clarity in this rule section.

SECTION-BY-SECTION SUMMARY

Section 97.61.

The proposed amendments to §97.61 would revise the section title for clarity, and revise subsection (b) to update to the department's current name. Subsection (c) of the rule is proposed to be updated by deleting the cross-reference to Texas Health and Safety Code, §81.002, because the term "instruction" is not contained in the current version of that statutory provision.

Section 97.63.

The amendments to §97.63 are being proposed primarily in order to update the Texas elementary and secondary school immunization requirements to adhere more closely to the current version of the Centers for Disease Control and Prevention (CDC), Advisory Committee on Immunization Practices (ACIP) recommended immunization schedule. The department agrees with these recommended changes from a public health perspective. These substantive changes to the rule section have been drafted so that they would become effective for the 2009 - 2010 school year, which should give school districts sufficient time to perform outreach/education regarding the new requirements and also for the required vaccinations to be administered. Changes are also proposed in this section to improve clarity and readability.

The department proposes the following amendments to become effective for the 2009 - 2010 school year:

Section 97.63(2)(B)(ii)(III) concerning Td/Tdap booster requirement:

-The current rule language provides that 1 booster dose of a tetanus/diphtheria containing-vaccine is required within the last 10 years.

-The proposed amendment provides that there be a Tdap requirement for students in 7th grade beginning in the 2009 - 2010 school year.

-The rationale for proposed rule amendment is the following:

(1) ACIP/CDC recommendation for adolescents (11 - 18 years) to receive a single booster dose of Tdap instead of Td (unless medically contraindicated);

(2) Preferred age for Tdap is 11 - 12 year old visit.

Section 97.63(2)(B)(iii) concerning measles, mumps, and rubella:

-The current rule language provides that 2 doses of a measles-containing vaccine are required, 1 dose of mumps and 1 dose of rubella for grades K - 12.

-The proposed rule amendment would require 2 doses of MMR, which is the current combination vaccine that is the recommended method to get the 3 individual vaccines.

-The rationale for the proposed rule amendment is the following:

(1) In order to align the Texas requirements with the most recent ACIP/CDC recommendations.

(2) Recent mumps outbreaks, January 1 through May 2, 2006, resulted in 2,597 cases of mumps in 11 states. The department wants to respond proactively before similar outbreaks occur in Texas.

Section 97.63(2)(B)(iv) concerning Hepatitis B.

The current rule language was written to phase-in a Hepatitis B vaccination requirement, and included a progressive schedule for certain grades by certain years. Now that the phase-in period has passed, the proposed amendment is written to articulate the requirement after the phase-in period and would delete the phase-in language.

Section 97.63(2)(B)(v) concerning varicella:

-The current rule language provides that 1 dose is to be received on/after 1st birthday for grades K - 12, according to the listed schedule.

-The proposed amendment provides that a progressive 2nd dose requirement for varicella at kindergarten entry be added (each subsequent school year, the next grade is added to the schedule).

-The rationale for proposed amendment is the following:

(1) In order to align the Texas requirements with the most recent ACIP/CDC recommendations.

(2) With 1-dose vaccination schedule, vaccine effectiveness of 85% has not been sufficient to prevent varicella outbreaks in highly-vaccinated school populations.

(3) In these school outbreaks, varicella vaccine coverage ranges from 96% to 100%, with vaccine effectiveness ranging from 72% to 85%.

(4) The peak age-specific incidence of varicella has shifted from 3 - 6 year old children in the pre-vaccine era to 9 - 11 year old children in the post-vaccine era, both for immunized and un-immunized children during these outbreaks.

(5) Studies show that the immune response after the 2nd dose of varicella vaccine demonstrate a greater than 10-fold boost.

(6) Approximately >99% of children achieve an antibody response after the 2nd dose of varicella vaccine compared with 76% - 85% of children with a single dose of varicella vaccine.

Section 97.63(2)(B)(vi) concerning Hepatitis A:

-The current rule language provides 2 doses of hepatitis A vaccine for grades K - 3 in 40 counties designated by the department.

-The proposed amendment would require that there be a statewide requirement for hepatitis A for kindergarten enterers in the 2009 - 2010 school year, and in subsequent years, the next grade level will be incorporated. The phrase "The 1st dose shall be administered on or after the 1st birthday" would be added to indicate when the series begins.

-The rationale for the proposed rule amendment is the following:

(1) In order to align the Texas requirements with the most recent ACIP recommendations.

(2) Majority of reported hepatitis A cases come from areas where hepatitis A vaccine is not required for children attending kindergarten through 3rd grade.

(3) A population of young children who may not have received hepatitis A vaccine still exist in counties where hepatitis A vaccine is not required for kindergarten attendance.

Section 97.63(2)(B)(vii) concerning meningococcal:

-Would add a 7th grade requirement for meningococcal vaccine on a schedule similar to Tdap in these proposed rules.

-The rationale for the proposed amendment is the following:

(1) In order to align the Texas requirements with the most recent ACIP/CDC recommendations.

(2) Adolescents and young adults are most likely to get meningococcal disease, especially those living in group settings such as college dorms.

(3) From 2000 - 2006, Texas averaged 106 cases and 4 deaths per year (excluding unknown ages).

(4) 27% of all cases occur in school aged children, 5 - 19 years.

(5) 35% of deaths occur among 10 - 29 year olds.

(6) Among infants aged <1year of age, >50% of cases are caused by serogroup B, for which no vaccine is licensed nor available in the United States (US).

(7) For all reported cases of meningococcal disease among persons aged ≥11 years, 75% are caused by serogroups (C, Y, or W-135), which are included in vaccines licensed and available in the US.

Also, §97.63(1) and (2), is proposed to be amended to improve clarity and readability. Section 97.63(2)(A) is proposed to be amended to improve clarity and readability, to update the agency name and address, and to insert the relevant cross-reference to the department's Immunization Schedule. Section 97.63(2)(B) is proposed to be amended to delete certain references to kindergartens because the rule's age-triggers in those places are sufficient to be protective of the public health. Section 97.63(2)(B)(i), (ii)(I), and (ii)(II), are also proposed to be amended to improve readability. Section 97.63(2)(B)(ii)(IV) is proposed to be amended by adding the phrase "(or prior to)" in order to clarify the schedule for this vaccination.

Section 97.64.

The proposed amendments to §97.64 would reorganize the section to improve clarity and readability, in response to past concerns expressed to the department. Subsection (a) is proposed to be rewritten to provide a clear statement of the section's applicability as to non-veterinary students, with a newly written subsection (d) covering section applicability as to veterinary students. Existing language at subsections (a) and (d) is proposed to be deleted.

The proposed amendments to §97.64 would also update and clarify the rule text regarding the vaccines required for students covered by the section. Existing language at subsection (b) is proposed to be deleted, with new language being proposed which would describe the vaccines that are required. Subsections which currently contain language regarding required vaccines, subsections (d) through (k), are proposed to be deleted, with subsections (d) and (e) replaced with entirely new language.

The following is a summary of the proposed substantive amendments to new §97.64(b) regarding required vaccines:

-Tetanus-diptheria:

One dose of a tetanus-diphtheria toxoid (Td) is required within the last 10 years. The booster dose may be in the form of a tetanus-diphtheria-pertussis containing vaccine (Tdap). The change to allow Tdap in lieu of Td reflects the recommendation by the ACIP for adults at high risk, such as students at post-high school educational institutions covered under this section.

-Measles, mumps, and rubella vaccines:

The proposed amendments to §97.64 would revise the section for measles, mumps, and rubella vaccines for clarity. The proposed reference to MMR reflects that vaccines for the 3 diseases are now commonly given in the 1 combination vaccine.

The proposed amendments to §97.64 also delete existing language in subsection (c) regarding provisional enrollment, and cover that issue through new subsection (c) language, which is stated in terms of "Limited Exceptions." This rewrite is designed to add consistency and clarity to the issue of what exceptions to the general requirements there are and how those exceptions work. The proposed language would allow students to participate in coursework activities described in subsection (a) if: (1) the student receives at least 1 dose of each specified vaccine prior to enrollment and completes the vaccination series according to the stated schedule; or (2) the student provides acceptable proof of serologic confirmation of immunity. The proposed language goes on to state that students claiming to have satisfied 1 of these 2 conditions cannot engage in the activities described in subsection (a) until they have provided acceptable proof.

New proposed language at §97.64(d) would cover applicability of the rule section to students enrolled in schools of veterinary medicine. The existing requirement in subsection (a) for these students to obtain Hepatitis B vaccinations would be moved to subsection (d) as the new (d)(2).

New proposed language at §97.64(e) would provide a cross-reference to §97.68 where requirements regarding "acceptable evidence" are found, since that term is used in this rule section.

Section 97.65.

The proposed amendments to §97.65 would revise the section title for clarity. The proposed amendments to subsection (a) would explicitly state that referenced laboratory report must be a valid one, and would also move the word "either" in the sentence to improve clarity and readability. The proposed amendments to subsection (b) would revise the rule text for clarity and readability, and would specify that statement made by the referenced person should be in writing. Proposed changes to subsection (b) would also state that a legal guardian or managing conservator may also make the referenced statement, if applicable. Proposed changes to this subsection would also provide a reference to a form considered acceptable for a parent, legal guardian, managing conservator, or physician to complete, in lieu of a vaccine record, in order to attest to a child's positive history of varicella disease or varicella immunity.

Section 97.66.

The proposed amendment to §97.66 would revise the section title for clarity, since the provisional enrollment for higher education students is located in §97.64.

Section 97.67.

The proposed amendments to §97.67 would provide that all schools and child-care facilities are required to maintain immunization records sufficient for a valid audit "or other assessment" to be completed by the entities listed. The changes are proposed in order to reflect that not all records checks are full-blown audits, and also to explicitly state the various governmental officials who are authorized under other law to perform records checks, audits, etc.

Section 97.68.

The proposed amendments to §97.68 would revise the section title and subsection (b) for clarity. Proposed amendments at subsection (c) would delete the reference to a "registry" because in Texas today, not all immunization registries are owned by a state or local health department, and further private registries may emerge in the future. Currently, the Texas Health and Safety Code does not acknowledge these private registries in this context, or make them equivalent to those it does reference which are owned by the state or local health departments. Proposed amendments to subsection (d) explicitly state that the referenced record must be an "official" record, and would also revise the rule text for better readability.

Section 97.69.

The proposed amendments to §97.69 would revise the section title for clarity.

Section 97.70.

The proposed amendments to §97.70 would revise the section title for clarity and to improve readability. Additionally, §97.70 is proposed to be amended to reflect the department's ability to view identified immunization records under the Texas Health and Safety Code and other law, and also to better state the purpose of the reviews in question. The proposed changes would also improve readability.

Section 97.71.

The proposed amendments to §97.71 would revise the section title for clarity.

Section 97.72

The proposed amendments to §97.72 are being made in order to clearly and accurately provide a cross-reference to statutory authority under which the department and/or a local health authority may require additional doses of vaccinations, beyond those contained in these rule sections, when circumstances warrant. The Texas Health and Safety Code, Chapter 81, Subchapter E, establishes the statutory scheme where the state and local health authorities can issue control orders to prevent the spread of disease and protect the public health. Under this statutory scheme, the local health authority takes the lead role, but can be preempted by the department. The department can also initiate these actions on its own initiative. The proposed changes are better reflective of current statutory authority than the current rule language.

FISCAL NOTE

Casey S. Blass, Section Director, Disease Prevention and Intervention Section, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed in §97.61 and §§97.63 - 97.72. The addition of a new vaccine requirement does not pose a fiscal impact. Students between 0 - 18 years of age, who will be required to have new vaccinations in order to comply with these rules, will have access to the required vaccines. Children who are insured will be covered through their healthcare provider's office. Children covered by Medicaid, Children's Health Insurance Program, uninsured, or underinsured are eligible for vaccines at no cost through the Texas Vaccines for Children Program.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Once a provider elects to be within the scope of these proposed rules, by virtue of providing vaccinations to children, then the rules provide for certain things that must be done such that the impacts are definite (e.g., vaccinate children with the newly required vaccines, and with currently required vaccines according to the new schedules). Since these impacts will happen, the department analysis under Economic Impact Statement of this preamble will also serve to satisfy the Small Business Impact Analysis required by Government Code, §2006.002(a).

The Economic Impact Statement of this preamble does not explicitly cover "micro-businesses," but Government Code, §2006.002(a), requires an analysis of the impacts on such businesses. The department believes that many of the health care providers impacted by the proposed rules will be "micro-businesses" as well as "small businesses," and thus the department's analyses regarding the latter will also be applicable to the former. While it is true that a micro-business may be inherently somewhat less able to absorb new regulatory burdens than a small business, the department believes that the new and additional vaccine requirements in the proposed rules would be minimal enough to not place an undue burden on these "micro-business" providers.

There is no anticipated negative impact on local employment.

Government Code, Chapter 2006, was amended by the 80th Legislative Regular Session (House Bill 3430) 2007 to require that, before adopting a rule that may have an adverse economic effect on small businesses, a state agency must first prepare an Economic Impact Statement and a Regulatory Flexibility Analysis.

The definition of a "small business" for purposes of this requirement was codified in Government Code, §2006.001(2). Under this definition, a "small business" is an entity that is: for profit, independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. Independently owned and operated businesses are self-controlling entities that are not subsidiaries of other entities or otherwise subject to control by other entities (and are not publicly traded).

Mr. Blass has determined that there may be an adverse economic effect on those small businesses impacted by the proposed rules.

ECONOMIC IMPACT STATEMENT

It is estimated that there may be a possible economic impact to physicians considered small businesses regarding these proposed rules. The approximate number of small businesses (health care providers and provider sites) potentially impacted by the changes to §97.61, and §§97.63 - 97.72 is 9,000 to 14,000 (including pediatricians, general practice physicians, family practice physicians and family medicine physicians). It is important to note that these rules have never required that any particular provider offer childhood vaccinations-rather, these rules specify the vaccines and the number of doses that must be administered in order for a child to be in compliance with the school and child-care facility attendance requirements for immunizations. The discussion below is in the context of providers that will vaccinate children to ensure compliance with school and child-care facility immunization requirements.

Physicians and healthcare providers that vaccinate children will need to purchase additional vaccines, except under the Texas Vaccines For Children program ("TVFC") (discussed below), in order to vaccinate their patients in accordance with these rules. The department, through the TVFC program, provides vaccine to children who are required to have a vaccine for school entry and have no other financial means to obtain the vaccine. In Texas, approximately 70% of children are covered by the program, under which vaccines are provided at no cost to enrolled providers and public clinics statewide to vaccinate eligible children. In addition, providers vaccinating children who receive benefits through Medicaid or the Children's Health Insurance Plan (CHIP) request reimbursement for the administration costs associated with giving a vaccine. The maximum fee that can be reimbursed in Texas for Medicaid clients is $14.85. This amount is set by the federal Centers for Medicaid and Medicare Services (CMS). Uninsured children, underinsured children, American Indian and Alaskan Natives may be charged an out-of-pocket expense for the administrative costs and this fee cannot exceed $14.85. No provider may deny the vaccine due to an inability to pay the administrative fee.

The remaining 30% of children are fully insured and healthcare providers will be reimbursed by the insurance carrier for both the administrative costs of giving a vaccine and the cost of the vaccine itself. There may be an economic impact to some of this subgroup of healthcare providers. Should some providers be reimbursed at a rate that is less than the amount of money the provider has to pay per dose for some vaccines, some providers may pass this unreimbursed cost to patients and some may not. Even though there is a potential for this to occur, key stakeholders, including members of the Texas Medical Association and Texas Pediatric Society, broadly support these proposed rules.

REGULATORY FLEXIBILITY ANALYSIS

Government Code, Chapter 2006, was amended by the 80th Legislative Regular Session (House Bill 3430) 2007 to require, as part of the rulemaking process, state agencies to prepare a Regulatory Flexibility Analysis that considers alternative methods of achieving the purpose of the rule and explains why those methods were not pursued in the rule amendment. There is an exception to this requirement, however. An agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small businesses, would not be protective of the "health, safety and environmental and economic welfare of the state." The department believes that the proposed changes to the vaccination requirements regarding new vaccines and changes to the schedule of currently-required vaccines are in fact necessary to protect the health and safety of the citizens of Texas. The proposed changes are recommended by Centers for Disease Control and Prevention's Advisory Committee on Immunization Practices (ACIP), and the department's medical experts concur with those recommendations as being appropriate to protect against the spread of vaccine-preventable diseases. Current immunization research supports this position. Any weakening of those proposed new requirements would result in a concurrent detriment to public health. That being said, and in the alternative, the department is conducting (below) a Regulatory Flexibility Analysis for these particular proposed rule changes-although the conducting of this analysis should not be read to concede the point that such an analysis is legally required.

Of the potential impact discussed herein, three alternatives would have had less impact on business but were not pursued in the proposed amendments because they would not be adequately protective of public health and safety. These options are: not adding a new meningococcal vaccine requirement; not expanding existing MMR, varicella, and hepatitis A vaccination requirements via the proposed new schedule; and not adding a Tdap vaccine requirement. Specifically, the department rejected these alternatives for the following reasons:

(1) The department could have chosen not to add the new meningococcal vaccine requirement for 7th grade students. The department rejected this choice because that alternative would not be consistent with the official medical recommendations by ACIP. Each year, an estimated 1,400 - 2,800 cases of meningococcal disease occur in the United States. The disease is transmitted through direct contact. Of those diagnosed with meningococcal disease, 10% to 14% die. Eleven to 19% of survivors have life-long disabilities such as neurologic disability, limb loss, or hearing loss. In May 2005, ACIP recommended routine vaccination with 1 dose of MCV4 vaccine for persons aged 11 - 12 years (if not previously vaccinated with MCV4). In June 2007, the ACIP revised its recommendation to include routine vaccination of all persons aged 11 - 18 years with 1 dose of MCV4. The ACIP recommends persons aged 11 - 12 years be routinely vaccinated at the 11th - 12th year health-care visit targeting 11 - 12 year old children. Ideally, the adolescent health-care visit should be done prior to the 7th grade entry for most children. The 7th grade is also targeted because the department selects this middle school grade to measure and monitor middle school compliance for the CDC. The proposed rule amendment is consistent with this most recent recommendation.

(2) For the existing vaccination requirements, the department considered not adding additional doses for varicella, MMR, and hepatitis A vaccines. However, the department rejected this

choice in order to be consistent with the ACIP medical recommendations and thus be protective of public health and safety.

(A) In order to align the Texas requirements with current ACIP recommendation, regarding these vaccines, the department proposes to add a progressive 2nd dose for varicella vaccine at kindergarten and 7th grade entry. There have been breakthrough varicella cases in Texas. More than 99% of children achieve an antibody response after the 2nd dose of varicella vaccine, compared with 76% to 85% of children with a single dose of varicella vaccine.

(B) To further align the Texas requirements with the most current ACIP recommendations regarding these MMR vaccines, the department proposes to add additional doses of mumps and rubella vaccine to the existing 2-dose measles requirement. The resulting 2-dose MMR vaccine requirement for kindergarten students will be consistent with the ACIP medical recommendations. Recent mumps outbreaks in 2006 resulted in 2,597 cases of mumps in 11 states--the largest outbreak of mumps in the U.S. in more than 20 years. In response to this nationwide mumps outbreak, ACIP recommendations for prevention and control of mumps were updated. Evidence of immunity through documentation of vaccination is now defined as 2 doses of live mumps vaccine for school-aged children (i.e., grades kindergarten - 12).

(C) Additional alignment of the Texas immunization requirements with the ACIP medical recommendation includes the enhancement of the hepatitis A vaccine requirement for routine vaccination for kindergarten students statewide. Routine vaccination of children is an effective way to reduce hepatitis A incidence in the United States. Since licensure of hepatitis A vaccine during 1995 - 1996, the hepatitis A childhood immunization strategy has been implemented incrementally, starting with the recommendation of the Advisory Committee on Immunization Practices (ACIP) in 1996 to vaccinate children living in communities with the highest disease rates and continuing in 1999 with ACIP's recommendations for vaccination of children living in states, counties, and communities with consistently elevated hepatitis A rates. The most recent updated ACIP recommendations represent the final step in the incremental childhood hepatitis A immunization strategy--routine hepatitis A vaccination of children nationwide. Texas immunization requirements have consistently followed the ACIP recommendations. Currently, Texas immunization requirements for hepatitis A vaccine are for the Texas-Mexico border counties, which were identified as having the highest disease rates, and 40 additional counties, which were identified as having a disease incidence of more than twice the national average for a 10-year period. Incidence rates in the current required 40 counties are now nearly identical to those rates in the non-required counties. The majority of the reported hepatitis A cases come from areas where hepatitis A vaccination is not required for children attending kindergarten, leaving a population of young children who may not have received the complete series of hepatitis A vaccine. Adding a statewide kindergarten requirement for 2 doses of hepatitis A vaccine will address this gap and will align Texas with the most recent ACIP recommendation.

(3) The department could have considered not expanding on the current tetanus-diphtheria (Td) vaccine requirement. However, the department rejected this alternative in order to be consistent with the ACIP medical recommendations. The proposed amendments are necessary to be protective of public health and safety.

Pertussis, an acute, infectious cough illness, remains endemic in the United States despite routine childhood pertussis vaccination for more than half a century and high coverage levels in children for more than a decade. A primary reason for the continued circulation of *Bordetella pertussis* is that immunity to pertussis wanes approximately 5 - 10 years after completion of childhood pertussis vaccination, leaving adolescents and adults susceptible to pertussis. Tdap is an adolescent and adult vaccine. In 2005, over 2,000 Texas cases of pertussis were reported to CDC, including 9 deaths (8 among infants). Twenty-six infant pertussis deaths have been recorded since 2000 in 21 different Texas counties.

To reduce pertussis morbidity in adolescents and maintain the standard of care for tetanus and diphtheria protection, ACIP now recommends that: 1) adolescents aged 11 - 18 years should receive a single dose of Tdap instead of tetanus and diphtheria toxoids vaccine (Td) for booster immunization against tetanus, diphtheria, and pertussis if they have completed the recommended childhood DTaP vaccination series and have not received Td or Tdap.

Adolescents with pertussis can transmit the disease to infants. Unfortunately, infants are too young to have completed their vaccinations and do not have the same level of maternal antibody protection for pertussis as they do for other diseases (e.g., measles, varicella), leaving them susceptible. Increasingly, physicians and epidemiologists have recognized that adolescents and adults, especially those living with an infant, are the most likely sources of pertussis transmission to infants[1].

References:

1. Bisgard, K.M., Pascual, F.B., Ehresmann, K.R., et al. (2004). Infant pertussis: who was the source? *Pediatr Infect Dis J*, 23, 985--9.

PUBLIC BENEFIT

Mr. Blass has determined that for each year of the first five years that the sections are in effect, the public will benefit from adoption of the sections proposed. The proposed amendments would provide clarity and better readability to the section titles and text. The reorganized sections should be much easier to read and understand than the current language, which will address concerns previously expressed to the department on those issues.

The proposed amendments to §97.63 would benefit the public by aligning the Texas immunization requirements in Texas elementary and secondary schools with the most recent recommendations by the Centers for Disease Control and Prevention, Advisory Committee on Immunization Practices. The department agrees, from a medical perspective, with the rationale behind the federal recommendations and is convinced that the proposed changes would be good for the public health in Texas.

The proposed amendments to §97.64 would benefit the public by updating, reorganizing and clarifying the rule text regarding the vaccines required, and limited exceptions to those requirements, for students enrolled in health-related courses before they may engage in the course activities which will involve direct patient contact with potential exposure to blood or bodily fluids in educational, medical, or dental care facilities. The public would also benefit from the improved readability of this rule section.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure

and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposed rules may be submitted to Tim Hawkins, Disease Prevention and Intervention Section, Division of Prevention and Preparedness, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, or by email to Tim.Hawkins@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed amendments are authorized by Health and Safety Code, §81.021, which requires the department to protect the public from communicable disease; §81.004 which allows the department to adopt rules for the effective administration of the Communicable Disease Act; and §161.004 and §161.0041 regarding statewide immunization of children and associated logistics; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed amendments affect Health and Safety Code, Chapters 81, 161, and 1001; and Government Code, Chapter 531.

§97.61. Children and Students Included in Vaccine Requirements.

(a) The vaccine requirements apply to all children and students entering, attending, enrolling in, and/or transferring to child-care facilities or public or private primary or secondary schools or institutions of higher education.

(b) The vaccines required in this section are also required for all children in the State of Texas, including children admitted, detained, or committed in Texas Department of Criminal Justice, Department of State Health Services [~~Texas Mental Health and Mental Retardation~~], and Texas Youth Commission facilities.

(c) The vaccine requirements are adopted as a statewide control measure for communicable disease as defined in Health and Safety Code, §81.081 and §81.082. [~~The requirements are adopted as an "instruction" of the department as that term is used in the Health and Safety Code, §81.002.~~]

§97.63. Immunization Requirements in Texas Elementary and Secondary Schools [~~and Institutions of Higher Education~~].

Every child in the state shall be vaccinated [~~immunized~~] against vaccine-preventable [~~vaccine preventable~~] diseases caused by infectious agents, in accordance with the following immunization schedule.

(1) A vaccine administered up to four days prior to the deadline for that vaccine in the department Immunization Schedule, §97.221 of this title (relating to Department of State Health Services Immunization Schedule), is considered compliant with that deadline.

[~~(1) In accordance with the Department of State Health Services Immunization Schedule as informed by the Advisory Committee on Immunization Practices' (ACIP) recommendations and adopted by the Executive Commissioner of the Health and Human Services Commission and published in the *Texas Register* annually, for all vaccines herein, vaccine doses administered less than or equal to four days before the minimum interval or age shall be counted as valid.~~]

(2) A child or student shall show acceptable evidence of vaccination prior, for diseases listed below, to entry, attendance, or transfer to a child-care facility or public or private elementary or secondary school, or institution of higher education.

(A) Children enrolled in child-care facilities, pre-kindergarten, or early childhood programs shall have the following immunizations (at the ages indicated) against: [~~Age-appropriate vaccination against~~] diphtheria, pertussis, tetanus, poliomyelitis, *Haemophilus influenzae* type b (Hib), measles, mumps, rubella, hepatitis B, hepatitis A, invasive pneumococcal, and varicella diseases in accordance with the department [~~Department of State Health Services~~] Immunization Schedule, §97.221 of this title [~~as informed by the Advisory Committee on Immunization Practices' (ACIP) recommendations and adopted by the Executive Commissioner of the Health and Human Services Commission and published in the *Texas Register* annually.~~] A copy of the current schedule is available at www.ImmunizeTexas.com or by mail to the Department of State Health Services, P.O. Box 149347 [~~1100 West 49th Street~~], Austin, Texas 78714-9347 [~~78756~~].

(B) Students in kindergarten through twelfth grade shall have the following vaccines.

(i) Poliomyelitis.

(I) Students [~~Upon entry into kindergarten, students~~] are required to have four doses of polio vaccine - one of which must have been received on or after the fourth birthday. Or, if the third dose was administered on or after the fourth birthday, only three doses are required. If any combination of four doses of OPV and IPV was received before four years of age, no additional dose is required.

(II) Polio vaccine is not required for persons eighteen years of age or older.

(ii) Diphtheria/Tetanus/Pertussis.

(I) Students [~~Upon entry into kindergarten, students~~] are required to have five doses of a diphtheria/tetanus/pertussis-containing [~~diptheria-tetanus-pertussis containing~~] vaccine - one of which must have been received on or after the fourth birthday. Or, if the fourth dose was administered on or after the fourth birthday, only four doses are required.

(II) Students seven years of age or older are required to have at least three doses of a tetanus/diphtheria-containing vaccine [~~tetanus-diptheria containing vaccine~~], provided at least one dose was administered on or after the fourth birthday. Any combination of three doses of a tetanus/diphtheria-containing vaccine [~~tetanus-diphtheria containing~~] vaccine will meet this requirement.

(III) Tdap. Beginning school year (SY) 2009 - 2010, students will be required to have one booster dose of a tetanus/diphtheria/pertussis-containing vaccine for entry into the 7th grade, if at least five years have passed since the last dose of a tetanus-containing vaccine. If five years have not elapsed since the last dose of a tetanus-containing vaccine at entry into the 7th grade, then this dose will become due as soon as the five- year interval has passed. Td vaccine is an acceptable substitute, if Tdap vaccine is medically contraindicated.

[(III) ~~One dose of a tetanus-diptheria containing vaccine is required within the last ten years.~~]

(IV) Children who were enrolled in school, grades K - 12, prior to August 1, 2004, and who received a booster dose of DTaP or polio vaccine in the calendar month of (or prior to) [~~or prior to~~] their fourth birthday, shall be considered in compliance with clause (i)(I) (polio) and clause (ii)(I) (DTaP) of this subparagraph.

(iii) MMR. Students are required to have two [~~Measles. Two~~] doses of MMR [~~measles-containing~~] vaccine upon kindergarten entry for the following grades and school years (The first dose shall be administered on or after the first birthday): [~~are required. The first dose shall be administered on or after the first birthday.~~]

(I) SY 2009 - 2010: K;

(II) SY 2010 - 2011: K, 1;

(III) SY 2011 - 2012: K, 1, 2;

(IV) SY 2012 - 2013: K, 1, 2, 3;

(V) SY 2013 - 2014: K, 1, 2, 3, 4;

(VI) SY 2014 - 2015: K, 1, 2, 3, 4, 5;

(VII) SY 2015 - 2016: K, 1, 2, 3, 4, 5, 6;

(VIII) SY 2016 - 2017: K, 1, 2, 3, 4, 5, 6, 7;

(IX) SY 2017 - 2018: K, 1, 2, 3, 4, 5, 6, 7, 8;

(X) SY 2018 - 2019: K, 1, 2, 3, 4, 5, 6, 7, 8, 9;

(XI) SY 2019 - 2020: K, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10;

(XII) SY 2020 - 2021: K, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11; and

(XIII) SY 2021 - 2022: K, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.

[(iv) ~~Rubella. One dose of rubella vaccine received on or after the first birthday is required.~~]

[(v) ~~Mumps. One dose of mumps vaccine received on or after the first birthday is required.~~]

(iv) [~~(vi)~~] Hepatitis B.

(I) Students are required to have three [~~Three~~] doses of hepatitis B vaccine upon entry into kindergarten. [~~are required for the following grades for the following school years:~~]

[~~(-a-) 2004-2005 for kindergarten through fifth grade and seventh through tenth grade;~~]

[~~(-b-) 2005-2006 for kindergarten through eleventh grade; and~~]

[~~(-c-) thereafter, beginning in school year 2006-2007, for all students in grades kindergarten through twelfth grade.~~]

(II) In some circumstances, the United States Food and Drug Administration may officially approve in writing the use of an alternative dosage schedule for an existing vaccine. Such an [~~These~~] alternative regimen [~~regimens~~] may be used to meet the requirements under this section [~~this requirement~~] only when alternative regimens are fully documented. Such documentation must include vaccine manufacturer and dosage received for each dose of that vaccine.

(v) [~~(vii)~~] Varicella. Students are required to have two doses [~~One dose~~] of varicella vaccine received on or after the first birthday [~~is required~~] for the following grades and [~~for the following~~] school years (Two doses are required if the child was thirteen years old or older at the time the first dose of varicella vaccine was received):

(I) SY 2009 - 2010: K, 7;

[(I) ~~2004-2005 for kindergarten through fourth grade and seventh through tenth grade;~~]

(II) SY 2010 - 2011: K, 1, 7, 8;

[(II) ~~2005-2006 for kindergarten through fifth grade and seventh through eleventh grade; and~~]

(III) SY 2011- 2012: K, 1, 2, 7, 8, 9;

[(III) ~~thereafter, beginning in school year 2006-2007, for all students in grades kindergarten through twelfth grade. Two doses are required if the child was thirteen years old or older at the time the first dose of varicella vaccine was received.~~]

(IV) SY 2012 - 2013: K, 1, 2, 3, 7, 8, 9, 10;

(V) SY 2013 - 2014: K, 1, 2, 3, 4, 7, 8, 9, 10, 11;

(VI) SY 2014 - 2015: K, 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12; and

(VII) SY 2015 - 2016: K through 12th grade.

(vi) [~~(viii)~~] Hepatitis A. Students are required to have [~~Upon entry into kindergarten through third grade,~~] two doses of hepatitis A vaccine for the following grades and school years (The first dose shall be administered on or after the first birthday): [~~are required for students attending a school located in a high incidence geographic area as designated by the department. The first dose shall be administered on or after the second birthday. A list of geographic areas for which hepatitis A is mandated shall be published in the *Texas Register* on an annual basis and is available at www.ImmunizeTexas.com, or by mail request at Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756.~~]

(I) SY 2009 - 2010: K;

(II) SY 2010 - 2011: K, 1;

(III) SY 2011 - 2012: K, 1, 2;

(IV) SY 2012 - 2013: K, 1, 2, 3;

(V) SY 2013 - 2014: K, 1, 2, 3, 4;

(VI) SY 2014 - 2015: K, 1, 2, 3, 4, 5;

(VII) SY 2015 - 2016: K, 1, 2, 3, 4, 5, 6;

(VIII) SY 2016 - 2017: K, 1, 2, 3, 4, 5, 6, 7;

(IX) SY 2017 - 2018: K, 1, 2, 3, 4, 5, 6, 7, 8;

(X) SY 2018 - 2019: K, 1, 2, 3, 4, 5, 6, 7, 8, 9;

(XI) SY 2019 - 2020: K, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10;

(XII) SY 2020 - 2021: K, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11; and

(XIII) SY 2021 - 2022: K, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.

(vii) Meningococcal. Students are required to have one dose of meningococcal vaccine for the following grades and school years:

(I) SY 2009 - 2010: 7;

(II) SY 2010 - 2011: 7, 8;

(III) SY 2011 - 2012: 7, 8, 9;

(IV) SY 2012 - 2013: 7, 8, 9, 10;

(V) SY 2013 - 2014: 7, 8, 9, 10, 11; and

(VI) SY 2014 - 2015: 7, 8, 9, 10, 11, 12.

§97.64. Required Vaccinations for Students Enrolled in Health-related and Veterinary Courses in Institutions of Higher Education.

(a) Applicability for non-veterinary students. This section applies to all students enrolled in health-related higher education courses which will involve direct patient contact with potential exposure to blood or bodily fluids in educational, medical, or dental care facilities.

[~~(a) This section applies to all students enrolled in health-related courses, which will involve direct patient contact in medical or dental care facilities. This includes all medical interns, residents, fellows, nursing students, and others who are being trained in medical schools, hospitals, and health science centers listed in the Texas Higher Education Coordinating Board's list of higher education in Texas; and students attending two-year and four-year colleges whose course work involves direct patient contact regardless of the number of courses taken, number of hours taken, and the classification of the student. Subsection (i) of this section also applies to veterinary medical students whose course work involves direct contact with animals or animal remains regardless of number of courses taken, number of hours taken, and the classification of the student.~~]

(b) Vaccines Required. Students must have the all the following vaccinations before they may engage in the course activities described in subsection (a) of this section:

(1) Tetanus-diphtheria. One dose of a tetanus-diphtheria toxoid (Td) is required within the last ten years. The booster dose may be in the form of a tetanus-diphtheria-pertussis containing vaccine (Tdap).

(2) Measles, Mumps, and Rubella Vaccines.

(A) Students born on or after January 1, 1957, must show, prior to patient contact, acceptable evidence of vaccination of two doses of a measles-containing vaccine administered since January 1, 1968 (preferably MMR vaccine).

(B) Students born on or after January 1, 1957, must show, prior to patient contact, acceptable evidence of vaccination of one dose of a mumps vaccine.

(C) Students must show, prior to patient contact, acceptable evidence of one dose of rubella vaccine.

(3) Hepatitis B Vaccine. Students are required to receive a complete series of hepatitis B vaccine prior to the start of direct patient care or show serologic confirmation of immunity to hepatitis B virus.

(4) Varicella Vaccine. Students are required to have received one dose of varicella (chickenpox) vaccine on or after the student's first birthday or, if the first dose was administered on or after the student's thirteenth birthday, two doses of varicella (chickenpox) vaccine are required.

[~~(b) Students may be provisionally enrolled for up to one semester or one quarter to allow students to attend classes while obtaining the required vaccines and acceptable evidence of vaccination.~~]

(c) Limited Exceptions.

(1) Notwithstanding the other requirements in this section, a student may be provisionally enrolled in these courses if the student has received at least one dose of each specified vaccine prior to enrollment and goes on to complete each vaccination series on schedule in accordance the Centers for Disease Control and Prevention's Recommended Adult Immunization Schedule as approved by the Advisory Committee on Immunization Practices (ACIP), American College of Obstetricians and Gynecologists (ACOG), the American Academy of Family Physicians (AAFP), and the American College of Physicians. However, the provisionally enrolled student may not participate in coursework activities involving the contact described in subsection (a) of this section until the full vaccination series has been administered.

(2) Students, who claim to have had the complete series of a required vaccination, but have not properly documented them, cannot participate in coursework activities involving the contact described in subsection (a) of this section until such time as proper documentation has been submitted and accepted.

(3) The immunization requirements in subsections (b) and (d) of this section are not applicable to individuals who can properly demonstrate proof of serological confirmation of immunity. Vaccines for which this may be potentially demonstrated, and acceptable methods for demonstration, are found in rule §97.65 of this title (relating to Exceptions to Immunization Requirements (Verification of Immunity/History of Illness)). Such a student cannot participate in coursework activities involving the contact described in subsection (a) of this section until such time as proper documentation has been submitted and accepted.

[~~(c) Students cannot be provisionally enrolled without at least one dose of measles, mumps, and rubella vaccine if direct patient contact will occur during the provisional enrollment period.~~]

(d) Students enrolled in schools of veterinary medicine.

(1) Rabies Vaccine. Students enrolled in schools of veterinary medicine whose coursework involves direct contact with animals or animal remains shall receive a complete primary series of rabies vaccine prior to such contact. Serum antibody levels must be checked every two years, with a booster dose of rabies vaccine administered if the titer is inadequate.

(2) Hepatitis B Vaccine. Students enrolled in schools of veterinary medicine whose coursework involves direct contact with animals or animal remains shall receive a complete series of Hepatitis B vaccine prior to such contact.

[~~(d) Polio vaccine is not required. Students enrolled in health-related courses are encouraged to ascertain that they are immune to poliomyelitis.~~]

(e) Requirements regarding acceptable evidence of vaccination are found at §97.68 of this title (relating to Acceptable Evidence of Vaccination(s)).

[~~(e) One dose of tetanus-diphtheria toxoid (Td) is required within the last ten years.~~]

[~~(f) Students who were born on or after January 1, 1957, must show, prior to patient contact, acceptable evidence of vaccination of two doses of measles-containing vaccine administered since January 1, 1968.~~]

[~~(g) Students must show, prior to patient contact, acceptable evidence of vaccination of one dose of rubella vaccine.~~]

[~~(h) Students born on or after January 1, 1957, must show, prior to patient contact, acceptable evidence of vaccination of one dose of mumps vaccine.~~]

[~~(i) Students shall receive a complete series of hepatitis B vaccine prior to the start of direct patient care or show serologic confirmation of immunity to hepatitis B virus.~~]

[~~(j) Students enrolled in schools of veterinary medicine shall receive a complete primary series of rabies vaccine prior to the start of contact with animals or their remains; and, a booster dose of rabies vaccine every two years unless protective serum antibody levels are documented.~~]

[~~(k) Students shall receive two doses of varicella vaccine unless the first dose was received prior to thirteen years of age.~~]

§97.65. Exceptions to Immunization Requirements [~~Requirement~~] (Verification of Immunity/History of Illness).

(a) Serologic confirmations of immunity to measles, rubella, mumps, hepatitis A, hepatitis B, or varicella, are acceptable. Evidence of measles, rubella, mumps, hepatitis A, or hepatitis B, or varicella illnesses must consist of a valid laboratory report that indicates [~~either~~] confirmation of either immunity or infection.

(b) A written statement from a parent (or legal guardian or managing conservator), school nurse, or physician attesting to a child's positive [~~or physician validated~~] history of varicella disease (chickenpox), or of varicella immunity, is acceptable in lieu of a vaccine record for that disease (see form at http://www.dshs.state.tx.us/immunize/docs/c-9.pdf). [~~A written statement from a physician, or the student's parent or guardian, or school nurse, must support histories of varicella disease.~~]

§97.66. Provisional Enrollment for (Non-Higher Education) Students.

(a) The law requires that students be fully vaccinated against the specified diseases. A student may be enrolled provisionally if the student has an immunization record that indicates the student has received at least one dose of each specified age-appropriate vaccine required by this rule. To remain enrolled, the student must complete the required subsequent doses in each vaccine series on schedule and as rapidly as is medically feasible and provide acceptable evidence of vaccination to the school. A school nurse or school administrator shall review the immunization status of a provisionally enrolled student every 30 days to ensure continued compliance in completing the required doses of vaccination. If, at the end of the 30-day period, a student has not received a subsequent dose of vaccine, the student is not in compliance and the school shall exclude the student from school attendance until the required dose is administered.

(b) A student who is homeless, as defined by §103 of the McKinney Act, 42 USC §11302, shall be admitted temporarily for 30 days if acceptable evidence of vaccination is not available. The school shall promptly refer the student to appropriate public health programs to obtain the required vaccinations.

§97.67. School Records.

All schools and child-care facilities are required to maintain immunization records sufficient for a valid audit or other assessment to be completed by federal, state and/or local public health officials.

§97.68. Acceptable Evidence of Vaccination(s) [~~Vaccination~~].

(a) Vaccines administered after September 1, 1991, shall include the month, day, and year each vaccine was administered.

(b) Documentation of vaccines administered that include the signature or stamp of the physician or his/her designee, or public health personnel, is acceptable.

(c) An official immunization record generated from a state or local health authority [~~, such as a registry,~~] is acceptable.

(d) An official [~~A~~] record received from school officials, including a record from another state, is acceptable.

§97.69. Transfer of Immunization Records.

(a) A student can be enrolled provisionally for no more than 30 days if he/she transfers from one Texas school to another, and is awaiting the transfer of the immunization record.

(b) A dependent of a person who is on active duty with the armed forces of the United States can be enrolled provisionally for no more than 30 days if he/she transfers from one school to another and is awaiting the transfer of the immunization record.

§97.70. Review of Records and Providing Assistance.

Representatives of the department and local health authorities may advise and assist schools in meeting these requirements. The department shall conduct periodic review of [~~de-identified~~] school immunization records in order to determine compliance with this subchapter [~~allow public health officials to obtain information required for public health purposes~~].

§97.71. Annual Report of Immunization Status of Students.

Schools shall submit annual reports of the immunization status of students, in a format prescribed by the department, to monitor compliance with these requirements.

§97.72. Additional Vaccination Requirements [~~Vaccine-Preventable Disease Outbreaks~~].

Under Texas Health and Safety Code, Chapter 81, Subchapter E, additional vaccinations may be required by the department and/or the local health authority in specific situations under the mechanism of a control order containing control measures. [~~In the event of an outbreak of vaccine-preventable disease, the local health authority may require or recommend additional doses or boosters to provide further protection.~~]

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

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804158
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 458-7111 x6972

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES

SUBCHAPTER W. COVERAGE FOR ACQUIRED BRAIN INJURY

28 TAC §§21.3101 - 21.3107

The Texas Department of Insurance proposes amendments to §§21.3101 - 21.3105 and new §21.3106 and §21.3107, concerning coverage for acquired brain injury. These amendments and new sections are necessary to implement House Bill (HB) 1919, 80th Legislature, Regular Session, effective January 1, 2008, which amended Insurance Code Chapter 1352, relating to required coverage for acquired brain injury. The proposed amendments and new sections: (i) address expanded coverage of acquired brain injury provisions in health benefit plans to include coverage of post-acute care and cognitive rehabilitation for survivors of brain injuries; (ii) distinguish required coverage provisions that do not apply to small business health benefit plans and provide alternative coverage provisions that do apply to small business health benefit plans; (iii) specify the content for a notification of coverage that health benefit plan issuers, other than small business plans, are required to annually provide to insureds or enrollees; and (iv) specify procedures for the distribution of the required notification of coverage. The amendments are also necessary to update statutory citations in existing rules to conform to the non-substantive revised Insurance Code, which are necessary for easier use and readability of the rules.

The proposed amendment to delete §21.3101(a)(4) is necessary because the statutory authority for the provision has expired. The statutory authority for §21.3101(a)(4) in SECTION 2 of Acts 2001, 77th Legislature, Chapter 859 required the Sunset Commission to prepare a report and the Department to assist the Sunset Commission as necessary. However, under SECTION 2(d), SECTION 2 expired on September 1, 2007. The proposed amendments to §21.3101(c)(1) are necessary to specify an effective date for the proposed amendments and new sections. The Department is proposing an effective date of October 31, 2008.

The proposed amendments to §21.3101(c)(2) are necessary to make clarifying changes to punctuation within the paragraph.

The proposed amendments to §21.3102 are necessary to add definitions for "outpatient day treatment services" and "post-acute care treatment services," and to redesignate the following paragraphs accordingly.

The proposed amendments to §21.3103 are necessary to expand the section, adding new subsections, paragraphs, and subparagraphs, in order to implement provisions of HB 1919 related to required coverage for acquired brain injury. Additionally, proposed amendments are necessary to re-organize existing subsections into paragraphs and subparagraphs for purposes of better organization and clarity of the proposed and existing rules. Subsection titles are proposed to assist in organization and provide clarity. The proposed amendment to §21.3103(a), which addresses required coverage, is necessary to modify the existing provision concerning coverage for services to conform to the Insurance Code §1352.003, as amended by HB 1919, by adding "outpatient day treatment services or other post-acute care treatment services" to the types of required coverage. Section 21.3103(b) addresses medically necessary and appropriate treatments and services for an acquired brain injury. The proposed amendment to §21.3103(b)(1) that changes the existing reference to "subsection (a) of this section" to "this subchapter" is necessary because the reorganization of §21.3103 and the expansion of the subchapter to implement HB 1919 results in the use of the terms "necessary" and "medically necessary" in other rules within the subchapter in addition to §21.3103(a). The proposed amendment to §21.3103(b) that adds new subparagraph (2) is consistent with the Insurance Code §1352.007(a) as enacted by HB 1919, which prohibits health benefit plans from denying benefits for the coverage required under Chapter 1352 of the Insurance Code based solely on the fact that the treatment or services are provided at a facility other than a hospital, and mandates that medically necessary treatment and services for an acquired brain injury must be provided under the coverage required by Chapter 1352 at a facility at which appropriate services may be provided. Additionally, in accordance with the Insurance Code §1352.007(a)(1) and (2), the proposed new §21.3103(b)(2) provides examples of such facilities in subparagraphs (A) and (B). The proposed amendment to §21.3103(c)(1) is necessary to specify that the source of the mandated coverage is the Insurance Code Chapter 1352. In accordance with the Insurance Code §1352.003(e), proposed new §21.3103(c)(2) provides that a health benefit plan must include coverage for reasonable expenses related to periodic reevaluation of the care of an individual covered under the plan who has incurred an acquired brain injury, been unresponsive to treatment, and becomes responsive to treatment at a later date. In accordance with the Insurance Code §1352.003(f), proposed §21.3103(c)(2) specifies five factors that are to be used in determining whether expenses related to periodic reevaluation of care are reasonable and must be covered. Section 21.3103(d) addresses annual or lifetime payment limitations, deductibles, copayments, and coinsurance. Proposed new §21.3103(d)(1) is necessary to prohibit a health benefit plan from subjecting the coverage for services required by §21.3103 to payment limitations, deductibles, copayments, and coinsurance factors that are more restrictive than payment limitations, deductibles, copayments, and coinsurance factors applicable to other similar coverage provided under the health benefit plan.

Proposed new §21.3103(d)(2) is necessary to clarify the Insurance Code §1352.003(c) provisions relating to health benefit plan post acute care treatment limitations. HB 1919 amends §1352.003 of the Insurance Code to add subsection (c) which provides that a health benefit plan may not include, in any lifetime limitation on the number of days of acute care treatment covered under the plan, any post-acute care treatment covered under the plan. Section 1352.003(c) further provides that any limitation imposed under the plan on days of post-acute care treatment must be separately stated in the plan. Thus, while both sentences in §1352.003(c) address limitations related to days of post-acute care treatment, the first sentence in §1352.003(c) expressly prohibits including any post-acute care treatment covered under the plan in *any lifetime limitation* on the number of days of acute care treatment covered under the plan, and the second sentence provides that *any limitation* imposed under the plan on days of post-acute care treatment must be separately stated in the plan. The reference to *any limitation* in the second sentence clearly includes any lifetime limitation as well as any other type of limitation under a health benefit plan. Limitations on the number of days in a health benefit plan may be annual limitations or lifetime limitations. However, because of the first sentence in §1352.003(c), which addresses only lifetime limitations, it is possible for a health benefit plan to apply the second sentence in §1352.003(c) to provide that only lifetime limitations for post acute care treatment must be stated separately, and another health benefit plan to apply the sentence to provide that both lifetime and annual limitations for post acute care treatment must be stated separately. This could result in insureds and enrollees of some plans having different acute care and post acute care limitations than insureds and enrollees in other plans, which is not consistent with the intent of the statute. Therefore, it is necessary to provide guidance to ensure consistent implementation

of §1352.003(c) so that all insureds and enrollees of health benefit plans are treated uniformly with respect to acute care limitations and post acute care limitations. As a result, the Department is proposing §21.3103(d)(2)(A) to provide that a health benefit plan may not include post-acute care treatment related to acquired brain injury in any coverage provisions under the plan that address annual and/or lifetime limitations on the number of days of post acute care treatment related to acquired brain injury. The Department is also proposing §21.3103(d)(2)(B) to provide, in accordance with the Insurance Code §1352.003(c), that a health benefit plan that includes annual and/or lifetime limitations on coverage for acquired brain injury must provide a separate statement of coverage under the plan for any annual and/or lifetime limitations for post-acute care treatment related to acquired brain injury. These provisions are proposed for the following reasons. The plain language in the first sentence in §1352.003(c) does not expressly address the inclusion or prohibited inclusion of limitations other than lifetime limitations. The first sentence prohibits a health benefit plan that has a lifetime limitation on the number of days of acute care from including in that limitation any post acute care covered under the plan. As previously stated, the reference to *any limitation* in the second sentence clearly includes any lifetime limitation as well as any other type of limitation under health benefit plans. Because the limitations on the number of days in a health benefit plan may be annual limitations or lifetime limitations, the second sentence provides that any lifetime or annual limitation imposed on the number of days of covered acute care treatment under the plan must be separately stated in the plan. If such limitations must be separately stated, it is anticipated that the plans have such limitations. Because the first sentence in §1352.003(c) does not expressly address any type of limitation other than lifetime limitations, including the prohibition of annual limitations, and because the second sentence anticipates the use of both annual and lifetime limitations for acute care treatment, proposed §21.3103(d)(2)(A) provides that a health benefit plan may not include post-acute care treatment related to acquired brain injury in any coverage provisions under the plan that address annual and/or lifetime limitations on the number of days of post acute care treatment related to acquired brain injury. Proposed §21.3103(d)(2)(B) provides, in accordance with the Insurance Code §1352.003(c), that a health benefit plan that includes annual and/or lifetime limitations on coverage for acquired brain injury must provide a separate statement of coverage under the plan for any annual and/or lifetime limitations for post-acute care treatment related to acquired brain injury.

Section 21.3103(e) addresses other coverage limitations. The proposed amendment to §21.3103(e) is necessary to reflect that the source of the mandated coverage is the Insurance Code Chapter 1352. Section 21.3103(f) addresses permitted coverage exclusions. One of the proposed amendments to §21.3103(f) is necessary to clarify that the term that is defined in §21.3102 is "neurofeedback therapy" rather than the existing referenced term "neurofeedback." The proposed amendments to §21.3103(f) are necessary to specify that the source of the mandated coverage is the Insurance Code Chapter 1352. Section 21.3103(g) addresses permitted coverage denials. A proposed amendment in §21.3103(g) that changes the term "an issuer" to "a health benefit plan" is necessary for consistency with the Insurance Code §1352.003. A second proposed amendment in §21.3103(g) that changes the phrase "listed in subsection (a) of this section" to "required under the Insurance Code Chapter 1352" is necessary to specify that the source of the mandated coverage is the Insurance Code Chapter 1352. Proposed new §21.3103(h) is necessary to address the inapplicability of §21.3103 to small employer health benefit plans in accordance with the Insurance Code §1352.003(h) and §1352.007(b).

Existing §21.3104(c) specifies the minimum training required in order for each issuer to comply with the requirements of §21.3104(c) relating to preauthorization of coverage or utilization review training. The proposed amendment to §21.3104(c)(3) adds the word "and" to the end of that paragraph. This is necessary to clarify that all of the types of training or instruction listed in §21.3104(c)(1) - (4) comprise the total minimum requirements.

Proposed new §21.3106 is necessary to address small employer health benefit plans. The changes in Chapter 1352 of the Insurance Code enacted by HB 1919 are not applicable to small employer health benefit plans; instead, HB 1919 enacts a new §1352.0035 that contains the same requirements of Chapter 1352 that applied to small employer health benefit plans before the enactment of HB 1919. Proposed new §21.3106 is consistent with §1352.0035 of the Insurance Code.

Proposed new §21.3107 is necessary to address the mandatory annual notice of coverage to insureds and enrollees that is required in §1352.005 of the Insurance Code. Section 1352.005(a) requires a health benefit plan issuer, other than a small employer health benefit plan, to annually notify each insured or enrollee under the plan in writing about the coverages described by 1352.003. As required by §1352.005(b) of the Insurance Code, the proposed notice was prepared in consultation with the Texas Traumatic Brain Injury Advisory Council. Section 1352.005(c) of the Insurance Code specifies the required types of information that must be included in the notice. Proposed new §21.3107(a) specifies the content of the notice in accordance with §1352.005(c). Proposed §21.3107(b) provides a process for distribution of the notice of coverage for acquired brain injury. Proposed §21.3107(c) requires the notice to be printed in at least 12-point type and to comply with the timelines specified in proposed §21.3107(c)(1)(A) and (B). Under the proposed timelines, the notice must be provided within the policy term and no later than the 60th day after the effective date of this section to insureds or enrollees whose plans were delivered, issued for delivery, or renewed on or after January 1, 2008 and before the effective date of this section; or within the policy term and no later than the 60th day after enrollment and/or renewal to insureds or enrollees whose plans are delivered, issued for delivery, or renewed on or after the effective date of this section. Proposed new §21.3107(c)(2) requires a health benefit plan issuer to deliver the notices to insureds or enrollees through the U.S. Postal Service except as provided in §21.3107(c)(6). Proposed new §21.3107(c)(3) provides that the notice may be delivered with other health benefit plan documents that are delivered through the U.S. Postal Service as long as the time frames in §21.3107(c)(1) are met. For example, the notice may be delivered with the policy, certificate, evidence of coverage, or enrollment/insurance card. Proposed new §21.3107(c)(4) provides that if the notice is provided to the primary insured's or enrollee's last known address, the requirements of §21.3107 are satisfied with respect to all enrollees or insureds residing at that address. Proposed new §21.3107(c)(5) requires separate notices to be provided to the spouse or the dependent at the spouse's and/or dependent's last known address if the last known address of a covered spouse and/or dependent is different than the primary insured's or enrollee's last known address. Proposed new §21.3107(c)(6) allows the notice to be provided to the group master contract holder for distribution to insureds or

enrollees of group health benefit plans if the health benefit plan issuer has an agreement with the group master contract holder that the notice will be delivered in accordance with the timelines specified in §21.3107(c)(1). Proposed §21.3107(c)(6) further provides that in the event the notice is distributed to the group master contract holder, the health benefit plan issuer will be held responsible for ensuring that the notice is provided to the insureds or enrollees. Proposed new §21.3107(d) provides that the section does not apply to a small employer health benefit plan issuer in accordance with §1352.003(a) of the Insurance Code.

Proposed amendments to §§21.3101(a)(3), 21.3102(6) and (7), 21.3103(b)(1), 21.3104(a), (c), and (c)(4), and 21.3105 update statutory citations to conform with the non-substantive revised Insurance Code.

FISCAL NOTE. Debra Diaz-Lara, Acting Deputy Commissioner, Health and Workers' Compensation Network Certification and Quality Assurance Division (HWCN), has determined that for each year of the first five years the proposed amendments and new sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Diaz-Lara also has determined that for each year of the first five years the proposed amendments and new sections are in effect, the public benefit anticipated as a result of the proposal are rules that implement the Insurance Code Chapter 1352 as amended by HB 1919, 80th Legislature, and provide guidance to health benefit plan issuers on: (i) coverage of post-acute care and cognitive rehabilitation for survivors of brain injuries as required by the Insurance Code §1352.003(c); and (ii) the procedures for distribution to insureds and enrollees of the mandatory annual notification of coverage required by the Insurance Code §1352.005. Also, statutory citations in existing rules are updated to conform to the non-substantive revised Insurance Code, which will result in easier use and readability of the rules.

The Department does not anticipate any additional cost to persons required to comply with the proposal except for implementation of the procedures for distribution to insureds or enrollees of the mandatory annual notification of coverage for acquired brain injury in proposed §21.3107(c). Section 1352.005(a) of the Insurance Code requires a health benefit plan issuer subject to Chapter 1352, other than a small employer health benefit plan, to annually notify each insured or enrollee under the plan in writing about the coverages described by §1352.003 of the Insurance Code. Because the statute does not require a specific means of distribution, the department is proposing §21.3107(c)(2), which requires that a health benefit plan issuer deliver the notices to insureds or enrollees through the U.S. Postal Service.

Pursuant to §1352.005(a) of the Insurance Code, a small employer health benefit plan issuer is not required to distribute the notification, and therefore, no small employer health benefit plan issuer is subject to proposed §21.3107(c). Pursuant to §1501.002(14) of the Insurance Code, a "small employer" is a person that employed an average of at least two employees but not more than 50 eligible employees on business days during the preceding calendar year and that employs at least two employees on the first day of the plan year. Pursuant to §1501.002(15) of the Insurance Code, a "small employer health benefit plan" is a health benefit plan developed by the Commissioner under Insurance Code Chapter 1501 Subchapter F or any other health benefit plan offered to a "small employer" in accordance with Insurance Code §1501.252(c) or §1501.255. A "small employer health benefit plan" issuer may be a business of any size. A "small employer" is the purchaser of the health benefit plan whose employees are covered under the small employer health benefit plan. The statutory exemption from the annual notice requirement in §1352.005(a) of the Insurance Code applies to each health benefit plan issuer, regardless of the size of the individual issuer, that issues plans to those employers that meet the statutory definition of "small employer" in §1501.002(14) of the Insurance Code. The exemption does not pertain to the size of the individual health benefit plan issuer. Therefore, persons that are required to distribute the notification are health benefit plan issuers, regardless of size, that provide acquired brain injury coverage to insureds or enrollees under any plan other than a plan that qualifies as a "small employer health benefit plan." Part of the costs associated with the notification of insureds and enrollees of coverage for acquired brain injury are the direct result of HB 1919. Section 1352.005 of the Insurance Code requires that the notice of coverage for acquired brain injury be distributed annually in writing to each insured or enrollee under the plan. Section 1352.005(c) specifies the content that must be included in the notice. This content includes: (i) a description of the benefits listed under §1352.003 of the Insurance Code; (ii) a statement that the fact that an acquired brain injury does not result in hospitalization or receipt of a specific treatment or service described by the Insurance Code §1352.003 for acute care treatment does not affect the right of the insured or enrollee to receive benefits described by the Insurance Code §1352.003 commensurate with the condition of the insured or enrollee; and (iii) a statement of the fact that benefits described by the Insurance Code §1352.003 may be provided in a facility listed in the Insurance Code §1352.007. Section 1352.005(b) requires the Commissioner to prescribe the specific contents and wording in the notice in consultation with the Texas Traumatic Brain Injury Advisory Council. The notice contents required pursuant to proposed §21.3107(a) does not contain any information that is not specified in §1352.005(c) of the Insurance Code, either generally as in §1352.005(c)(1) or specifically as provided in §1352.005(c)(2) and (3). The proposal does not require any information to be included in the notice that is additional to that specified in §1352.005(c). Therefore, the annual printing costs associated with preparation of the required notice of coverage for acquired brain are a direct result of the legislative enactment of HB 1919. As previously indicated, the statute, however, does not address the manner of delivery of the required notice. The proposal in §21.3107(c)(2) requires that the notice be delivered through the U.S. Postal Service. The anticipated cost associated with such delivery is approximately $0.45 per notice. This estimate is based on the fact that a box of 500 pre-stamped window envelopes may be purchased from the U.S. Post Office for $224.90. This amount divided by 500 equals $0.4498. The total actual cost for each issuer will vary depending on how many insureds and enrollees of each issuer must receive the notice. If a health benefit plan issuer opts to use another type of envelope and means of postage, the issuer has the information necessary to estimate the costs of such an option. The Department has attempted to defray the cost resulting from proposed §21.3107(c)(2) through the alternatives in proposed §21.3107(c)(3), which permits health benefit plan issuers to deliver the required notice of coverage for acquired brain injury with other health benefit plan documents (such as the policy, certificate, evidence of coverage, or enrollment/insurance card)

and in proposed §21.3107(c)(6), which permits group health benefit plan issuers to provide the notice to the group master contract holder for distribution to insureds or enrollees when the carrier has an agreement with the group master contract holder that the notice will be delivered in accordance with the timelines specified in the proposed rule.

All other costs required to comply with the proposal result from the legislative enactment of HB 1919 and not as a result of the adoption, enforcement, or administration of this proposal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(a)(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(a)(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.001(a)(1) does not specify a maximum level of gross receipts for a "micro business." The Department has determined that the proposal may have an adverse economic impact on approximately 30 - 40 health benefit plan issuers that qualify as small or micro businesses under the Government Code §2006.001(a)(1) and (2) and that are required to comply with the proposed rules. The only adverse economic impact of the proposed rules anticipated by the Department on these 30 - 40 health benefit plan issuers is the additional cost required to comply with the procedures for distribution of the mandatory annual notification under proposed §21.3107(c)(2) to insureds and enrollees under any health benefit plan other than a plan that qualifies as a small employer health benefit plan. These 30 - 40 health benefit plan issuers are not necessarily the same health benefit plan issuers as the "small employer health benefit plan issuers" that are statutorily exempt from the annual notice requirements of §1352.005(a) of the Insurance Code and therefore also exempt from proposed §21.3107(c). Pursuant to §1501.002(14) of the Insurance Code, a "small employer" is a person that employed an average of at least two employees but not more than 50 eligible employees on business days during the preceding calendar year and that employs at least two employees on the first day of the plan year. Pursuant to §1501.002(15) of the Insurance Code, a "small employer health benefit plan" is a health benefit plan developed by the Commissioner under Insurance Code Chapter 1501 Subchapter F or any other health benefit plan offered to a "small employer" in accordance with Insurance Code §1501.252(c) or §1501.255. A "small employer health benefit plan" issuer may be a business of any size, and a "small employer" is the purchaser of the health benefit plan whose employees are covered under the small employer health benefit plan. The statutory exemption from the requirements in §1352.005 of the Insurance Code applies to health benefit plan issuers, regardless of the size of the individual issuer, that issue plans to those employers that meet the statutory definition of "small employer" in §1501.002(14) of the Insurance Code. The exemption does not pertain to the size of the individual health benefit plan issuer. For example, a health benefit plan issuer that does not qualify as a small or micro business under the Government Code §2006.001(a)(1) and (2) may be the plan issuer for a small employer health benefit plan; in this instance, the health benefit plan issuer would not be subject to §1352.005 of the Insurance Code or proposed §21.3107(c). Or, alternatively, a health benefit plan issuer that qualifies as a small or micro business under the Government Code §2006.001(a)(1) and (2) may be the plan issuer for a small employer benefit plan and also would not be subject to §1352.005 or proposed §21.3107(c), but if the same small or micro business health benefit plan issuer were a plan issuer for a plan other than a plan that qualifies as a "small employer health benefit plan," the small or micro business plan issuer would be subject to §1352.005 and proposed §21.3107(c). Therefore, those health benefit plan issuers that qualify as a small or micro business under the Government Code §2006.001(a)(1) and (2) that are required to distribute the notification are those small and micro business health benefit plan issuers that provide acquired brain injury coverage to insureds or enrollees under any plan other than a plan that qualifies as a small employer health benefit plan. Any health benefit plan issuer that qualifies as a small or micro business under the Government Code §2006.001(a)(1) and (2) that provides acquired brain injury coverage to insureds or enrollees under a "small employer health benefit plan" is not required by the Insurance Code §1352.003(a) or proposed §21.3107(c) to distribute the annual notification. The Department's cost analysis for the distribution of the annual notice and resulting estimated costs on a per notice basis in the Public Benefit/Cost Note portion of this proposal is equally applicable to those health benefit plan issuers that qualify as small or micro businesses under the Government Code §2006.001(a)(1) and (2). As previously indicated, the total actual cost for each issuer, regardless of size, will vary depending on how many insureds and enrollees of each issuer must receive the notice.

In accordance with the Government Code §2006.002(c-1), the Department has considered other regulatory methods to accomplish the objectives of the proposal that will also minimize any adverse impact on the estimated 30 - 40 health benefit plan issuers that qualify as small or micro businesses under the Government Code §2006.001(a)(1) and (2).

The Insurance Code §1352.005 requires a health benefit plan issuer that is subject to Chapter 1352, other than a small employer health benefit plan issuer, to annually notify each insured or enrollee under the plan in writing about the brain injury coverages described in §1352.003 of the Insurance Code. The primary objective of §1352.005 is to ensure that all insureds and enrollees covered under any health benefit plan other than a plan that qualifies as a "small employer health benefit plan" are provided, on an annual basis, essential information about the brain injury coverages under the plan. This includes insureds and enrollees covered under health benefit plans issued by health benefit plan issuers that qualify as a small or micro business under the Government Code §2006.001(a)(1) and (2) when such insureds and enrollees are covered by a health benefit plan other than a plan that qualifies as a "small employer health benefit plan." Proposed §21.3107(c) implements §1352.005 in part by requiring that the health benefit plan issuer, except for the small employer benefit plan issuer, deliver the notices to insureds and enrollees through the U.S. Postal Service. This method of delivery is proposed because it is an efficient method of delivery that is consistent with delivery of notices required by other Department rules. The objective of proposed §21.3107(c) is to establish a standardized

method of delivery that is most likely to reach the greatest number of insureds or enrollees.

The other regulatory methods considered by the Department to accomplish the objectives of the statute and the proposal and to minimize any adverse impact on health benefit plan issuers that qualify as small or micro businesses under the Government Code §2006.001(a)(1) and (2) include: (i) not adopting the proposed regulation; (ii) implementing different requirements or standards for the estimated 30 - 40 health benefit plan issuers that qualify as small or micro businesses under the Government Code §2006.001(a)(1) and (2); and (iii) allowing other alternative methods of delivery.

Not adopting proposed §21.3107(c)(2). If the proposed requirement in §21.3107(c)(2) were not adopted, a health benefit plan issuer that provides acquired brain injury coverage to insureds or enrollees in plans other than small employer health benefit plans and regardless of the size of the health benefit plan issuer would still be statutorily required to distribute an annual notice of coverage for acquired brain injury, but would have no regulatory guidance on procedures for distribution of the notice. Each health benefit plan issuer would have discretion in how the notice was delivered or transmitted to insureds and enrollees. This could result in what could be considered for some insureds and enrollees to be a less reliable and consistent means of notification. For example, a health benefit plan issuer could opt to use methods of notification that not all insureds or enrollees have access to, such as email, fax, or internet posting. The Department, therefore, rejected this approach because the Department could not be sure that it would accomplish the objective of the statute and the rule proposal and, therefore would not be consistent with legislative intent.

Implementing different requirements or standards for health benefit plan issuers that qualify as small and micro businesses. If the proposed requirement in §21.3107(c)(2) that requires a health benefit plan issuer, other than a small employer health benefit plan issuer, to deliver the required notice to insureds and enrollees through the U.S. Postal Service were not made applicable to health benefit plan issuers that qualify as small or micro businesses under the Government Code §2006.001(a)(1) and (2), the proposal would not result in an adverse economic effect on the small or micro business health benefit plan issuers. However, it would also result in the small and micro business health benefit plan issuers having discretion in how the notice was delivered or transmitted to each plan's insureds or enrollees. This could result in what could be considered for some insureds and enrollees to be a less reliable or consistent means of notification. For example, a small or micro business health benefit plan issuer could opt to use methods of notification that not all insureds or enrollees have access to, such as email, fax, or internet posting. The Department, therefore, rejected this approach because the Department could not be sure that it would accomplish the objective of the statute and the rule proposal and implement the legislative intent, i.e., that all insureds and enrollees covered under any health benefit plan other than a plan that qualifies as a small employer health benefit plan, including those covered by health benefit plans issued by an issuer that qualifies as a small or micro business under the Government Code §2006.001(a)(1) and (2), receive essential information, on an annual basis, about the brain injury coverages under the plan.

Allowing alternative methods of delivery. The Department anticipates that costs resulting from the proposed requirement in §21.3107(c)(2) that health benefit plan issuers, except small employer health benefit plan issuers, deliver the required notice to insureds and enrollees through the U.S. Postal Service can be reduced or eliminated through two alternative methods of delivery that may be used by an issuer, including health benefit plan issuers that qualify as small and micro businesses under the Government Code §2006.001(a)(1) and (2): (i) proposed §21.3107(c)(3) allows health benefit plan issuers to distribute the annual notice of coverage for acquired brain injury with other health benefit plan documents that already must be distributed (such as the policy, certificate, evidence of coverage, or enrollment/insurance card), and (ii) proposed §21.3107(c)(6) allows group health benefit plan issuers to provide the annual notice to the group master contract holder for distribution to insureds or enrollees when the health benefit plan issuer has an agreement with the group master contract holder that the notice will be delivered in accordance with the statutory requirement of annual notice and with the notification requirements specified in proposed §21.3107(c)(1)(A) and (B). The Department has determined that both of these methods will achieve the purpose of the statute and the proposed rule and will be consistent with the legislative intent. Both alternatives will also reduce the economic impact on health benefit plan issuers that qualify as small and micro businesses under the Government Code §2006.001(a)(1) and (2) and that must issue the notice to insureds and enrollees covered under any health benefit plan other than a small employer health benefit plan.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action 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 must be submitted no later than 5:00 p.m. on September 25, 2008 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Debra Diaz-Lara, Manager, HWCN Division, Mail Code 103-6A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The Commissioner will consider the adoption of the proposed amendments and new sections in a public hearing under Docket No. 2692 scheduled for September 25, 2008 at 10:00 a.m. in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas. Written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The amendments and new sections are proposed pursuant to the Insurance Code §§1352.003(g), 1352.0035(c), 1352.005(b), and 36.001. Section 1352.003(g) provides that the Commissioner shall adopt rules as necessary to implement Insurance Code Chapter 1352, relating to brain injury coverage. Section 1352.0035(c) provides that the Commissioner shall adopt rules as necessary to implement §1352.0035, relating to required brain injury coverage for small employer benefit plans. Section 1352.005(b) provides that the Commissioner, in consultation with the Texas Traumatic Brain Injury Advisory Council, shall prescribe by rule the specific contents and wording of the notice of coverage for acquired brain injury that is required by §1352.005(a). Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and ap-

propriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: §§1352.001, 1352.002, 1352.003, 1352.004, 1352.0035, and 1352.005.

§21.3101. General Provisions.

(a) Purpose. The purpose of this subchapter is to:

(1) ensure that enrollees in health benefit plans receive coverage for certain services for acquired brain injury and to facilitate the recovery and progressive rehabilitation of survivors of acquired brain injuries to the extent possible to their pre-injury condition by making available therapies that are medically necessary, clinically proven, goal-oriented, efficacious, based on individualized treatment plans, and provided by, or ordered and provided under the direction of a licensed healthcare practitioner with the goal of returning the individual to, or maintaining the individual in, the most integrated living environment appropriate to the individual;

(2) ensure that an issuer provides coverage for services related to an acquired brain injury under the medical/surgical provisions of the health benefit plan;

(3) require the issuer of a health benefit plan to provide adequate training of individuals responsible for preauthorization of coverage or utilization review under the plan in order to prevent wrongful denial of coverage required under the Insurance Code Chapter 1352 [~~Article 21.53Q~~] and this subchapter, and to avoid confusion of medical/surgical benefits with mental/behavioral health benefits; and

[~~(4) gather information to allow the department to cooperate with, and to assist, the Sunset Advisory Commission in determining to what extent the coverage required by Article 21.53Q and this subchapter is being used by enrollees in health benefit plans to which the article and this subchapter apply, and to determine the impact of the required coverage on the cost of those health benefit plans.~~]

(b) (No change.)

(c) Applicability.

(1) Except as otherwise specified in this subchapter:

(A) This subchapter applies [~~These sections apply~~] to all health benefit plans delivered, issued for delivery, or renewed on or after October 31, 2008 [~~January 1, 2002~~].

(B) Health benefit plans delivered, issued for delivery, or renewed prior to October 31, 2008 are subject to the statutes and provisions of this subchapter in effect at the time the health benefit plans were delivered, issued for delivery, or renewed.

(2) Nothing in this subchapter requires the issuer of a health benefit plan to provide coverage for services that are not medically necessary;[~~,~~] clinically proven;[~~,~~] goal-oriented;[~~,~~] efficacious;[~~,~~] based on an individualized treatment plan;[~~,~~] or provided by, or ordered and provided under the direction of a licensed healthcare practitioner.

§21.3102. Definitions.

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

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

(6) Health benefit plan--As described in the Insurance Code §1352.001 and §1352.002 [~~Article 21.53Q, §1~~].

(7) Issuer--Those entities identified in the Insurance Code §1352.001 [~~Article 21.53Q, §1(a)(1) - (9)~~].

(8) - (17) (No change.)

(18) Outpatient day treatment services--Structured services provided to address deficits in physiological, behavioral, and/or cognitive functions. Such services may be delivered in settings that include transitional residential, community integration, or non-residential treatment settings.

(19) Post-acute care treatment services--Services provided after acute care confinement and/or treatment that are based on an assessment of the individual's physical, behavioral, or cognitive functional deficits, which include a treatment goal of achieving functional changes by reinforcing, strengthening, or re-establishing previously learned patterns of behavior and/or establishing new patterns of cognitive activity or compensatory mechanisms.

(20) [~~(18)~~] Post-acute transition services--Services that facilitate the continuum of care beyond the initial neurological insult through rehabilitation and community reintegration.

(21) [~~(19)~~] Psychophysiological testing--An evaluation of the interrelationships between the nervous system and other bodily organs and behavior.

(22) [~~(20)~~] Psychophysiological treatment--Interventions designed to alleviate or decrease abnormal physiological responses of the nervous system due to behavioral or emotional factors.

(23) [~~(21)~~] Remediation--The process(es) of restoring or improving a specific function.

(24) [~~(22)~~] Services--The work of testing, treatment, and providing therapies to an individual with an acquired brain injury.

(25) [~~(23)~~] Therapy--The scheduled remedial treatment provided through direct interaction with the individual to improve a pathological condition resulting from an acquired brain injury.

§21.3103. Coverage for Services.

(a) Required Coverage. Pursuant to the Insurance Code Chapter 1352, a health benefit plan must include [~~An issuer may not exclude~~] coverage for services specified in §1352.003, including [~~for~~] cognitive rehabilitation therapy, cognitive communication therapy, neurocognitive therapy and rehabilitation, neurobehavioral, neurophysiological, neuropsychological, and psychophysiological testing and [~~or~~] treatment, neurofeedback therapy, remediation, post-acute transition services and [~~or~~] community reintegration services, including outpatient day treatment services, or other post-acute care treatment services, if such services are necessary as a result of and related to an acquired brain injury.

(b) Medically Necessary and Appropriate.

(1) For purposes of the Insurance Code §1352.003 [~~Article 21.53Q, §2~~] and this subchapter [~~subsection (a) of this section~~], the word "necessary" means "medically necessary."

(2) Pursuant to the Insurance Code §1352.007(a), a health benefit plan may not deny benefits for the coverage required under the Insurance Code Chapter 1352, relating to brain injury, based solely on the fact that the treatment or services are provided at a facility other than a hospital. Medically necessary treatment and services for an acquired brain injury must be provided under the coverage required by Chapter 1352 at a facility at which appropriate services may be provided, which may include:

(A) a hospital regulated under the Health and Safety Code Chapter 241, including an acute or post-acute rehabilitation hospital; and

(B) an assisted living facility regulated under the Health and Safety Code Chapter 247.

(c) Maintenance, Prevention, and Reevaluation of Care.

(1) Treatment goals for services required by the Insurance Code Chapter 1352 [~~subsection (a) of this section~~] may include the maintenance of functioning or the prevention of or slowing of further deterioration.

(2) Pursuant to the Insurance Code §1352.003(e), a health benefit plan must include coverage for reasonable expenses related to periodic reevaluation of the care of an individual covered under the plan who has incurred an acquired brain injury, been unresponsive to treatment, and becomes responsive to treatment at a later date. In accordance with the Insurance Code §1352.003(f), factors for determining whether reasonable expenses related to periodic reevaluation of care must be covered may include:

(A) cost;

(B) the time that has expired since the previous evaluation;

(C) any difference in the expertise of the physician or practitioner performing the evaluation;

(D) changes in technology; and

(E) advances in medicine.

(d) Annual or Lifetime Payment Limitations, Deductibles, Copayments, and Coinsurance.

(1) a health benefit plan is prohibited from subjecting the coverage for services required under the Insurance Code Chapter 1352 to payment limitations, deductibles, copayments, and coinsurance factors that are more restrictive than payment limitations, deductibles, copayments, and coinsurance factors [~~The coverage for services required by subsection (a) of this section may be subject to the deductibles, copayments, coinsurance, or annual or maximum payment limits that are consistent with deductibles, copayments, coinsurance, and annual or maximum payment limits~~] applicable to other similar coverage provided under the health benefit plan.

(2) A health benefit plan that includes annual and/or lifetime limitations on coverage for acquired brain injury:

(A) may not include post-acute care treatment related to acquired brain injury in any coverage provisions under the plan that address annual and/or lifetime limitations on the number of days of acute care treatment related to acquired brain injury, and

(B) must provide a separate statement of coverage under the plan for any annual and/or lifetime limitations for post-acute care treatment related to acquired brain injury.

(e) Other Coverage Limitations. The coverage for services required under the Insurance Code Chapter 1352 [~~by subsection (a) of this section~~] may be subject to limitations and exclusions that are generally applicable to other physical illnesses or injuries under the health benefit plan. These types of exclusions or limitations include, but are not limited to, limitations or exclusions for services that may be limited or excluded because they are solely educational in nature, experimental or investigational, not medically necessary, or services for which the enrollee failed to obtain proper preauthorization under the requirements of the health benefit plan.

(f) Permitted Coverage Exclusions. The types of limitations or exclusions permitted under the Insurance Code §1352.003(d) [~~subsection (d) of this section~~] do not include limitations or exclusions under a health benefit plan which, in and of themselves, meet the definition of a therapy or service required under the Insurance Code Chapter 1352 [~~subsection (a) of this section~~]. For example, if a health benefit plan contains an exclusion for biofeedback therapy, the issuer may deny coverage for biofeedback therapy for any diagnosis except an acquired brain injury diagnosis because biofeedback falls within the definition of "neurofeedback therapy" as defined in §21.3102 [~~§21.3102(12)~~] of this subchapter (relating to Definitions), and for which coverage is required under the Insurance Code Chapter 1352 [~~subsection (a) of this section~~]. However, if the same health benefit plan also contains an exclusion for services that are not authorized prior to service, the issuer may, as allowed by subsection (e) of this subsection, deny coverage based upon the prior authorization exclusion.

(g) Permitted Coverage Denials. A health benefit plan [~~An issuer~~] may deny coverage and/or apply a limitation or exclusion in a health benefit plan for a service required under the Insurance Code Chapter 1352 [~~listed in subsection (a) of this section~~] if the service is prescribed for a condition that, although a result of, or related to, an acquired brain injury, was sustained in an activity or occurrence for which other similar coverage under the health benefit plan is limited or excluded (e.g., acts of war, participation in a riot, etc.).

(h) Inapplicability of Section to Small Employer Health Benefit Plan. In accordance with the Insurance Code §1352.003(h) and §1352.007(b), this section does not apply to a small employer health benefit plan.

§21.3104. Training.

(a) In this section, "preauthorization" has the meaning assigned by the Insurance Code §1352.004(a) [~~Article 21.53Q~~], and includes benefit determinations for proposed medical or health care services.

(b) (No change.)

(c) Each health benefit plan issuer shall ensure that all employees or staff responsible for preauthorization of coverage or utilization review, or any individual performing these processes, receive training to prevent wrongful denial of coverage required under the Insurance Code Chapter 1352 [~~Article 21.53Q~~] and this subchapter, and to avoid confusion of medical/surgical benefits with mental/behavioral health benefits. At a minimum, training shall consist of:

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

(3) instruction relating to correctly evaluating requests for services to differentiate between covered medical/surgical benefits versus covered benefits for mental/behavioral health; and

(4) instruction relating to the requirements of the Insurance Code Chapter 1352 [~~Article 21.53Q~~] and this subchapter.

(d) - (e) (No change.)

§21.3105. Provision of CPT Codes.

Each issuer of a health benefit plan subject to the Insurance Code Chapter 1352 [~~Article 21.53Q~~] and this subchapter shall, upon request from the department, submit to the department the list of CPT codes identified by the issuer pursuant to §21.3104(b)(1) of this subchapter (relating to Training).

§21.3106. Small Employer Health Benefit Plans.

(a) Required Coverage. Pursuant to the Insurance Code §1352.0035(a), a small employer health benefit plan may not exclude

coverage for cognitive rehabilitation therapy, cognitive communication therapy, neurocognitive therapy and rehabilitation, neurobehavioral, neurophysiological, neuropsychological, or psychological testing or treatment, neurofeedback therapy, remediation, post-acute transition services, or community reintegration services, if such services are medically necessary as a result of and related to an acquired brain injury.

(b) Deductibles, Copayments, Coinsurance, and Lifetime Limitations. Pursuant to the Insurance Code §1352.0035(b), small employer health benefit plan coverage of acquired brain injury may be subject to deductibles, copayments, coinsurance, or annual or maximum payment limits consistent with the deductibles, copayments, coinsurance, or annual or maximum payment limits applicable to other similar coverage provided under the small employer health benefit plan.

(c) Maintenance and Prevention; Treatment Goals. Treatment goals for services required by the Insurance Code §1352.0035 may include the maintenance of functioning or the prevention of or slowing of further deterioration.

(d) Other Coverage Limitations. The coverage for services required by the Insurance Code §1352.0035 may be subject to limitations and exclusions that are generally applicable to other physical illnesses or injuries under the health benefit plan. These types of exclusions or limitations include, but are not limited to, limitations or exclusions for services that may be limited or excluded because they are solely educational in nature, experimental or investigational, not medically necessary, or services for which the enrollee failed to obtain proper preauthorization under the requirements of the health benefit plan.

(e) Permitted Coverage Exclusions. The types of limitations or exclusions permitted under subsection (d) of this section do not include limitations or exclusions under a health benefit plan which, in and of themselves, meet the definition of a therapy or service required under subsection (a) of this section. For example, if a health benefit plan contains an exclusion for biofeedback therapy, the issuer may deny coverage for biofeedback therapy for any diagnosis except an acquired brain injury diagnosis because biofeedback falls within the definition of "neurofeedback therapy" as defined in §21.3102 of this subchapter (relating to Definitions), and for which coverage is required under subsection (a) of this section. However, if the same health benefit plan also contains an exclusion for services that are not authorized prior to service, the issuer may, as allowed by subsection (d) of this subsection, deny coverage based upon the prior authorization exclusion.

(f) Permitted Coverage Denials. A small employer health benefit plan may deny coverage and/or apply a limitation or exclusion in a health benefit plan for a service required under the Insurance Code Chapter 1352 if the service is prescribed for a condition that, although a result of, or related to, an acquired brain injury, was sustained in an activity or occurrence for which other similar coverage under the health benefit plan is limited or excluded (e.g., acts of war, participation in a riot, etc.).

§21.3107. Mandatory Annual Notice to Insureds and Enrollees.

(a) Pursuant to the Insurance Code §1352.005, health benefit plan issuers shall provide to insureds and enrollees the notification specified in this subsection. A representation of this notification is as follows:

Figure: 28 TAC §21.3107(a)

(b) The notice required by the Insurance Code §1352.005 and subsection (a) of this section is required by the Insurance Code §1352.005 to be issued annually to each insured or enrollee under the plan. In accordance with SECTION 9 of HB 1919, 80th Legislature, the notice shall be issued to each insured or enrollee of a health benefit plan that is delivered, issued for delivery, or renewed on or after January 1, 2008.

(c) The notice must be printed in at least 12-point type and must comply with the following requirements;

(1) The notice shall be provided during the policy term for the plan, and no later than:

(A) the 60th day after the effective date of this section to insureds or enrollees whose plans were delivered, issued for delivery, or renewed on or after January 1, 2008 and before the effective date of this section; or

(B) the 60th day after enrollment and/or renewal to insureds or enrollees whose plans are delivered, issued for delivery, or renewed on or after the effective date of this section.

(2) Except as specified in paragraph (6) of this subsection, a health benefit plan issuer shall deliver the notice to insureds or enrollees through the U.S. Postal Service.

(3) The notice may be delivered with other health benefit plan documents that are delivered through the U.S. postal service as long as the time frames set forth in paragraph (1) of this subsection are met. For example, the notice may be delivered with the policy, certificate, evidence of coverage, or enrollment/insurance card.

(4) If the notice is provided to the primary insured's or enrollee's last known address, the requirements of this section are satisfied with respect to all insureds or enrollees residing at that address.

(5) If the last known address of a covered spouse and/or dependent is different than the primary insured's or enrollee's last known address, separate notices are required to be provided to the spouse or the dependent at the spouse's and/or dependent's last known address.

(6) For group health benefit plans, the notice may be provided to the group master contract holder for distribution to insureds or enrollees, if the health benefit plan issuer has an agreement with the group master contract holder that the notice will be delivered in accordance with the timelines specified in paragraph (1) of this subsection; however, the health benefit plan issuer will be held responsible for ensuring that the notice is provided to the insureds or enrollees.

(d) In accordance with the Insurance Code §1352.005(a), this section does not apply to a small employer health benefit plan issuer.

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

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804281
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 463-6327

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CHAPTER 33. CONTINUING CARE RETIREMENT FACILITIES

The Texas Department of Insurance proposes amendments to §33.2, concerning general provisions of continuing care retirement facilities (CCRCs); §33.204, concerning the application by

a CCRC provider for a certificate of authority; and §33.403 and §33.404, concerning CCRC escrow accounts.

Traditionally, CCRC operators have first built their facilities, next obtained their certificate of authority from the Department, and then began accepting residents. As a result, existing rules regulating CCRC providers address operators who function in that manner. However, certain CCRC providers have recently changed their manner of operation by opting to obtain their certificate of authority from the Department prior to facility construction, and subsequently building their facilities in phases on an as-needed basis, depending on demand. This deviation from traditional CCRC operations created a challenge for the Department and the phase-in CCRC provider, for whom existing regulations are not designed to address.

The 80th Texas Legislature, Regular Session, passed House Bill 2392, effective June 15, 2007, adding §246.0735 and §246.0736 to the Health and Safety Code, which authorize the Commissioner of Insurance to create different requirements for escrow release of entrance fees by which phase-in CCRC providers must abide.

Under the current rules, a continuing care provider operating a phase-in facility has to complete and submit multiple filings with an escrow agent, and subsequently with the Department, each and every time the provider wants to access funds in an entrance fee escrow account. However, under the proposed amendments, these providers will be allowed to make an initial filing with the escrow agent, and subsequently with the Department, and then further supplement the filing with quarterly reports showing the provider's ongoing financial fitness as a whole. This will avoid the submission of multiple reports that fail to provide the pertinent financial information necessary for efficient monitoring by the Department.

The proposed amendments to §§33.2, 33.403, and 33.404 are necessary to implement a process by which continuing care providers who operate facilities that are built on a phase-in basis can access funds from statutorily created entrance fee escrow accounts without creating excessive reporting to the Department, but also while continuing to safeguard the continuing care providers' clients' funds. These proposed amendments are necessary to amend the definition of the term *facility* to account for phase-in facilities and to establish the process by which release of escrowed entrance fees to continuing care providers with phase-in facilities can be achieved. In addition, these amendments are necessary to revise existing rules to ensure that loan reserve fund escrow account requirements continue to apply to all CCRC providers.

Specifically, the proposed amendments to §33.2 redefine *facility* to account for CCRCs built on a phase-in basis, and the proposed amendments to §33.403 revise the requirements necessary for filing entrance fee escrow release forms with the Department. These changes take into consideration the nature of the phase-in model's method of operations as well as the Department's duty to monitor a provider's financial stability.

In addition, the proposed amendments to §33.404 retain the requirement for a provider to establish a loan reserve fund escrow account, but take into consideration those providers who lease their facilities, rather than purchase them outright. These proposed amendments are necessary because operators of phase-in facilities are likely to enter into lease agreements for their facilities, and by amending this definition to include lease agreements, this rule will apply to such providers.

CCRC providers who apply for a certificate of authority to operate in this state are required to submit up to nineteen particular items specified in paragraphs (1) - (19) of §33.204(a) to the Department, as applicable to their operations. Existing rules require an applicant to submit an original and two copies of only nine of those nineteen items, as applicable.

The proposed amendment to §33.204(a) is necessary to require an applicant to submit an original and two copies of items (1) - (19), as applicable, instead of only items (1) - (9), as applicable. The Department currently receives CCRC applications that provide information listed in items (1) - (19), but this revision will clarify to applicants what is expected of them. All 19 items are important to the Department for determining whether a Certificate of Authority should be granted to an applicant.

FISCAL NOTE. Godwin Ohaechesi, Director of Company Licensing and Registration, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact to state and local governments as a result of the enforcement or administration of the amendments. Further, there will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Ohaechesi has determined that for each year of the first five years the proposed amendments to §§33.2, 33.403, and 33.404 are in effect, the public benefits anticipated as a result of the proposed amendments will be the elimination of multiple reports that fail to provide the pertinent financial information necessary for efficient monitoring by the Department for the escrow release process that would otherwise exist under existing rules for continuing care providers who build their facilities on a phase-in basis. The proposed amendments will benefit both the provider operating the phase-in facility who must submit filings with the Department for the release of escrow and Department staff, who must handle and process all of these administrative filings. Changing the manner in which escrow filings can be submitted for these providers will help facilitate a smoother system by which they can furnish their financial reports to the Department for review. There is no additional probable economic cost to persons required to comply with this section because all CCRC operators must comply with existing escrow release statutes and rules, and these proposed amendments prevent the incurrence of excessive costs on CCRC operators.

Mr. Ohaechesi has also determined that for each year of the first five years the amendment to §33.204 is in effect, the public benefits anticipated as a result of the proposed amendment will be a clear and unambiguous rule for applicants to follow and for the Department to implement, thereby alleviating uncertainty and increasing the efficiency of the application process for applicants and regulators alike. The probable economic cost to persons required to comply with this section is negligible; any additional cost will be incurred as a result of an applicant providing two additional copies of a particular document to the Department. For example, for a 500-page application, an applicant would have to spend an additional $150 to make and submit two additional copies of the original application if the price per page for a photocopy is $0.15. Thus, no significant adverse economic impact is anticipated for any CCRC applicant.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by the Government Code §2006.002(c), the Department has determined that the proposed amendments will

not have an adverse economic effect on small or micro businesses because the proposed amendments do not apply to any small or micro-businesses. According to the Government Code §2006.001, small business and micro-business are each defined as a legal entity "formed for the purpose of making a profit". In anticipation of this analysis, the Department reviewed the files for the 25 licensed CCRC facilities in the state and determined that all 25 CCRCs operate as non-profit entities. Therefore, in accordance with the Government Code §2006.002(c), the Department has determined that a regulatory flexibility analysis is not required because such an analysis is inapplicable to non-profit entities.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action 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 must be submitted no later than 5:00 p.m. on September 22, 2008 to Gene C. Jarmon, General Counsel and Chief Clerk, Texas Department of Insurance, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Godwin Ohaechesi, Director of Company Licensing and Registration, Texas Department of Insurance, P.O. Box 149104, MC 305-2C, Austin, Texas 78714-9104. A request for public hearing on the proposal should be submitted separately to the Office of the Chief Clerk.

SUBCHAPTER A. GENERAL PROVISIONS

28 TAC §33.2

STATUTORY AUTHORITY. The amendments are proposed under Health and Safety Code §§246.003, 246.022, 246.0735, and 246.0736 and Insurance Code §36.001. Health and Safety Code §246.003 authorizes the Commissioner to adopt rules to administer and enforce Chapter 246 of the Health and Safety Code. Health and Safety Code §246.022 requires the Commissioner to adopt rules stating the information an applicant for a certificate of authority to operate a CCRC must submit. Health and Safety Code §246.0735 authorizes the Commissioner to create different escrow release requirements for providers that obtain a certificate of authority issued under Chapter 246 prior to facility construction. Health and Safety Code §246.0736 requires the Commissioner to adopt rules to implement the escrow release process. Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance and other laws of the state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Health and Safety Code §§246.0735, 246.022, and 246.0736.

§33.2. Definitions.

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

(1) - (12) (No change.)

(13) Facility--A [~~Each separate~~] place in which a person undertakes to provide continuing care. A place is an establishment, complex, [~~or~~] campus, or group of living units at which a provider engages in the business of providing continuing care. If two or more establishments, [~~or~~] complexes, campuses, or groups of living units are located on one premise [~~the premises~~], they shall be treated as one facility [~~separate facilities~~] if their operations are controlled by the same provider. If two or more establishments, complexes, campuses, or group of living units are located on one premise but controlled by separate providers, they shall be treated as separate facilities [~~administratively independent of each other~~]. A facility that is constructed on an as-needed basis and for which a certificate of authority is obtained from the department prior to facility construction shall be considered a phase-in facility.

(14) - (22) (No change.)

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

Filed with the Office of the Secretary of State on August 6, 2008.

TRD-200804111
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 463-6327

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SUBCHAPTER C. APPLICATION BY CONTINUING CARE PROVIDER FOR CERTIFICATE OF AUTHORITY

28 TAC §33.204

STATUTORY AUTHORITY. The amendments are proposed under Health and Safety Code §§246.003, 246.022, 246.0735, and 246.0736 and Insurance Code §36.001. Health and Safety Code §246.003 authorizes the Commissioner to adopt rules to administer and enforce Chapter 246 of the Health and Safety Code. Health and Safety Code §246.022 requires the Commissioner to adopt rules stating the information an applicant for a certificate of authority to operate a CCRC must submit. Health and Safety Code §246.0735 authorizes the Commissioner to create different escrow release requirements for providers that obtain a certificate of authority issued under Chapter 246 prior to facility construction. Health and Safety Code §246.0736 requires the Commissioner to adopt rules to implement the escrow release process. Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance and other laws of the state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Health and Safety Code §§246.0735, 246.022, and 246.0736.

§33.204. Contents of Application for Certificate of Authority.

(a) The applicant shall submit an original and two copies of the items listed in paragraphs (1) -(19) [~~(9)~~], as applicable.

(1) - (19) (No change.)

(b) (No change.)

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

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Gene C. Jarmon
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Texas Department of Insurance
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For further information, please call: (512) 463-6327

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SUBCHAPTER E. ESCROW ACCOUNTS

28 TAC §33.403, §33.404

STATUTORY AUTHORITY. The amendments are proposed under Health and Safety Code §§246.003, 246.022, 246.0735, and 246.0736 and Insurance Code §36.001. Health and Safety Code §246.003 authorizes the Commissioner to adopt rules to administer and enforce Chapter 246 of the Health and Safety Code. Health and Safety Code §246.022 requires the Commissioner to adopt rules stating the information an applicant for a certificate of authority to operate a CCRC must submit. Health and Safety Code §246.0735 authorizes the Commissioner to create different escrow release requirements for providers that obtain a certificate of authority issued under Chapter 246 prior to facility construction. Health and Safety Code §246.0736 requires the Commissioner to adopt rules to implement the escrow release process. Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance and other laws of the state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Health and Safety Code §§246.0735, 246.022, and 246.0736.

§33.403. Release of Funds from the Entrance Fee Escrow Account to Provider.

(a) The escrow agent shall notify the department of a request for release of funds from the entrance fee escrow account for a facility to the provider in writing within three banking days of receipt of the request. The notice shall be sent to the department on CCRC Form #9 (Notice of Request to Release Entrance Fee Escrow Funds).

(b) The conditions listed in paragraphs (1) - (5) of this subsection must be met before funds in the entrance fee escrow account may be released to the provider.

(1) At least 50% of the living units in the facility must be reserved for residents or prospective residents. In support of this, the provider must have sufficient binding continuing care contracts and at least 10% of the entrance fees designated in the binding continuing care contracts on deposit in the entrance fee escrow account. For phase-in facilities, in lieu of the 10% deposit, the provider shall deposit in the entrance fee escrow account an amount equal to 10% of the amount of entrance fees required for the facility and provide evidence that the resident has full occupancy of the living unit.

(2) The sum of the entrance fees received or receivable by the provider under binding continuing care contracts; the anticipated proceeds of any first mortgage loan or other long-term financing commitment described under paragraph (3) of this subsection; and funds from other sources in the provider's actual possession must be equal to or more than the sum of at least 90% of the aggregate cost of constructing, [~~or~~] purchasing, or leasing, equipping, and furnishing the facility; at least 90% of the funds estimated as necessary to cover initial losses of the facility as stated in the current disclosure statement on file with the department; and at least 90% of the amount of the loan reserve fund escrow account required under §33.405 of this title (relating to Loan Reserve Fund Escrow Accounts).

(3) The provider must have commitments for all permanent mortgage loans, [~~and~~] other long-term financing, and lease payments described in the statement of anticipated source and application of funds included in the current disclosure statement on file with the department.

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

(c) The provider shall deliver a completed CCRC #14 (Calculations Concerning Conditions for Release of Entrance Fees to Provider) to the department for release of entrance fees for a facility.

(d) (No change.)

(e) If the initial release of an entrance fee by an escrow agent for a particular facility has met the criteria under subsection (b) of this section, the department may authorize an escrow agent to continue to release escrowed entrance fees for that facility to the provider without further proof of satisfying the requirements specified in subsection (b) of this section if the provider meets the following conditions:

(1) the provider provides a quarterly report to the department reflecting an accounting of the activities of the entrance fee escrow account for that particular facility;

(2) the accounting reflects a beginning balance, dates of each withdrawal from escrow during the reporting period, and an ending balance. This accounting must be verified, attested to in regards to its accuracy, and signed by both the bank escrow agent and the facility's Chief Financial Officer or person of likewise authority; and

(3) the provider immediately informs the department of any problems, issues, and/or irregularities encountered in the release of entrance fee escrow funds as set forth under this subsection.

§33.404. Loan Reserve Fund Escrow Account.

(a) (No change.)

(b) The amount required to be maintained in the loan reserve fund escrow account is equal to the total of all principal and interest payments due during the next 12 months on all first mortgage loans, [~~or~~] other long-term financing arrangements for the facility, or 12 months of lease payments if the provider and facility are operating under a lease agreement. If no principal payments or lease payments are due during the next 12 months, the provider shall maintain in the loan reserve fund escrow account an amount equal to interest payments due during the next 12 months.

(c) - (d) (No change.)

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

Filed with the Office of the Secretary of State on August 6, 2008.

TRD-200804113
Gene C. Jarmon
General Counsel and Chief Clerk
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 1. PURPOSE OF RULES, GENERAL PROVISIONS

30 TAC §1.10

The Texas Commission on Environmental Quality (commission or TCEQ) proposes an amendment to §1.10.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

This proposed rulemaking is necessary to update the Texas Commission on Environmental Quality (TCEQ) rules to reflect the number of copies required to be filed in the Office of the Chief Clerk for all documents to be considered at a commission meeting. Currently, 11 copies are required. Decreasing the number of required copies to seven or less, as prescribed by the Chief Clerk or General Counsel, will reduce the amount of paper necessary for commission meeting filings and significantly reduce waste.

SECTION DISCUSSION

The proposed amendment to §1.10(d), Document Filing Procedures, would change the number of copies required for consideration at a commission meeting from 11 to seven or less, as prescribed by the Chief Clerk or General Counsel. The proposed amendment to §1.10(g) would define the acronym "SOAH" as "State Office of Administrative Hearings."

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rule. The proposed rule will generate savings for the agency and other governmental entities because fewer copies of documentation will be required for commission meetings.

The proposed rule would amend §1.10 to decrease the number of hard copies that entities or individuals are currently required to file in the Office of the Chief Clerk. The proposed rule would decrease the number of hard copies from 11 to seven or less, as prescribed by the Chief Clerk or General Counsel. The reduction in the number of required copies is expected to generate some savings for governmental entities, although the amount of savings is not anticipated to be significant. The amount of savings will depend on the cost of paper, the number of pages to be copied, and the number of requests submitted for commission action. The agency expects to reduce the amount of waste generated from excess documentation, but the amount of waste reduction is not expected to generate a material amount of savings. The additional proposed amendment to §1.10(g) that defines the acronym "SOAH" as "State Office of Administrative Hearings" is administrative in nature and would have no fiscal implications.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be less generation of paper waste and a reduced impact on the environment.

The proposed rule will generate some cost savings for businesses and individuals submitting copies of documents to the agency because the agency will only require seven copies or less, as prescribed by the Chief Clerk or General Counsel, of documentation to be provided for commission action instead of 11. The amount of cost savings will depend on the cost of paper, the number of pages to be copied, and the number of requests submitted for commission ruling.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Small and micro-businesses should experience the same cost savings as those experienced by other entities or individuals submitting copies of documents to be considered at a commission meeting.

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 rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect. The proposed rule is expected to generate savings for entities or individuals submitting copies of documents to be considered at a commission meeting, although the amount of these savings is not anticipated to be significant.

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 rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of the Administrative Procedure Act, Texas Government Code, §2001.001, *et seq*., and determined that the proposed rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in §2001.0225. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the proposed rulemaking is to decrease the number of copies of documents to be considered at a commission meeting as well as define the acronym "SOAH" as "State Office of Administrative Hearings." The changes are not expressly to protect the environment and reduce risks to human health and the environment. Therefore, the commission concludes that the proposed rule does not constitute a major environmental rule. The commission invites public comment on the draft regulatory impact analysis determination.

Furthermore, the proposed rule does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule which: (1) exceeds a standard set by federal law, unless the rule is specifically required by state law; (2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; (3) exceeds a requirement of a delegation agreement or contract

between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopts a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rule does not exceed a federal standard because there are no federal standards regulating the number of copies for commission meetings. The proposed rule does not exceed state law requirements because there are no state laws governing this area. Also, the proposed rule does not exceed a requirement of an agreement because there are no delegation agreements or contracts between the State of Texas and an agency or representative of the federal government to implement a state and federal program regarding commission meeting filings. And finally, though this rule is being proposed under the general powers of the agency, it is not a major environmental rule, and would not trigger the fourth applicability requirement.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an assessment of whether this proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to update the number of copies required for consideration at a commission meeting as well as define the acronym "SOAH" as "State Office of Administrative Hearings." The proposed rule will substantially advance this stated purpose. Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rule would not constitute a statutory or constitutional taking because there are no burdens imposed on private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rule and found that it is not 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 proposed rule is not subject to the Texas Coastal Management Program.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, 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.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2008-018-001-AS. The comment period closes September 22, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact LaDonna Castañuela, Chief Clerk's Office, (512) 239-3300.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of the Commission; TWC, §5.102, concerning General Powers; TWC, §5.103, concerning Rules; and TWC, §5.105 concerning General Policy.

The proposed amendment implements TWC, §§5.013, 5.102, 5.103, and 5.105.

§1.10. Document Filing Procedures.

(a) All documents to be considered in a commission meeting or by judges in contested cases shall be filed with the chief clerk. Hearing requests and responses shall also be filed with the chief clerk.

(b) If a docket number has been assigned, it should appear on the first page of all filed documents.

(c) Documents shall be filed by United States mail, facsimile, or hand delivery. If a person files a document by facsimile, he or she must file with the chief clerk the appropriate number of copies by mail or hand delivery within three days.

(d) The original or one copy of a document shall be filed, except for documents to be considered at a commission meeting. For documents to be considered at a commission meeting, seven [~~11~~] copies or less, as prescribed by the Chief Clerk or General Counsel, shall be filed.

(e) The time of filing is upon receipt by the chief clerk as evidenced by the date stamp affixed to the document by the chief clerk, or as evidenced by the date stamp affixed to the document or envelope by the commission mail room, whichever is earlier.

(f) The chief clerk shall accept all documents presented for filing. The chief clerk's acceptance is not a determination that a document meets filing deadlines or other requirements.

(g) If the requirements of this section are not followed, the commission, or a judge in a State Office of Administrative Hearings (SOAH) [~~SOAH~~] proceeding, may choose not to consider the documents. In the absence of a waiver under subsection (h) of this section, the commission may choose not to consider documents filed within two days of a commission meeting.

(h) The judge may waive one or more of the requirements of this section, or impose additional filing requirements in SOAH proceedings. The commission or general counsel may waive one or more of the requirements of this section, or impose additional filing requirements for commission meetings.

(i) This section does not apply to offers of evidence during a hearing.

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

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804154
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 239-2548

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CHAPTER 101. GENERAL AIR QUALITY RULES
SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 4. DISCRETE EMISSION CREDIT BANKING AND TRADING

30 TAC §101.376, §101.379

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §101.376 and §101.379.

These amendments 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 proposed rulemaking would create an enforceable mechanism that allows the executive director to restrict the use of discrete emissions reduction credits (DERCs) in the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area to a level consistent with the attainment and maintenance of the National Ambient Air Quality Standard (NAAQS). The amount of DERCs used in the photochemical modeling submitted as part of the May 23, 2007, DFW Eight-Hour Ozone Attainment Demonstration SIP Revision was overly conservative, but consistent with EPA's growth projections guidance, in the assumption that all existing banked DERCs from the DFW area, 20.4 tons per day of nitrogen oxides (NO_x), would be used to increase emissions in 2009. While historically regulated entities in DFW have submitted Notice of Intent to Use Discrete Emission Credits (DEC-2 Forms), no DERCs have ever been used in the region for compliance with the state NO_x emission specifications for attainment demonstration. EPA Region 6 has indicated that in order to grant conditional approval of the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard, anticipated to be adopted in December, 2008, the TCEQ would need to adopt an enforceable flow control mechanism to limit the use of DERCs in 2009 and in each subsequent calendar year in which the total amount of DERCs could impact the attainment and maintenance of the NAAQS.

The proposed rulemaking would revise Chapter 101, Subchapter H, Division 4, to specifically grant the executive director the authority to approve the amount of DERCs available for use in any calendar year consistent with attainment and maintenance of the NAAQS. The proposed rulemaking would also change the deadline for the submittal of a DEC-2 Form from 45 days to specify that the forms are due by September 1 of the calendar year immediately prior to the applicable calendar year use period. DEC-2 forms may be submitted after the September 1 deadline but may only be considered after all DEC-2 forms submitted by the September 1 deadline are approved by the executive director, consistent with SIP requirements and the current flow control level. This rulemaking change would allow adequate time for the executive director to determine the amount of available DERCs through an annual review process.

The TCEQ DERC banking and trading program in the DFW eight-hour ozone nonattainment area is a discretionary economic incentive program (EIP) that uses market-based principles to encourage air pollution reductions in the most efficient manner as specified in EPA's guidance document, *Improving Air Quality with Economic Incentive Programs,* January 2001. In §5.3(c) and §6.4(a), the EPA's EIP guidance document specifies that if the state EIP program is part of a SIP for a nonattainment area, and an annual evaluation identifies there is uncertainty or a potential for the EIP program to create a shortfall or adversely impact the attainment and maintenance of the NAAQS, then the program must include an enforceable commitment to correct the problem as expeditiously as possible. One reconciliation procedure identified to correct a potential SIP deficit is the restriction of banking and trading activities such as flow control or suspending the use of banked emissions. EIP, §16.15 includes safeguards for EIPs with banking provisions, which discusses additional provisions to prevent the EIP from interfering with the attainment and maintenance of the NAAQS. The safeguards specify that EIPs with banking provisions must demonstrate how likely it is that emission spiking would occur, include safeguards in the EIP to prevent emission spiking, and include in the EIP SIP submittal a demonstration showing that banking and trading reductions would not interfere with attainment or maintenance of the NAAQS, or Reasonable Further Progress and Rate of Progress requirements.

The proposed rulemaking would require the executive director to complete an annual review of the submitted DEC-2 Forms to determine the number of DERCs available for potential use in the upcoming calendar year. The number of DERCs available would be developed to ensure noninterference with attainment and maintenance of the NAAQS and would be based on the annual review or on the flow control limit for DERCs prescribed in the most recent SIP adopted by the commission. The annual review would determine the likelihood of emission spiking resulting from the number of potential participants and the amount of DERCs requested for usage.

The flow control limit for a particular year would be determined using the equation in proposed §101.379(c)(2)(A). The flow control limit would be the sum of the 2009 flow control limit in the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision plus the estimated emission reductions associated with fleet turnover that are not used to satisfy contingency requirements plus the unused DERCs certified on or after March 1, 2009, and approved for use in the previous calendar year control period that remain unused. This flow control limit design would prevent emission spiking and interference with the attainment and maintenance of the NAAQS from DERC usage.

SECTION BY SECTION DISCUSSION

In addition to the proposed amendments to §101.376 and §101.379 discussed elsewhere in this preamble, the commission also proposes to make various stylistic non-substantive changes to update rule language to current Texas Register style and format requirements, as well as establish more consistency in the rules. Such changes include appropriate and consistent use of acronyms, punctuation, section references, and certain terms such as "must" and "shall." These changes are non-substantive and generally are not specifically discussed in this preamble.

Section 101.376, Discrete Emission Credit Use

The commission proposes §101.376(a)(5), which would allow a user to submit additional DEC-2 Form requests for approval by the executive director if the flow control limit for a particular year of DERCs has not yet been met and all other requirements in §101.376(a) are met.

The commission proposes §101.376(a)(6), which would specify that if the flow control limit in the DFW eight-hour ozone nonattainment area has been met, a user may apply for additional DERCs under the emergency provision in subsection (d)(3).

The commission proposes §101.376(a)(7), which would establish that DERC use must be preceded by executive director approval of a DEC-2 Form.

The commission proposes to revise the amount of discrete emission credits of NO_x used by permitted facilities in a 12-month period in §101.376(b)(1)(A) to the numerical "10" instead of the word "ten." The commission also proposes to revise the amount of discrete emission credits for volatile organic compounds used by permitted facilities in a 12-month period in §101.376(b)(1)(A) to the numerical "5" instead of the word "five."

The commission proposes to revise §101.376(c)(4) to use the acronym "DERC" instead of the phrase "discrete emission reduction credit" in order to conform to current Texas Register drafting standards.

The commission proposes to add §101.376(c)(7) to establish that DERCs may not be used in the DFW eight-hour ozone nonattainment area if the DERC usage request exceeds the flow control limit for that year determined by the annual review as specified in §101.379(c).

The commission proposes to revise §101.376(d)(1)(B) to delete deadlines for the submittal of the DEC-2 Forms in order to create distinct regional deadlines. The commission proposes to add §101.376(d)(1)(B)(i) to extend the submittal deadline for DEC-2 Forms in the DFW eight-hour ozone nonattainment area from 45 days to September 1 of the calendar year immediately prior to the applicable calendar year use period. This extension provides the executive director with the time required to review the total amount of DERCs included in the DEC-2 Forms submitted and to perform the annual review specified in §101.379(c) to determine the appropriate level of DERC flow control consistent with attainment and maintenance of the NAAQS. The commission proposes §101.376(d)(1)(B)(ii) to specify the submittal deadlines for discrete emission credits for use in all other areas as previously contained in §101.376(d)(1)(B).

The commission proposes to revise §101.376(d)(3) by changing "notice late" to "late DEC-2 Form" to clarify that the DEC-2 Form is the notice that may be submitted late in the case of an emergency.

The commission proposes to delete §101.376(e)(3)(B) and revise §101.376(e)(3)(A) to include the deleted language specifying that the DERC use period must not exceed 12 months. As a result of these changes, the commission proposes to reformat §101.376(e)(3)(C) to §101.376(e)(3)(B).

The commission proposes §101.376(f) to establish provisions for the executive director to apportion the amount of DERCs for each control period, as determined by the annual review, for the DFW eight-hour ozone nonattainment area. Proposed §101.376(f)(1) would specify that if the total number of DERCs submitted for the upcoming control period in all DEC-2 Forms received by the deadline is greater than the limit determined by the current annual review, the executive director would apportion the number of DERCs for use. Proposed §101.376(f)(1)(A) specifies the executive director would consider the appropriate amount of DERCs allocated for each DEC-2 Form submitted on a case-by-case basis. In determining the amount of DERCs to approve for each DEC-2 Form application, the executive director would take into consideration the provisions specified in proposed §101.376(f)(1)(A)(i) to (v). These provisions include the total number of DERCs existing in the nonattainment area bank; the total number of DERCs submitted for use in the upcoming control period; the proportion of DERCs requested for use to the total amount requested; the amount of DERCs required by the applicant for compliance with the eight-hour emission specifications; and the technological and economic aspects of other compliance options available to the applicant.

The commission proposes §101.376(f)(1)(B), which would establish that any credits requested for use by the applicant in the DEC-2 Form that were certified by the executive director after March 1, 2009, would be included in the flow control limit determined by the annual review process, detailed later in this preamble, and approved for use by the executive director for any subsequent control period.

The commission proposes §101.376(f)(2), which would establish that if the total number of DERCs submitted for use is less than the flow control limit determined according to the annual review, the executive director may approve all requests for DERC usage provided that all other requirements of this section are met.

Section 101.379, Program Audits and Reports

The commission proposes to amend §101.379(b), which would clarify that the report due to the general public and the EPA by February 1 of each year would contain information regarding DERC generation and use from the previous calendar year control period. In addition, proposed language would require the report include the amount of DERCs approved for use under proposed §101.379(c).

The commission proposes §101.379(c), which would establish that no later than November 1 of each year, the executive director would complete and make available to the public an annual review that determines the number of DERCs available for use in DFW under the flow control limit for the upcoming calendar year. The number of DERCs available would be developed to ensure noninterference with attainment and maintenance of the NAAQS for each calendar year beginning in 2009.

The commission proposes §101.379(c)(1), which would specify that for the 2009 control period, the flow control limit for DERCs available for use would be the number prescribed in the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard.

For each following calendar year after 2009, the annual review would set the flow control limit for that year using the equation in proposed §101.379(c)(2)(A). The equation calculates the flow control limit using variable "B" as the 2009 flow control limit prescribed in the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard; variable "C_1" is the estimated emission reductions associated with fleet turnover from mobile sources during the previous calendar year control period; variable "C_2" is the emission reduction associated with the contingency requirement for the current control period; variable "D_1" is the DERCs certified on or after March 1, 2009, and approved for use in the previous calendar year control period; variable "D_2" is the DERCs certified on or after March 1, 2009, and used in the previous calendar year control period; and variable "E" is DERCs certified before March 1, 2009, and approved for use in the previous calendar year control period that remain unused.

The commission proposes §101.379(c)(2)(B), which would specify that if the flow control limit, as calculated in the equation in subparagraph (A), is greater than the number of DERCs available in the bank, then flow control is not necessary, and the annual review would set the number of DERCs potentially available for use as the total number of DERCs in the bank. The com-

mission proposes §101.379(c)(2)(C) to specify that if use of the entire DERC bank would not interfere with attainment and maintenance of the eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area, then the number of DERCs potentially available for use is the total number of DERCs in the bank. The commission proposes §101.379(c)(2)(D) to specify that if the flow control limit for a particular year, as calculated in the equation in subparagraph (A), is greater than the total number of DERCs requested for use in accordance with §101.376(d), then flow control is not necessary.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The agency would utilize existing resources to implement the proposed rules. The proposed rules would affect the use of DERCs in the DFW eight-hour ozone nonattainment area. Local governments in the DFW eight-hour ozone nonattainment area are not expected to be impacted since they typically do not generate or use DERCs.

Historically, the only NO_x DERC trade in the DFW eight-hour ozone nonattainment area was between portfolios within the same business entity. Therefore, no market price has been established for the economic value of DERCs in the DFW eight-hour ozone nonattainment area, and the fiscal effect of the proposed rules can not be determined at this time. However, the estimated capital cost to install selective catalytic reduction (SCR) controls in the DFW eight-hour ozone nonattainment area to control NO_x emissions would average approximately $2,000 per ton of NO_x reduced. Costs could be as much as $50 million per regulated entity for those entities most likely to be affected by the proposed rules. It is not expected that the proposed rules would cause a regulated entity to incur this much in capital expenditures, but facilities may be faced with some increased capital expenditures if the executive director is required to restrict the use of DERCs in the DFW eight-hour ozone nonattainment area if ozone attainment standards for the area cannot be met.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be increased protection of public health and the environment.

Two utility electric generation sources operating in the DFW eight-hour ozone nonattainment area own DERCs at this time. If these entities, or any others, plan to utilize these DERCs, they would have to give the executive director additional notice under the proposed rules by meeting a September 1 deadline instead of 45 days notice. The market price of DERCs is not known at this time since no market activity has taken place, and the value of DERCs in the DFW eight-hour ozone nonattainment area is not known. However, the estimated capital cost to install SCR in the DFW eight-hour ozone nonattainment area to control NO_x emissions would average $2,000 per ton of NO_x reduced. Costs could be as much as $50 million per regulated entity if the use of DERCs must be restricted.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses in the DFW eight-hour ozone nonattainment area. Small or micro-businesses do not typically own DERCs since they do not typically participate in the activities that would generate them. If a small or micro-business becomes the owner of DERCs, it could expect to be subject to the same conditions as a large business. A small or micro-business would have to meet the same notice deadline and be subject to the executive director's authority to restrict the use of DERCs in the DFW eight-hour ozone nonattainment area to a level consistent with attainment and maintenance of the NAAQS.

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 not expected to have adverse impacts on a small or micro-business in a material way for the first five years that the proposed rules are in effect. Small or micro-businesses in the DFW eight-hour ozone nonattainment area typically do not own DERCs, and staff does not expect any of them to become subject to the provisions of the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking action does meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 101 and revisions to the SIP add an enforceable mechanism to allow the executive director to restrict the use of DERCs in the DFW eight-hour ozone nonattainment area and change the deadlines to submit a DEC-2 Form. The proposed control mechanism is a flow control strategy that potentially limits the use of DERCs on an annual basis in the DFW eight-hour ozone nonattainment area. The proposed amendments are necessary to ensure that potential use of DERCs would not interfere with attainment and maintenance of the NAAQS. The proposed rulemaking may potentially prohibit and limit the use and trading of DERCs in the DFW eight-hour ozone nonattainment area.

This rulemaking does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. 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. Specifically, the proposed

amendments were developed to provide a flow control mechanism for the DERC program in the DFW eight-hour ozone nonattainment area, and to ensure that potential use of DERCs would not interfere with attainment and maintenance of the NAAQS. This flow control mechanism is developed in accordance with the *Improving Air Quality with Economic Incentive Programs* of the January 2001 document. The proposed rulemaking does not exceed an express requirement of federal or state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed under federal law and authorized under the Texas Health and Safety Code (THSC).

The rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the NAAQS in each air quality control region of the state. While 42 USC, §7410 does not require specific programs, methods, or reductions to meet the standard, a 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," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the Federal Clean Air Act (FCAA) does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC, §7410. The provisions of the 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 to attain 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. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state would be brought into attainment on schedule. The proposed amendments are necessary to ensure that the DERC program does not interfere with attainment or maintenance of the NAAQS in the DFW eight-hour ozone nonattainment area.

The requirement to provide a fiscal analysis of adopted regulations in the Texas Government Code was amended by SB 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that would have a material adverse impact and would 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 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill would 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 proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC, §7410 does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area would meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed 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 Legislative Budget Board in its fiscal notes. Because 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 Legislative Budget Board, the commission contends 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 would have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC, §7410. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2) requires attainment as expeditiously as practicable, and 42 USC, §7511(a), requires states to submit ozone attainment demonstration SIPs for ozone nonattainment areas such as the DFW eight-hour ozone nonattainment area. As discussed earlier in this preamble, the proposed rules would ensure that use of DERCs in the DFW eight-hour ozone nonattainment area would not interfere with the attainment and maintenance of the air quality standards established under federal law as NAAQS.

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 unchanged. The commission presumes 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); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *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).

As discussed, this rulemaking implements requirements of 42 USC, §7410. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is it adopted solely under the general powers of the agency. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, Texas Clean Air Act (TCAA), and Texas Water Code (TWC) that are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, and 382.017. Therefore, this rulemaking action is not

subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rulemaking does not meet any of the four applicability requirements. The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043. The primary purpose of the rulemaking is to add an enforceable flow control process to the DERC program in the DFW eight-hour ozone nonattainment area, so that the use of DERCs would not interfere with the attainment and maintenance of the ozone NAAQS in the DFW eight-hour ozone nonattainment area. Promulgation and enforcement of the amendments would not burden private real property. The rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits that would be affected by these rules are not property rights (§101.372(j)). Because DERCs are not property, limiting the use of DERCs does not constitute a taking. Consequently, this rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

Additionally, Texas Government Code, §2007.003(b)(4) provides that Chapter 2007 does not apply to this rulemaking action because it is reasonably taken to fulfill an obligation mandated by federal law. The changes to the use of DERCs within the DFW eight-hour ozone nonattainment area that are proposed by these rules were developed to ensure that the use of DERCs would not interfere with attainment and maintenance of NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS. However, this rulemaking is only one step among many necessary for attaining the ozone NAAQS.

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)(2), relating to rules subject to the Coastal Management Program, and would, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. The commission reviewed this proposed rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the proposed amendments are consistent with CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants would be authorized and the revisions would maintain the same level of emissions control as previous rules. The CMP policy applicable to this rulemaking action is the policy that the commission's rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action 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.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 101, Subchapter H is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed amendments to Chapter 101, Subchapter H are adopted, owners or operators subject to the Federal Operating Permits Program must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 101, Subchapter H requirements.

ANNOUNCEMENT OF HEARING

Public hearings for this proposed rulemaking have been scheduled on September 9, 2008, at 6:30 p.m. in the J. Erik Jonsson Central Library Auditorium, 1515 Young Street, Dallas, and on September 10, 2008, at 10:00 a.m. in the Arlington City Hall Council Chambers, 101 W. Abram Street, Arlington. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A time limit may be established at each hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposals 30 minutes before each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Joyce Spencer, Air Quality Division at (512) 239-5017. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Kristin Smith, 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.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-011-101-EN. The comment period closes September 12, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Luke Baine, Air Quality Division, Stationary Source Programs Team, (512) 239-5856.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, §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. In addition, the amendment is proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which states the policy and purpose of the State of Texas and the Texas Clean Air Act (TCAA); §382.011, concerning General

Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.012, concerning the State Air Control Plan, which requires the commission to develop plans for protection of the state's air; §382.014, concerning Emission Inventory, which authorizes the commission to require submission information relating to emissions of air contaminants; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; §382.017, concerning Rules, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe the sampling methods and procedures; and §382.051(d), concerning Permitting Authority of Commission Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Chapter 382. In addition, amendment is proposed under federal mandates contained in 42 United States Code, §§7410 *et seq.*, which require states to adopt pollution control measures in order to reach specific air quality standards in particular areas of the state.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.021, and 382.051(d).

§101.376. Discrete Emission Credit Use.

(a) Requirements to use discrete emission credits. Discrete emission credits may be used if the following requirements are met.

(1) The user shall have ownership of a sufficient amount of discrete emission credits before the use period for which the specific discrete emission credits are to be used.

(2) The user shall hold sufficient discrete emission credits to cover the user's compliance obligation at all times.

(3) The user shall acquire additional discrete emission credits during the use period if it is determined the user does not possess enough discrete emission credits to cover the entire use period. The user shall acquire additional credits as allowed under this section prior to the shortfall, or be in violation of this section.

(4) Facility or mobile source operators may acquire and use only discrete emission credits listed on the registry.

(5) In the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area as defined in §101.1 of this title (relating to Definitions), if the flow control limit for a particular year of discrete emission reduction credits (DERC), as determined by the annual review in §101.379(c) of this title (relating to Program Audits and Reports) has not yet been met, a user may submit additional Notice of Intent to Use Discrete Emission Credits (DEC-2 Form) requests, which the executive director may approve, if all other requirements of this section are met.

(6) If the flow control limit in the DFW eight-hour ozone nonattainment area as established in §101.379(c)(2)(A) of this title has been met, a user may only apply for additional DERCs under the emergency provision in subsection (d)(3) of this section.

(7) The executive director has approved the intent to use as prescribed in subsection (f)(1) of this section.

(b) Use of discrete emission credits. With the exception of uses prohibited in subsection (c) of this section or precluded by commission order or condition within an authorization under the same commission account number, discrete emission credits may be used to meet or demonstrate compliance with any facility or mobile regulatory requirement including the following:

(1) to exceed any allowable emission level, if the following conditions are met:

(A) in ozone nonattainment areas, permitted facilities may use discrete emission credits to exceed permit allowables by no more than 10 [~~ten~~] tons for nitrogen oxides or 5 [~~five~~] tons for volatile organic compounds in a 12-month period as approved by the executive director. This use is limited to one exceedance, up to 12 months within any 24-month period, per use strategy. The user shall demonstrate that there will be no adverse impacts from the use of discrete emission credits at the levels requested; or

(B) at permitted facilities in counties or portions of counties designated as attainment or unclassified, discrete emission credits may be used to exceed permit allowables by values not to exceed the prevention of significant deterioration significance levels as provided in 40 Code of Federal Regulations (CFR) §52.21(b)(23), as approved by the executive director prior to use. This use is limited to one exceedance, up to 12 months within any 24-month period, per use strategy. The user shall demonstrate that there will be no adverse impacts from the use of discrete emission credits at the levels requested;

(2) as new source review (NSR) permit offsets, if the following requirements are met:

(A) the user shall obtain the executive director's approval prior to the use of specific discrete emission credits to cover, at a minimum, one year of operation of the new or modified facility in the NSR permit;

(B) the amount of discrete emission credits needed for NSR offsets equals the quantity of tons needed to achieve the maximum allowable emission level set in the user's NSR permit. The user shall also purchase and retire enough discrete emission credits to meet the offset ratio requirement in the user's ozone nonattainment area. The user shall purchase and retire either the environmental contribution of 10% or the offset ratio, whichever is higher; and

(C) the NSR permit must meet the following requirements:

(i) the permit must contain an enforceable requirement that the facility obtain at least one additional year of offsets before continuing operation in each subsequent year;

(ii) prior to issuance of the permit the user shall identify the discrete emission credits; and

(iii) prior to start of operation the user shall submit a completed DEC-2 Form, [~~Notice of Intent to Use Discrete Emission Credits~~] along with the original certificate;

(3) to comply with the Mass Emissions Cap and Trade Program requirements as provided in §101.356(g) of this title (relating to Allowance Banking and Trading); or

(4) to comply with Chapters 114, 115, and 117 of this title (relating to Control of Air Pollution from Motor Vehicles; Control of Air Pollution from Volatile Organic Compounds; and Control of Air Pollution from Nitrogen Compounds), as allowed.

(c) Discrete emission credit use prohibitions. A discrete emission credit may not be used under this division:

(1) before it has been acquired by the user;

(2) for netting to avoid the applicability of federal and state NSR requirements;

(3) to meet (as codified in 42 United States Code (USC), Federal Clean Air Act (FCAA)) requirements for:

(A) new source performance standards under FCAA, §111 (42 USC, §7411);

(B) lowest achievable emission rate standards under FCAA, §173(a)(2) (42 USC, §7503(a)(2));

(C) best available control technology standards under FCAA, §165(a)(4) (42 USC, §7475(a)(4)) or Texas Health and Safety Code, §382.0518(b)(1);

(D) hazardous air pollutants standards under FCAA, §112 (42 USC, §7412), including the requirements for maximum achievable control technology;

(E) standards for solid waste combustion under FCAA, §129 (42 USC, §7429);

(F) requirements for a vehicle inspection and maintenance program under FCAA, §182(b)(4) or (c)(3) (42 USC, §7511a(b)(4) or (c)(3));

(G) ozone control standards set under FCAA, §183(e) and (f) (42 USC, §7511b(e) and (f));

(H) clean-fueled vehicle requirements under FCAA, §246 (42 USC, §7586);

(I) motor vehicle emissions standards under FCAA, §202 (42 USC, §7521);

(J) standards for non-road vehicles under FCAA, §213 (42 USC, §7547);

(K) requirements for reformulated gasoline under FCAA, §211(k) (42 USC, §7545); or

(L) requirements for Reid vapor pressure standards under FCAA, §211(h) and (i) (42 USC, §7545(h) and (i));

(4) to allow an emissions increase of an air contaminant above a level authorized in a permit or other authorization that exceeds the limitations of §106.261 or §106.262 of this title (relating to Facilities (Emission Limitations); and Facilities (Emission and Distance Limitations)) except as approved by the executive director and the United States Environmental Protection Agency. This paragraph does not apply to limit the use of DERC [~~discrete emission reduction credits (DERC)~~] or mobile DERC [~~discrete emission reduction credits~~] in lieu of allowances under §101.356(h) of this title;

(5) to authorize a facility whose emissions are enforceably limited to below applicable major source threshold levels, as defined in §122.10 of this title (relating to General Definitions), to operate with actual emissions above those levels without triggering applicable requirements that would otherwise be triggered by such major source status; [~~or~~]

(6) to exceed an allowable emission level where the exceedance would cause or contribute to a condition of air pollution as determined by the executive director; or [~~.~~]

(7) in the DFW eight-hour ozone nonattainment area, if the DERC usage requested exceeds the flow control limit for a particular year determined by the annual review as specified in §101.379(c) of this title.

(d) Notice of intent to use.

(1) A completed DEC-2 Form, signed by an authorized representative of the applicant, must [~~shall~~] be submitted to the executive director in accordance with the following requirements.

(A) Discrete emission credits may be used only after the applicant has submitted the notice and received executive director approval.

(B) The application must be submitted: [~~at least 45 days prior to the first day of the use period if the discrete emission credits were generated from a facility, 90 days if the discrete emission credits were generated from a mobile source, and every 12 months thereafter for each subsequent year if the use period exceeds 12 months.~~]

(i) for DERC use in the DFW eight-hour ozone nonattainment area as defined in §101.1 of this title, no later than September 1 prior to the beginning of the calendar year that the DERCs are intended for use; and

(ii) for all other discrete emission credit use, at least 45 days prior to the first day of the use period if the discrete emission credits were generated from a facility, 90 days if the discrete emission credits were generated from a mobile source, and every 12 months thereafter for each subsequent year if the use period exceeds 12 months.

(C) A copy of the application must [~~shall~~] also be sent to the federal land manager 30 days prior to use if the user is located within 100 kilometers of a Class I area, as listed in 40 CFR Part 81 (2001).

(D) The application must include, but is not limited to, the following information for each use:

(i) the applicable state and federal requirements that the discrete emission credits will be used to comply with and the intended use period;

(ii) the amount of discrete emission credits needed;

(iii) the baseline emission rate, activity level, and total emissions for the applicable facility or mobile source;

(iv) the actual emission rate, activity level, and total emissions for the applicable facility or mobile source;

(v) the most stringent emission rate and the most stringent emission level for the applicable facility or mobile source, considering all applicable regulatory requirements;

(vi) a complete description of the protocol, as submitted by the executive director to the United States Environmental Protection Agency for approval, used to calculate the amount of discrete emission credits needed;

(vii) the actual calculations performed by the user to determine the amount of discrete emission credits needed;

(viii) the date that the discrete emission credits were acquired or will be acquired;

(ix) the discrete emission credit generator and the original certificate of the discrete emission credits acquired or to be acquired;

(x) the price of the discrete emission credits acquired or the expected price of the discrete emission credits to be acquired, except for transfers between sites under common ownership or control;

(xi) a statement that due diligence was taken to verify that the discrete emission credits were not previously used, the discrete emission credits were not generated as a result of actions prohibited under this regulation, and the discrete emission credits will not be used in a manner prohibited under this regulation; and

(xii) a certification of use, that must contain certification under penalty of law by a responsible official of the user of truth, accuracy, and completeness. This certification must state that based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(2) DERC use calculation.

(A) To calculate the amount of discrete emission credits necessary to comply with §§117.123, 117.223, 117.320, 117.323, 117.423, 117.1020, 117.1120, 117.1220, or 117.3020 of this title (relating to Source Cap; and System Cap), a user may use the equations listed in those sections, or the following equations.

(i) For the rolling average cap:
Figure: 30 TAC §101.376(d)(2)(A)(i) (No change.)

(ii) For maximum daily cap:
Figure: 30 TAC §101.376(d)(2)(A)(ii) (No change.)

(B) The amount of discrete emission credits needed to demonstrate compliance or meet a regulatory requirement is calculated as follows.
Figure: 30 TAC §101.376(d)(2)(B) (No change.)

(C) The amount of discrete emission credits needed to exceed an allowable emissions level is calculated as follows.
Figure: 30 TAC §101.376(d)(2)(C) (No change.)

(D) The user shall retire 10% more discrete emission credits than are needed, as calculated in this paragraph, to ensure that the facility or mobile source environmental contribution retirement obligation will be met.

(E) If the amount of discrete emission credits needed to meet a regulatory requirement or to demonstrate compliance is greater than 10 tons, an additional 5.0% of the discrete emission credits needed, as calculated in this paragraph, must be acquired to ensure that sufficient discrete emission credits are available to the user with an adequate compliance margin.

(3) A user may submit a late DEC-2 Form [~~notice late~~] in the case of an emergency, but the notice must be submitted before the discrete emission credits can be used. The user shall include a complete description of the emergency situation in the notice of intent to use. All other notices submitted less than 45 days prior to use, or 90 days prior to use for a mobile source, will be considered late and in violation.

(4) The user is responsible for determining the credits it will purchase and notifying the executive director of the selected generating facility or mobile source in the notice of intent to use. If the generator's credits are rejected or the notice of generation is incomplete, the use of discrete emission credits by the user may be delayed by the executive director. The user cannot use any discrete emission credits that have not been certified by the executive director. The executive director may reject the use of discrete emission credits by a facility or mobile source if the credit and use cannot be demonstrated to meet the requirements of this section.

(5) If the facility is in an area with an ozone season less than 12 months, the user shall calculate the amount of discrete emission credits needed for the ozone season separately from the non-ozone season.

(e) Notice of use.

(1) The user shall calculate:

(A) the amount of discrete emission credits used, including the amount of discrete emission credits retired to cover the environmental contribution, as described in subsection (d)(2)(C) of this section, associated with actual use; and

(B) the amount of discrete emission credits not used, including the amount of excess discrete emission credits that were purchased to cover the environmental contribution, as described in subsection (d)(2)(C) of this section, but not associated with the actual use, and available for future use.

(2) DERC use is calculated by the following equations.

(A) The amount of discrete emission credits used to demonstrate compliance or meet a regulatory requirement is calculated as follows.
Figure: 30 TAC §101.376(e)(2)(A) (No change.)

(B) The amount of discrete emission credits used to comply with permit allowables is calculated as follows.
Figure: 30 TAC §101.376(e)(2)(B) (No change.)

(3) A DEC-3 Form, Notice of Use of Discrete Emission Credits, must [~~shall~~] be submitted to the commission in accordance with the following requirements.

(A) The notice must be submitted within 90 days after the end of the use period. Each use period must not exceed 12 months.

[~~(B) The notice must be submitted within 90 days of the conclusion of each 12-month use period, if applicable.~~]

(B) [~~(C)~~] The notice is to be used as the mechanism to update or amend the notice of intent to use and must include any information different from that reported in the notice of intent to use, including, but not limited to, the following items:

(i) purchase price of the discrete emission credits obtained prior to the current use period, except for transfers between sites under common ownership or control;

(ii) the actual amount of discrete emission credits possessed during the use period;

(iii) the actual emissions during the use period for volatile organic compounds and nitrogen oxides;

(iv) the actual amount of discrete emission credits used;

(v) the actual environmental contribution; and

(vi) the amount of discrete emission credits available for future use.

(4) Discrete emission credits that are not used during the use period are surplus and remain available for transfer or use by the holder. In addition, any portion of the calculated environmental contribution not attributed to actual use is also available.

(5) The user is in violation of this section if the user submits the report of use later than the allowed 90 days following the conclusion of the use period.

(f) DFW eight-hour ozone nonattainment area DERC usage.

(1) If the total number of DERCs submitted for the upcoming control period in all DEC-2 Forms received by the deadline in subsection (d)(1)(B)(i) of this section is greater than the flow control limit determined by the annual review specified in §101.379(c) of this title, applicable to the control period specified in the DEC-2 Form, the executive director shall apportion the number of DERCs for use.

(A) The executive director shall consider the appropriate amount of DERCs allocated for each DEC-2 application submitted on a case-by-case basis. In determining the amount of DERC use to

approve for each DEC-2 application, the executive director may take into consideration:

(i) the total number of DERCs existing in the nonattainment area bank;

(ii) the total number of DERCs submitted for use in the upcoming control period;

(iii) the proportion of DERCs requested for use to the total amount requested;

(iv) the amount of DERCs required by the applicant for compliance; and

(v) the technological and economic aspects of other compliance options available to the applicant.

(B) Any credits requested for use by the applicant in the DEC-2 Form that were certified by the executive director after March 1, 2009, will be applied to the flow control limit determined by the annual review as specified in §101.379(c) of this title and approved for use by the executive director for any subsequent control period.

(2) If the total number of DERCs submitted for use is less than the flow control limit for that particular year determined according to the annual review specified in §101.379(c) of this title, the executive director may approve all requests for DERC usage provided that all other requirements of this section are met.

§101.379. Program Audits and Reports.

(a) No later than three years after the effective date of this section, and every three years thereafter, the executive director will audit this program.

(1) The audit will evaluate the timing of credit generation and use, the impact of the program on the state's attainment demonstration and the emissions of hazardous air pollutants, the availability and cost of credits, compliance by the participants, and any other elements the executive director may choose to include.

(2) The executive director will recommend measures to remedy any problems identified in the audit. The trading of discrete emission credits may be discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(3) The audit data and results will be completed and submitted to the United States Environmental Protection Agency [~~EPA~~] and made available for public inspection within six months after the audit begins.

(b) No later than February 1 of each calendar year, the executive director shall develop and make available to the general public and the United States Environmental Protection Agency [~~EPA~~] a report that includes the following information for the previous calendar year:

(1) the amount of each pollutant emission credits generated under this division;

(2) the amount of each pollutant emission credits used under this division; [~~and~~]

(3) a summary of all trades completed under this division; and [~~.~~]

(4) the amount of discrete emission reduction credit (DERC) approved for use under subsection (c) of this section.

(c) No later than November 1 of each year, the executive director will complete, and make available to the general public and the Environmental Protection Agency, an annual review to determine the number of DERCs available for potential use in the upcoming calendar year for the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area. The number of DERCs available for use will be calculated based on the technical analysis to ensure noninterference with attainment and maintenance of the ozone National Ambient Air Quality Standard (NAAQS) and will be based on the annual review, or on the flow control limit for DERCs prescribed in the most recent state implementation plan (SIP) adopted by the commission.

(1) For the 2009 control period, the flow control limit for DERCs available for use is the number prescribed in the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard.

(2) For any control period after 2009, the annual review will establish a flow control limit for that year.

(A) The flow control limit for a particular year will be determined using the following equation:
Figure: 30 TAC §101.379(c)(2)(A)

(B) If the flow control limit, as calculated in the equation in subparagraph (A) of this paragraph, is greater than the number of DERCs available in the bank, then flow control is not necessary, and the annual review will set the number of DERCs potentially available for use as the total number of DERCs in the bank.

(C) If use of the entire DERC bank would not interfere with attainment and maintenance of the eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area, then the number of DERCs potentially available for use is the total number of DERCs in the bank.

(D) If the flow control limit, as calculated in the equation in subparagraph (A) of this paragraph, is greater than the total number of DERCs requested for use in accordance with §101.376(d) of this title (relating to Discrete Emission Credit Use), then flow control is not necessary.

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

Filed with the Office of the Secretary of State on August 8, 2008.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 239-0177

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CHAPTER 291. UTILITY REGULATIONS

The Texas Commission on Environmental Quality (agency or commission) proposes amendments to §291.3 and §291.144; and proposes new §291.147.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

In 2007, the 80th Legislature passed House Bill (HB) 149, relating to water utilities. HB 149 amended Texas Water Code (TWC), Chapter 13, Subchapter C, by adding §13.046, which requires the commission by rule to provide a streamlined process to allow the retail public utility that takes over the nonfunctioning retail water or sewer utility to apply for a ruling on the reasonableness of the newly implemented rates. The bill further requires the commission to establish, in consultation with the utility,

a reasonable amount of time for the retail public utility to bring the water or wastewater system into compliance, and prohibits the commission from imposing a penalty during this period for any violation that existed at the time the nonfunctioning system was taken over.

On January 16, 2008 the commission approved for proposal a set of rules (Rule Project 2007-048-291-PR) that contained amendments to implement HB 149. This rule proposal was published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 871). During the comment period for the proposed rule, the commission received comments that caused it to reconsider the way it was implementing HB 149 and the commission withdrew the sections of the proposed rule related to HB 149 from that rulemaking.

The rule proposed in the *Texas Register* today is the commission's proposal for implementing HB 149.

SECTION BY SECTION DISCUSSION

Subchapter A: General Provisions

§291.3, Definitions of Terms

The commission proposes to add a definition for "nonfunctioning system" in §291.3(28). The commission proposes the following definition: A retail public utility under the supervision of a receiver, temporary manager, or that has been referred for the appointment of a temporary manager or receiver, pursuant to §291.142 of this title (relating to Operation of Utility That Discontinues Operation or Is Referred for Appointment of a Receiver) and §291.143 of this title (relating to Operation of a Utility by a Temporary Manager). The definition increases the number of systems that qualify as nonfunctioning. By being classified as a nonfunctioning system, a system can qualify to have a temporary manager or receiver appointed. The individual appointed will have the necessary expertise to help the nonfunctioning system move toward compliance. The commission proposes this change to provide guidance in implementing TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007. The subsequent definitions were relettered to accommodate this proposed new definition.

Subchapter J: Enforcement, Supervision, and Receivership

§291.144, Fines and Penalties

The commission proposes to amend §291.144 to add §291.144(b) which would mandate that the commission not impose a penalty on the retail public utility taking over the nonfunctioning system for a period to be determined in cooperation with the retail public utility, which includes municipalities, districts, river authorities, and other local governments to ensure that the commission did not impose a penalty on an entity taking over a nonfunctioning utility. The commission proposes this change to implement TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007. With the addition of proposed subsection (b), the current implied subsection (a) became subsection (a). The commission also proposes to delete the catchline in the existing implied subsection (a). The commission also proposes to correctly reference "Water Code" as "Texas Water Code."

§291.147, Temporary Rates for Services Provided for a Nonfunctioning System

The commission proposes new §291.147 which would establish a procedure for a retail public utility that acquires a nonfunctioning system to charge a temporary rate to recover the reasonable costs incurred for interconnection or other costs incurred in making services available and any other reasonable costs incurred to bring the nonfunctioning system into compliance. The commission proposes this new section to implement TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules are expected to provide incentives for retail public utility providers to take over nonfunctioning retail public utility providers to ensure the continued provision of public utility services.

The proposed rules amend Chapter 291 to provide a streamlined process allowing a retail public utility taking over a nonfunctioning retail water or sewer utility to apply for a ruling by the agency on the reasonableness of newly implemented rates to recover service costs. The agency would be required to consult with the utility to establish a reasonable timeframe to bring the water or wastewater system into compliance with agency rules. The proposed rules would also prohibit the agency from imposing penalties during this period for violations existing at the time the nonfunctioning system was taken over by the functioning retail public utility. Since the proposed rules would allow a local government to recoup reasonable costs and avoid the payment of penalties for certain violations, positive fiscal implications are expected for local governments providing retail water and sewer services to an area previously serviced by a nonfunctioning water or sewer utility.

There are approximately 1,375 retail water systems and 589 retail sewer systems owned by local governments. It is not known how many local governments might choose to take over a nonfunctioning retail water or sewer utility, but staff expects at least one municipality will take over a nonfunctioning system in the near future.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be the provision of continuous water or sewer service for areas where the water or sewer system is nonfunctioning.

By providing a streamlined process to establish reasonable fees that allow a retail public utility to recoup costs it may incur to bring a nonfunctioning water or sewer system into compliance and by not imposing penalties while a system is brought into compliance, the proposed rules should encourage businesses or individuals that own retail public utilities to provide water and sewer service to areas where systems have ceased to function properly. The costs of bringing a nonfunctioning system into compliance are impacted by economies of scale. If the customer base is large, the cost increase for each customer is expected to be minimal. If the customer base is small, the cost increase to recoup interconnection and other costs would have a greater impact on customers. Any reasonable cost increase will avoid the inconvenience costs and public health costs that might occur with a nonfunctioning, non-compliant water or sewer system.

Currently, there are two large businesses that own retail public utilities in the state. It is not known how many retail public utilities owned by businesses or individuals will choose to take over nonfunctioning water or sewer systems and bring them into compliance. However, since they may apply to the agency to increase rates to a reasonable level to recoup costs of bringing nonfunctioning systems into compliance, businesses and individuals that own retail public utilities are not expected to experience any adverse fiscal implications as a result of the proposed rules.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. There are currently 143 investor owned retail sewer systems and 601 investor owned retail water systems in the state that are small or micro-businesses. Since the proposed rules will allow any small or micro-business to recoup reasonable costs of bringing a nonfunctioning water or sewer system they may take over into compliance, these providers are not expected to experience adverse fiscal implications due to implementation of the proposed rules.

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 the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" 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 specific intent of the proposed rules is to implement provisions enacted in HB 149 of the 80th Legislature. Generally, these rules are intended to impact only the economic regulation of water and sewer providers. More specifically, the provisions provide a streamlined process to allow the retail public utility that takes over a nonfunctioning retail water or sewer system to implement temporary rates and apply for a ruling on the reasonableness of the newly implemented rates and establishes a reasonable amount of time for the retail public utility to bring the water or wastewater system into compliance, and prohibits the commission from imposing a penalty during this period for any violation that existed at the time the nonfunctioning system was taken over. The proposed rules are not intended to have any impact on environmental regulations. Furthermore, this rulemaking does not qualify as a major environmental rule because it will not have an adverse economic effect. Based on the foregoing, the proposed rulemaking does not constitute a major environmental rule, and thus is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a).

This rulemaking does not meet the definition of a major environmental rule because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because the proposed rules: 1) are specifically required by state law, namely the TWC, and do not exceed a standard set by federal law; 2) do not exceed the express requirements of the TWC; 3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and 4) the proposed rules will not be adopted solely under the general powers of the commission.

Based on the foregoing, the proposed rulemaking does not constitute a major environmental rule, and thus is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

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

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed amendments to Chapter 291 and performed an analysis of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The intent of the proposed rules is to implement amendments enacted in HB 149, of the 80th Legislature.

The proposed rules would substantially advance the intent of the rulemaking by creating a streamlined process to allow the retail public utility that takes over a nonfunctioning water or sewer system to implement temporary rates and apply for a ruling on the reasonableness of the newly implemented rates and by establishing a reasonable amount of time for the retail public utility to bring the nonfunctioning system into compliance, during which the commission will not impose a penalty for any violation that existed at the time the nonfunctioning system was taken over.

Promulgation and enforcement of these proposed rules will constitute neither a statutory nor a constitutional taking of private real property. The proposed regulations do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because this rulemaking does not burden nor restrict or limit the owner's right to property. More specifically, these rules implement retail water and sewer utility rate regulations, and other related regulations of retail water and sewer service providers, none of which imposes any burdens or restrictions on private real property. Therefore, the proposed

rules do not constitute a taking under Texas Government Code, Chapter 2007.

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 September 18, 2008, 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 Michael Parrish, Office of Legal Services at (512) 239-2548. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, 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.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-014-291-PR. The comment period closes September 22, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Tammy Benter, Utilities and Districts Section, Water Supply Division, at (512) 239-6136.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §291.3

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.102, which provides the commission the general powers to carry out duties under TWC and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission. Finally, TWC, §13.046 requires the commission to adopt rules that allow a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility service provider to charge a reasonable rate for the services provided to the customers of the nonfunctioning system and TWC, §13.046 also requires the commission to provide a reasonable period for a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility system to bring the nonfunctioning system into compliance with the commission rules during which the commission shall not impose a penalty for any deficiency in the system that is present at the time the utility takes over the nonfunctioning system.

The proposed amendment implements TWC, §13.046.

§291.3. Definitions of Terms.

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

(1) - (27) (No change.)

(28) Nonfunctioning system--A retail public utility under the supervision of a receiver, temporary manager, or that has been referred for the appointment of a temporary manager or receiver, pursuant to §291.142 of this title (relating to Operation of Utility That Discontinues Operation or Is Referred for Appointment of a Receiver) and §291.143 of this title (relating to Operation of a Utility by a Temporary Manager).

(29) [~~(28)~~] Person--Any natural person, partnership, cooperative corporation, association, or public or private organization of any character other than an agency or municipality.

(30) [~~(29)~~] Physician--Any public health official, including, but not limited to, medical doctors, doctors of osteopathy, nurse practitioners, registered nurses, and any other similar public health official.

(31) [~~(30)~~] Point of use or point of ultimate use--The primary location where water is used or sewage is generated; for example, a residence or commercial or industrial facility.

(32) [~~(31)~~] Potable water--Water that is used for or intended to be used for human consumption or household use.

(33) [~~(32)~~] Premises--A tract of land or real estate including buildings and other appurtenances thereon.

(34) [~~(33)~~] Public utility--The definition of public utility is that definition given to water and sewer utility in this subchapter.

(35) [~~(34)~~] Purchased sewage treatment--Sewage treatment purchased from a source outside the retail public utility's system to meet system requirements.

(36) [~~(35)~~] Purchased water--Raw or treated water purchased from a source outside the retail public utility's system to meet system demand requirements.

(37) [~~(36)~~] Rate--Includes every compensation, tariff, charge, fare, toll, rental, and classification or any of them demanded, observed, charged, or collected, whether directly or indirectly, by any retail public utility, or water or sewer service supplier, for any service, product, or commodity described in Texas Water Code, §13.002(23), and any rules, regulations, practices, or contracts affecting any such compensation, tariff, charge, fare, toll, rental, or classification.

(38) [~~(37)~~] Ratepayer--Each person receiving a separate bill shall be considered as a ratepayer, but no person shall be considered as being more than one ratepayer notwithstanding the number of bills

received. A complaint or a petition for review of a rate change shall be considered properly signed if signed by any person, or spouse of any such person, in whose name utility service is carried.

(39) [~~(38)~~] Reconnect fee--A fee charged for restoration of service where service has previously been provided. It may be charged to restore service after disconnection for reasons listed in §291.88 of this title (relating to Discontinuance of Service) or to restore service after disconnection at the customer's request.

(40) [~~(39)~~] Retail public utility--Any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.

(41) [~~(40)~~] Retail water or sewer utility service--Potable water service or sewer service, or both, provided by a retail public utility to the ultimate consumer for compensation.

(42) [~~(41)~~] Safe drinking water revolving fund--The fund established by the Texas Water Development Board to provide financial assistance in accordance with the federal program established under the provisions of the Safe Drinking Water Act and as defined in Texas Water Code, §15.602.

(43) [~~(42)~~] Service--Any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under the Texas Water Code to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.

(44) [~~(43)~~] Service line or pipe--A pipe connecting the utility service provider's main and the water meter or for sewage, connecting the main and the point at which the customer's service line is connected, generally at the customer's property line.

(45) [~~(44)~~] Sewage--Ground garbage, human and animal, and all other waterborne type waste normally disposed of through the sanitary drainage system.

(46) [~~(45)~~] Standby fee--A charge imposed on unimproved property for the availability of water or sewer service when service is not being provided.

(47) [~~(46)~~] Tap fee--A tap fee is the charge to new customers for initiation of service where no service previously existed. A tap fee for water service may include the cost of physically tapping the water main and installing meters, meter boxes, fittings, and other materials and labor. A tap fee for sewer service may include the cost of physically tapping the main and installing the utility's service line to the customer's property line, fittings, and other material and labor. Water or sewer taps may include setting up the new customer's account, and allowances for equipment and tools used. Extraordinary expenses such as road bores and street crossings and grinder pumps may be added if noted on the utility's approved tariff. Other charges, such as extension fees, buy-in fees, impact fees, or contributions in aid of construction (CIAC) are not to be included in a tap fee.

(48) [~~(47)~~] Tariff--The schedule of a retail public utility containing all rates, tolls, and charges stated separately by type or kind of service and the customer class, and the rules and regulations of the retail public utility stated separately by type or kind of service and the customer class.

(49) [~~(48)~~] Temporary water rate provision--A provision in a utility's tariff that allows a utility to adjust its rates in response to mandatory water use reduction.

(50) [~~(49)~~] Test year--The most recent 12-month period for which representative operating data for a retail public utility are available. A utility rate filing must be based on a test year that ended less than 12 months before the date on which the utility made the rate filing.

(51) [~~(50)~~] Utility--The definition of utility is that definition given to water and sewer utility in this subchapter.

(52) [~~(51)~~] Water and sewer utility--Any person, corporation, cooperative corporation, affected county, or any combination of those persons or entities, other than a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for the production, transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public, other than equipment or facilities owned and operated for either purpose by a municipality or other political subdivision of this state or a water supply or sewer service corporation, but does not include any person or corporation not otherwise a public utility that furnishes the services or commodity only to itself or its employees or tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by others.

(53) [~~(52)~~] Water use restrictions--Restrictions implemented to reduce the amount of water that may be consumed by customers of the system due to emergency conditions or drought.

(54) [~~(53)~~] Water supply or sewer service corporation--Any nonprofit corporation organized and operating under Texas Water Code, Chapter 67, that provides potable water or sewer service for compensation and that has adopted and is operating in accordance with by-laws or articles of incorporation which ensure that it is member-owned and member-controlled. The term does not include a corporation that provides retail water or sewer service to a person who is not a member, except that the corporation may provide retail water or sewer service to a person who is not a member if the person only builds on or develops property to sell to another and the service is provided on an interim basis before the property is sold. For purposes of this chapter, to qualify as member-owned, member-controlled a water supply or sewer service corporation must also meet the following conditions.

(A) All members of the corporation meet the definition of "member" under this section, and all members are eligible to vote in those matters specified in the articles and bylaws of the corporation. Payment of a membership fee in addition to other conditions of service may be required provided that all members have paid or are required to pay the membership fee effective at the time service is requested.

(B) Each member is entitled to only one vote regardless of the number of memberships owned by that member.

(C) A majority of the directors and officers of the corporation must be members of the corporation.

(D) The corporation's by-laws include language indicating that the factors specified in subparagraphs (A) - (C) of this paragraph are in effect.

(55) [~~(54)~~] Wholesale water or sewer service--Potable water or sewer service, or both, provided to a person, political subdivision, or municipality who is not the ultimate consumer of the service.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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SUBCHAPTER J. ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP

30 TAC §291.144, §291.147

STATUTORY AUTHORITY

The amendment and new section are proposed under TWC, §5.102, which provides the commission the general powers to carry out duties under TWC and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission. Finally, TWC, §13.046 requires the commission to adopt rules that allow a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility service provider to charge a reasonable rate for the services provided to the customers of the nonfunctioning system and TWC, §13.046 also requires the commission to provide a reasonable period for a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility system to bring the nonfunctioning system into compliance with the commission rules during which the commission shall not impose a penalty for any deficiency in the system that is present at the time the utility takes over the nonfunctioning system.

The proposed amendment and new section implement TWC, §13.046.

§291.144. Fines and Penalties.

(a) [~~Disposition.~~] Fines and penalties collected under Texas Water Code, Chapter 13, from a retail public utility that is not a public utility in other than criminal proceedings shall be paid to the commission and deposited in the general revenue fund.

(b) The commission shall provide a reasonable period for a retail public utility that takes over a nonfunctioning system to bring the nonfunctioning system into compliance with commission rules, during which the commission may not impose a penalty for any deficiency in the system that is present at the time the utility takes over the nonfunctioning system. The commission must consult with the utility before determining the period and may grant an extension of the period for good cause.

§291.147. Temporary Rates for Services Provided for a Nonfunctioning System.

(a) Notwithstanding other provisions of this chapter, upon sending written notice to the executive director, a retail public utility that takes over the provision of services for a nonfunctioning retail public water or sewer utility service provider may immediately begin charging the customers of the nonfunctioning system a temporary rate to recover the reasonable costs incurred for interconnection or other costs incurred in making services available and any other reasonable costs incurred to bring the nonfunctioning system into compliance with commission rules.

(b) The retail public utility must provide notice of the temporary rate to the customers of the nonfunctioning system no later than the first bill which includes the temporary rates.

(c) Within 90 days of receiving notice of the temporary rate increase, the executive director will issue an order regarding the reasonableness of the temporary rates. In making the determination, the executive director will consider information submitted by the retail public utility taking over the provision of service, the customers of the nonfunctioning system, or any other affected person.

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

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 5. BOARDS FOR LEASE OF STATE-OWNED LANDS

CHAPTER 201. OPERATIONS OF THE TEXAS PARKS AND WILDLIFE DEPARTMENT AND TEXAS DEPARTMENT OF CRIMINAL JUSTICE BOARD FOR LEASE

31 TAC §§201.3 - 201.5

The Texas General Land Office (GLO) and the Texas Parks and Wildlife Department and the Texas Department of Criminal Justice Boards for Lease propose amendments to the following sections of Title 31, Part 5, Chapter 201 of the Texas Administrative Code: §201.3 (relating to "Filing in General Land Office"), §201.4 (relating to "Deposits") and §201.5 (relating to "Provisions") of the Operations of the Texas Parks and Wildlife Department and Texas Department of Criminal Justice Board For Lease. The first proposed amendment would update the legal reference relating to Filing in the General Land Office. The second proposed amendment would update the title of the Comptroller of Public Accounts. As currently written, this rule refers to the state treasurer. The third proposed amendment would update the legal reference relating to Royalty and Reporting Obligation to the State and Discontinuing the Leasehold Relationship.

Larry Laine, Chief Clerk, has determined that during the first five-year period the proposed new rule is in effect there will be no negative fiscal implications for state or local government or small businesses.

Mr. Laine has also determined that, during the first five-year period the rule is in effect, there will be no negative impact on the public as a result of the proposed amendments to the citations and title update.

Comments may be submitted to Walter Talley, Legal Services Division, General Land Office of the State of Texas, 1700 N. Congress Avenue, Austin, Texas 78701 or by facsimile (512) 463-6311, by no later than 30 days after publication.

The amendments to these sections are proposed under the Texas Natural Resource Code §34.065 which grants the Texas Department of Criminal Justice and Texas Parks and Wildlife Department boards for lease rulemaking authority.

Texas Natural Resources Code §§32.110, 34.002, 34.011, 34.012, 34.013, 34.014, 34.055, 34.057, and 34.064 are affected by this action.

§201.3. Filing in General Land Office.

Records pertaining to leases by a Board for Lease are to be filed in the records of the General Land Office accompanied by any filing fee prescribed by §3.31 [~~§1.3~~] of this title (relating to Fees).

§201.4. Deposits.

Payments received by a Board for Lease are payable to the commissioner of the General Land Office, who will deposit receipts with the Comptroller of Public Accounts [~~state treasurer~~] to the credit of the appropriate special mineral account for the agency involved.

§201.5. Provisions.

The provisions of Texas Natural Resources Code, Chapters 32 and 52, and §9.51 [~~§9.7~~] of this title (relating to Royalty and Reporting Obligation to the State), and Subchapter F, §§9.91 - 9.95 [~~§9.8~~] of this title (relating to Discontinuing the Leasehold Relationship) shall apply to leases issued by a Board for Lease.

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

Filed with the Office of the Secretary of State on August 4, 2008.

TRD-200804048

Trace Finley

Deputy Commissioner, Policy and Governmental Affairs, General Land Office

Boards for Lease of State-Owned Lands

Earliest possible date of adoption: September 21, 2008

For further information, please call: (512) 475-1859

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PART 17. TEXAS STATE SOIL AND WATER CONSERVATION BOARD

CHAPTER 523. AGRICULTURAL AND SILVICULTURAL WATER QUALITY MANAGEMENT

31 TAC §§523.1 - 523.4, 523.6

The Texas State Soil and Water Conservation Board (State Board or agency) proposes amendments to §§523.1 - 523.4 and §523.6.

BACKGROUND AND JUSTIFICATION

The rules in Chapter 523 pertain to the abatement of agricultural and silvicultural nonpoint source pollution under the authority of the State Board. These rules include the State Board's scope and jurisdiction (§523.1), as well as the process by which the State Board identifies problem areas related to agricultural and silvicultural nonpoint source pollution (§523.2). The rules also include the administrative and technical procedures of (1) the Water Quality Management Plan Certification Program (§523.3) required by Agriculture Code §201.026(g), (2) resolving complaints related to agricultural and silvicultural nonpoint source pollution (§523.4), and (3) cost-sharing soil and water conservation land improvement measures (§523.6).

The overwhelming preponderance of amendments serves only to improve organization, increase ease of readability, and general clarification of existing rule.

The State Board proposes new §523.1(b) to more clearly declare the water quality programs currently administered by the State Board in implementing Agriculture Code §201.026 relating to the State Board's designation as the lead agency for abating agricultural and silvicultural nonpoint source pollution. The programs listed in §523.1(b) include a (1) water quality management plan certification program required by Agriculture Code §201.026(g), a (2) nonpoint source grant program funded by §319(h) of the federal Clean Water Act through which the State Board and the Texas Commission on Environmental Quality jointly administer the Texas Nonpoint Source Management Program, a (3) total maximum daily load program to address nonpoint source pollution in cooperation with the Texas Commission on Environmental Quality, and a (4) program to address the agricultural and silvicultural management measures of the Texas Coastal Nonpoint Source Management Pollution Control Program as required by Agriculture Code §201.026(g) and related responsibilities associated with the State Board's inclusion as a member of the Coastal Coordination Council. All of these programs are currently administered by the State Board and are funded through a combination of federal Clean Water Act, §319(h) funds and general revenue appropriated by the Texas Legislature.

The State Board proposes to include definitions in §523.3(a) for terms that are unique to the Water Quality Management Plan Certification Program for clarity of their use. The definition of "operating unit," currently only defined in existing §523.6(b)(13) relating to the cost-sharing of soil and water conservation land improvement measures, is proposed to be included as a definition in new §523.3(a) due to its relevance to the technical aspects of the overall program. This enhanced definition, although not proposed in a manner that modifies the geographic scope of an operating unit in any way, would include additional rule language to provide greater clarification of the State Board's intent of existing rule language.

The State Board proposes to amend existing §523.3(e)(2) to incorporate the agency's longstanding policy that the implementation of a water quality management plan based on the United States Department of Agriculture - Natural Resources Conservation Service Field Office Technical Guide represents the best available technology for abating nonpoint source pollution to an extent that Texas surface water quality standards are being achieved.

The State Board proposes to amend §523.6(b)(11), relating to the maintenance agreement between an eligible person and a

soil and water conservation district for cost-share assistance, to clarify that it is the expectation that all water quality management plans be maintained by the program participant for an indefinite period of time. Existing rule language in this definition related to the minimum time periods for maintaining cost-shared soil and water conservation land improvement measures could be misinterpreted by the public as a time period after which an individual may qualify for additional cost-share funding. When misinterpreted, this definition could appear to be in conflict with existing §523.6(e)(2) which limits a participant's cost-share opportunities to one time per operating unit unless the criteria for a waiver has been met. The proposed amendment clarifies that the existence of a required minimum time period for maintaining cost-shared land improvement measures does not imply additional cost-share opportunities are available once it has expired.

SECTION-BY-SECTION DISCUSSION

Existing §523.1, Scope and Jurisdiction, would be amended to capitalize "State Board." Additionally, the inclusion of new §523(b), eliminates the option for an implied "(a)" at the beginning of the existing rule, therefore "(a)" has been added.

Proposed new §523(b) would more clearly declare the water quality programs currently administered by the State Board in implementing Agriculture Code §201.026 relating to the State Board's designation as the lead agency for abating agricultural and silvicultural nonpoint source pollution. The programs listed in §523.1(b) include a (1) water quality management plan certification program required by Agriculture Code §201.026(g), a (2) nonpoint source grant program funded by §319(h) of the federal Clean Water Act through which the State Board and the Texas Commission on Environmental Quality jointly administer the Texas Nonpoint Source Management Program, a (3) total maximum daily load program to address nonpoint source pollution in cooperation with the Texas Commission on Environmental Quality, and a (4) program to address the agricultural and silvicultural management measures of the Texas Coastal Nonpoint Source Management Pollution Control Program as required by Agriculture Code §201.026(g) and related responsibilities associated with the State Board's inclusion as a member of the Coastal Coordination Council. All of these programs are currently administered by the State Board and are funded through a combination of federal Clean Water Act, §319(h) funds and general revenue appropriated by the Texas Legislature.

Existing §523.2(a), Identification of Problem Areas, would be amended to capitalize "State Board." This specific amendment would be carried out in numerous other locations within §523.2 and will not be addressed again in this discussion section.

Existing §523.2(b)(4), relating to assessments, special studies, and programs and research conducted relative to surface and groundwater, would be amended to remove the presence of the acronym "(CZARA)" immediately located behind "Coastal Zone Act Reauthorization Amendments" because it is not present again in this section.

Existing §523.2(c)(3), relating to allocation of resources, would be amended to clarify that corrective actions plans to address problem areas may include watershed protection plans, total maximum daily loads, total maximum daily load implementation plans, nonpoint source grant project plans, or certified water quality management plans. The inclusion of these types of corrective action plans is necessary because, depending on the nature, scope, and severity of the problem, any of them may be used as the appropriate mechanism to deliver treatment depending on the situation.

Existing §523.3, Water Quality Management Plans, would be amended so that the title of the section is "Water Quality Management Plan Certification Program." This amendment is necessary to more closely reflect language used in Agriculture Code §201.026(g) which created the program. Additionally, existing §523.3(a), relating to the technical and certification requirements for water quality management plans would be moved to §523.3(c) to allow for the inclusion of new §523.3(a), Purpose, and new §523.3(b), Definitions. This also would result in a renumbering of existing §523.3(b) through existing §523.3(h) to be new §523.3(d) through new §523.3(j) for organizational purposes only.

Proposed new §523.3(a), Purpose, would establish the purpose of the program as being the State Board's need to carry out Agriculture Code §201.026(g) relating to the abatement of agricultural and silvicultural nonpoint source pollution through a water quality management plan certification program.

Proposed new §523.3(b), Definitions, would create a definitions section to clearly define terms that are unique to the Water Quality Management Plan Certification Program. Existing §523.3 did not offer a definitions section.

Proposed new §523.3(b)(1), Animal feeding operation, would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(2), Coastal Zone Act Reauthorization Amendments, would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(3), Dry-litter poultry facility, would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(4), Clean Water Act, would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(5), Field Office Technical Guide (FOTG), would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(6), Natural Resources Conservation Service (NRCS), would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(7), Operating unit, would be added to provide the definition for this term or phrase in this section. The definition of "operating unit," currently only defined in existing §523.6(b)(13) relating to the cost-sharing of soil and water conservation land improvement measures, is proposed to be included as a definition in new §523.3(a) due to its relevance to the technical aspects of the overall program. This enhanced definition, although not proposed in a manner that modifies the geographic scope of an operating unit in any way, would include additional rule language to provide greater clarification of the State Board's intent of existing rule language. The definition of "operating unit" in §523.6(b)(13) is proposed to be amended to be identical to the proposed new definition in §523.3(b)(7), previously existing §523.6(b)(13).

Proposed new §523.3(b)(8), Practice standard, would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(9), Resource management system, would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(10), Soil and water conservation district (SWCD), would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(11), State Board, would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(12), Status review, would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(13), Texas Nonpoint Source Management Program, would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(14), Texas surface water quality standards, would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(15), Water in the state, would be added to provide the definition for this term or phrase in this section.

Proposed new §523.3(b)(16), Water quality management plan, would be added to provide the definition for this term or phrase in this section. A definition for "water quality management plan" is currently only defined in existing §523.3(a); proposed new §523.3(b)(16) moves this definition to the proposed new definitions section.

Proposed new §523.3(c), previously existing §523.3(a), would be amended to remove the definition of "water quality management plan" from this section. This definition would be added in proposed new §523.3(b)(16). Additionally, the remaining rule language from existing §523.3(a) remains in §523.3(c) with the proposed inclusion of "at a minimum" with respect to the level of technical planning that is required for the State Board to certify a water quality management plan. This rule language would clarify that water quality management plans must minimally meet the resource quality criteria for water quality at the resource management system level specified within the United States Department of Agriculture - Natural Resources Conservation Service Field Office Technical Guide. The rule language "at the resource management system level" would be added to this section, but does not represent a substantive amendment as this is already a requirement of the program. The phrase "nonpoint source pollution abatement" would be included to emphasize that water quality management plans are solely for that purpose.

Proposed new §523.3(d), previously existing §523.3(b), would be amended to include "Texas surface" in front of existing rule language "water quality standards." This amendment would make reference to the standards using their appropriate name found in 30 TAC Chapter 307. This specific amendment would be carried out in numerous other locations within §523.3 and will not be addressed again in this discussion section.

Proposed new §523.3(e), Process for obtaining a Water Quality Management Plan, previously existing §523.3(c), would be amended in numerous locations to establish a consistent manner to refer to a soil and water conservation district or districts. All references would be either "soil and water conservation district" or "SWCD." This specific amendment would be carried out in numerous other locations within §523.3 and will not be addressed again in this discussion section.

Proposed new §523.3(f), Practice selection, previously existing §523.3(d), would be amended to replace "Agricultural and Silvicultural Nonpoint Source Management Program" with "Texas Nonpoint Source Management Program" to create consistency with the program's current appropriate name. In the past, the State Board referred to the agricultural and silvicultural aspects of the overall Texas Nonpoint Source Management Program in a manner that implied it was a formal or separate program named the Texas Agricultural and Silvicultural Nonpoint Source Management Program. The overall Texas Nonpoint Source Management Program is jointly administered by the State Board and the Texas Commission on Environmental Quality in a unified manner, so there is no purpose in referencing it as a separate component. This specific amendment would be carried out in numerous other locations within §523.3 and will not be addressed again in this discussion section. Additionally, a statement referencing this joint administration of the program would be included, the term "federal" would be shown in lower case, and the acronym for Coastal Zone Act Reauthorization Amendments, or CZARA, would be replaced with the fully spelled-out title because it does not reoccur in this section.

Proposed new §523.3(g), Practice standards, previously existing §523.3(e), would be amended by replacing "Natural Resources Conservation Service" with the acronym "NRCS," and "Field Office Technical Guide" with "FOTG." These acronyms are present in the definitions section at proposed new §523.3(b)(5) and (6) and would be used in each subsequent case. Additionally, a statement would be included that clarifies the State Board's longstanding determination that the implementation of a water quality management plan based on the United States Department of Agriculture - Natural Resources Conservation Service Field Office Technical Guide represents the best available technology for abating nonpoint source pollution to an extent that Texas surface water quality standards are being achieved. This determination was made by the State Board immediately following the passage of Senate Bill 503 during the 73rd Legislative Session, and remains unchanged. The State Board proposes to add the phrase "selected or" to the statement that describes how practice standards are chosen for use in water quality management plans. Because the Field Office Technical Guide has been adopted by the State Board as the technical basis for water quality management plans, and because the Field Office Technical Guide already includes technical specifications for practice standards, the rule language in this section would be amended to indicate that "selecting" practice standards from it is a more accurate way to describe the process. The term "developed" would remain for situations where special practice standards need to be developed prior to inclusion. Additionally, the names of several research partners would be updated to reflect their current names. No additional entities are proposed to be included.

Proposed new §523.3(j)(3), previously existing §523.3(h), would be amended by replacing reference to existing §523.3(f) with new §523.3(h) due to the renumbering of existing §523.3(b) through existing §523.3(h) to be new §523.3(d) through new §523.3(j).

Proposed new §523.3(j)(4), previously existing §523.3(h)(4), would be amended by replacing "State Soil and Water Conservation Board" with "State Board."

Existing §523.4, Resolution of Complaints, would be amended to replace "Water Quality Management Plan" with "water quality management plan." This specific amendment would be carried out in numerous other locations within §523.4 and will not be addressed again in this discussion section.

Existing §523.4(3)(C) would be amended to replace reference to "Texas Cooperative Extension" with "Texas AgriLife Extension Service" due to a change in the entity's name.

Existing §523.6(b), Definitions, would be amended so that the definitions would apply to Existing §523.6 only. Existing rule language implies the definitions may apply to other sections of Chapter 523.

Existing §523.6(b)(1), the definition of Allocated funds, would be defined with "soil and water conservation district" spelled-out rather than be defined using the acronym "SWCD." All subsequent references would be either "soil and water conservation district" or "SWCD" in existing §523.6; reference would be "soil and water conservation district" in all places prior to the actual definition of "soil and water conservation district" in proposed new §523.6(b)(18), existing §523.6(b)(17); all subsequent references would be "SWCD" because the acronym is provided in proposed §523.6(b)(18). This specific amendment would be carried out in numerous other locations within §523.6 and will not be addressed again in this discussion section.

Existing §523.6(b)(2), the definition of "applicant," would be amended to reference "person" rather than "persons" for grammatical correction only.

Existing §523.6(b)(4), the definition of Conservation land treatment measures(s), would be amended to be "conservation practices" rather than "conservation land treatment measures." The phrases "conservation practices," "conservation land treatment measures," and "soil and water conservation land improvement measures" have been used indiscriminately throughout Chapter 523, and in §523.6 in particular. With the exception of one instance, the State Board proposes to amend all references to any of these three phrases to be "conservation practice(s)" for consistency purposes, as the three phrases are considered to be synonymous. The one remaining exception would be the presence of "soil and water conservation land improvement measures" in the title of §523.6 due to its use in Agriculture Code §201.301, which is the enabling legislation for the cost-share program. Specific amendments pertaining to this issue would be carried out in numerous other locations within §523.6 and will not be addressed again in this discussion section.

Existing §523.6(b)(5), the definition of Cost-share assistance, would be amended to reference "Agriculture Code §201.301" rather than "Senate Bill 503, 73rd Texas Legislature." The statute established by Senate Bill 503 has been amended by the Legislature numerous times since the passage of the initial legislation; therefore the State Board proposes to reference the statute citation rather than the legislation for accuracy purposes and to avoid confusion by the public.

Existing §523.6(b)(11), the definition of Maintenance agreement, would be amended to include "measures" rather than "measure(s)" because it is impossible for a water quality management plan to include only a single "measure." Additionally, existing §523.6(b)(11) would be amended to include rule language to clarify that it is the expectation that all water quality management plans be maintained by the program participant for an indefinite period of time. Existing rule language in this definition related to the minimum time periods for maintaining cost-shared soil and water conservation land improvement measures could be misinterpreted by the public as a time period after which an individual may qualify for additional cost-share funding. When misinterpreted, this definition could appear to be in conflict with existing §523.6(e)(2) which limits a participant's cost-share opportunities to one time per operating unit unless the criteria for a waiver has been met. The proposed amendment clarifies that the existence of a required minimum time period for maintaining cost-shared land improvement measures does not allow for additional cost-share opportunities are available once it has expired.

Existing §523.6(b)(13), the definition of Operating Unit, would be amended to be consistent with the proposed new definition in §523.3(b)(7). This enhanced definition, although not proposed in a manner that modifies the geographic scope of an operating unit in any way, would include additional rule language to provide greater clarification of the State Board's intent of existing rule language. The existing definition only provided that an operating unit was "Land, whether contiguous or noncontiguous, owned and/or operated by the applicant as an independent management unit for agricultural or silvicultural purposes." The proposed enhanced definition would clarify the State Board's existing intent that an operating unit must be determined in a manner that has the abatement of agricultural or silvicultural nonpoint source pollution as the primary goal. Additionally, the enhanced definition would clarify that an operating unit must be mutually agreed upon by the holder of the water quality management plan, the soil and water conservation district, and the State Board. The enhanced definition would also provide further clarification on determining operating units for contiguous lands, non-contiguous lands, and lands associated with an animal feeding operation. The proposed amendment to the definition would also clarify the State Board's intent that land or lands already within the scope of another operating unit for a water quality management plan may not be separated from the existing operating unit unless a change of ownership has occurred; misinterpretation of the existing definition, in conjunction with misinterpretation of existing §523.6(b)(11) pertaining to the maintenance agreement, could lead some members of the public to believe that effectively "carving out" a new operating unit establishes grounds for additional cost-share assistance. That belief, though factually inaccurate due to the presence of existing §523.6(e)(2) which clearly establishes a one time cost-share opportunity per operating unit, has created confusion to the extent that the State Board wishes to propose this amendment for clarification purposes. The enhanced definition would also explicitly clarify that the State Board already makes a final determination on the appropriateness of all operating units through a decision whether or not to certify the water quality management plan.

Proposed new §523.6(b)(15) would add a definition for "practice standard." "Practice standard" is used frequently throughout §523.6 and the inclusion of a definition is needed for understandability and to prevent confusion between "practices" and "practice standards."

Existing §523.6(b)(15), the definition of Priority system, would be moved to proposed new §523.6(b)(16) due to the inclusion of proposed new §523.6(b)(15), the definition of Practice standard. The purpose of this amendment is organizational in purpose only.

Existing §523.6(b)(16), the definition of Program year, would be moved to proposed new §523.6(b)(17) due to the inclusion of proposed new §523.6(b)(15), the definition of Practice standard. The purpose of this amendment is organizational in purpose only.

Existing §523.6(b)(17), the definition of Soil and water conservation district (SWCD), would be moved to proposed new §523.6(b)(18) due to the inclusion of proposed new

§523.6(b)(15), the definition of Practice standard. Additionally, the definition would use the term "governmental" rather than "government" for grammatical correction, and remove "of Texas" from the end of the phrase "Chapter 201 of the Agriculture Code" because it is implicit and unnecessary.

Existing §523.6(b)(18), the definition of Texas State Soil and Water Conservation Board, would be moved to proposed new §523.6(b)(19) due to the inclusion of proposed new §523.6(b)(15), the definition of Practice standard. Additionally, "the provisions of" would be removed from in front of "Chapter 201 of the Agriculture Code" because it is redundant and unnecessary, and "of Texas" would be removed from the end of the phrase "Chapter 201 of the Agriculture Code" because it is implicit and unnecessary.

Existing §523.6(c)(2)(H), relating to a soil and water conservation district's responsibilities for filing applications during program administration, would be amended for ease of readability; "water quality management plan" would replace "Water Quality Management Plan."

Proposed new §523.6(d)(4), Maximum Allowable Amount of Cost-Share Funds per Operating Unit, would establish the maximum amount at $15,000 in rule, and would specify that the provision only applies to general revenue funds appropriated by the Texas Legislature. Since the inception of the Water Quality Management Plan Program, the State Board has adopted and maintained a maximum allowable cost-share amount. This amount has never been included in rule prior to this proposal; however, the State Board wishes to include the amount in rule to offer the public the opportunity to comment on future changes. Presently, the maximum cost-share rate is already adopted by the State Board to be $15,000 per operating unit, therefore, ultimately a decision by the State Board to remove this section prior to adoption will not result in a reversion to any previous amount; that eventuality would only result in the amount not being included in rule. Occasionally funding from federal sources becomes available for use as cost-share for providing an incentive toward the development and implementation of water quality management plans. Because in these cases special circumstances sometimes require conservation practices that so far exceed the established maximum allowable cost-share amount, the State Board proposes to clarify that it retains the right to adopt a different maximum amount when the funds are from sources other than general revenue.

Existing §523.6(e)(2), relating to a one time cost-share opportunity per operating unit, would be amended to replace "cost share" with "cost-share" for consistency with how the term is used throughout the remainder of the section.

The State Board proposes to remove capitalization of the first word in each of existing §523.6(e)(2)(A) - (D), as well as to place a semi-colon at the end of each previously mentioned section for grammatical correctness.

Existing §523.6(e)(2)(A) would be amended to replace "indicates" with "indicate(s)" for grammatical correctness, and "Texas surface" would be included in front of "water quality standards" for consistency with other sections of the chapter.

Existing §523.6(e)(2)(B) would be amended to replace "land treatment measures" with "practices" for consistency with other sections of the chapter, and "Texas surface" would be included in front of "water quality standards" for consistency with other sections of the chapter.

Existing §523.6(e)(2)(C) would be amended to include "Texas surface" in front of "water quality standards" for consistency with other sections of the chapter.

Existing §523.6(e)(2)(E) would be amended to replace "The life expectancy of the previously cost-shared best management practice(s) has expired" with "the life expectancy of a conservation practice or practices that was/were previously cost-shared through this program has/have expired and the practice or practices is/are mandated by state law or the laws, rules, or regulations of a political subdivision. This waiver is only applicable to the mandated practice or practices..." This amendment is proposed by the State Board to eliminate possible confusion by the public regarding the State Board's intent for this waiver. Some members of the public could misinterpret existing §523.6(e)(2)(D) to mean that once a cost-shared practice's life expectancy has expired, the holder of the water quality management plan may reapply and be granted more cost-share assistance for the same and/or different practices. That is an incorrect interpretation and is not consistent with the intent of the State Board; therefore this amendment is proposed by the State Board to clarify their intent, which is that no operating unit may receive cost-share more than once unless a mandate for the practice exists in law or the criteria for a waiver has been met.

Proposed new §523.6(e)(2)(F) would clarify that if the holder of a water quality management plan has previously received cost-share through this program but an additional practice or practices has/have been subsequently mandated by law, the instance of the previous cost-share does not preclude the holder of the water quality management plan from being eligible for future cost-share assistance for the mandated practice or practices.

Existing §523.6(e)(3)(B) would be amended to replace "his" with "his/her."

Existing §523.6(e)(6) would be amended to include "as needed" with respect to the State Board's approval of a list of eligible practices, and the phrase "at the beginning of each fiscal year" would be removed because the State Board has the flexibility to make changes to the list at any point during the year. "Cost-share assistance for" would be inserted into the sentence regarding a soil and water conservation district's request to the State Board for the cost-sharing of a practice not already on the State Board's approved list because the purpose of the request is for cost-sharing a practice, not merely the practice itself. "Conform" would replace "conforms" for grammatical correctness.

Existing §523.6(f)(2)(F) would be amended to replace "applicants" with "applicant(s)" for grammatical correctness.

Existing §523.6(f)(3)(C) would be amended to include the term "practice" in front of "standard" for technical accuracy and consistency with the definition of "practice standard."

Existing §523.6(f)(4) would be amended to refer to the "State Board" rather than the "Texas State Soil and Water Conservation Board" because the agency is referred to as "State Board" in all previous instances in the chapter.

Existing §523.6(f)(5) would be amended to refer to subsection "(e)(8)" rather than "(e)(8)(B)" for technical accuracy.

Existing §523.6(f)(7) would be amended to include "year" after the word program for consistency with the State Board's intent and for clarification purposes.

Existing §523.6(g)(1) would be amended to replace "persons" with "person's" for grammatical correctness.

Existing §523.6(g)(4)(B) would be amended to replace "fails" with "fail" for grammatical correctness.

Existing §523.6(j) would be amended to remove "the Texas" from in front of "Agriculture Code" because it is implicit and unnecessary, and "Section" would be replaced with "§" for consistency with other sections of the chapter.

FISCAL NOTE

Mr. Kenny Zajicek, Fiscal Officer, Texas State Soil and Water Conservation Board, has determined that for the first five year period there will be no fiscal implications for state or local government as a result of administering these amended rules.

PUBLIC BENEFITS AND COSTS

Mr. Zajicek has also determined that for the first five year period these amended rules are in effect, the public benefit anticipated as a result of administering these amended rules will be a consistency of terms and definitions and better understanding of the program by any and all individuals involved with and/or concerned with this program.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ASSESSMENT

There is no anticipated cost to small businesses or individuals resulting from these amended rules.

SUBMITTAL OF COMMENTS

Comments on the proposed amended rules may be submitted in writing to Rex Isom, Executive Director, Texas State Soil and Water Conservation Board, P.O. Box 658, Temple, Texas 76503, (254) 773-2250 ext. 231.

STATUTORY AUTHORITY

The amended rules are proposed under the Agriculture Code of Texas, Title 7, Chapter 201, §201.020, which authorizes the Texas State Soil and Water Conservation Board to adopt rules that are necessary for the performance of its functions under the Agriculture Code.

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

§523.1. Scope and Jurisdiction.

(a) The Texas State Soil and Water Conservation Board (State Board) [~~(state board)~~] is the lead agency in this state for activity relating to abating agricultural and silvicultural nonpoint source pollution.

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

(b) As the lead agency, the State Board shall plan, implement, and manage programs and practices for abating agricultural and silvicultural nonpoint source pollution. At a minimum, these programs shall include:

(1) a water quality management plan certification program required by Agriculture Code §201.026(g);

(2) a nonpoint source grant program funded by §319(h) of the federal Clean Water Act and any planning, assessment, education, demonstration, or implementation programs associated with the effective administration of the Texas Nonpoint Source Management Program;

(3) a total maximum daily load program in cooperation with the Texas Commission on Environmental Quality and as required by §303(d) of the federal Clean Water Act; the State Board may enter into an agreement with the Texas Commission on Environmental Quality regarding the effective coordination of agricultural and silvicultural nonpoint source pollution components of total maximum daily loads and total maximum daily load implementation plans; and

(4) a coastal nonpoint source pollution control program as required by §6217 of the Coastal Zone Act Reauthorization Amendments of 1990 in cooperation with the Coastal Coordination Council and the Texas Coastal Management Program as required by Natural Resources Code §33.052.

§523.2. Identification of Problem Areas.

(a) On its own petition or on the petition of a soil and water conservation district, the State Board [~~state board~~] may delineate an area having the potential to develop agricultural or silvicultural nonpoint source water pollution problems.

(b) Problem areas may be delineated based on the following criteria:

(1) (No change.)

(2) data and information obtained by the State Board [~~state board~~];

(3) studies conducted by the State Board [~~state board~~] or soil and water conservation districts;

(4) (No change.)

(5) guidelines developed and promulgated by the State Board [~~state board~~].

(c) Allocation of resources will be based on priority considerations. In allocating program resources, the State Board [~~state board~~] will consider the following:

(1) first, known problems, where the State Board [~~state board~~] has determined that adequate data show the existence of a water quality problem caused by agricultural or silvicultural nonpoint sources;

(2) second, potential problems, where the State Board [~~state board~~] has determined that the intensity and location of certain agricultural and silvicultural activities requires program implementation to prevent pollution problems caused by agricultural and silvicultural nonpoint source activities;

(3) third, corrective action plans needing to be implemented, the economic impact on producers, and benefits to water quality. Corrective action plans may include, but are not limited to, watershed protection plans, total maximum daily loads and associated implementation plans, nonpoint source grant project plans, or certified water quality management plans.

§523.3. Water Quality Management Plan Certification Program [~~Plans~~].

(a) Purpose. The purpose of this program is to carry out the mandate in Agriculture Code §201.026(g) relating to the abatement of agricultural and silvicultural nonpoint source pollution through a water quality management plan certification program.

(b) Definitions. For the purposes of this section the following definitions shall apply.

(1) Animal feeding operation--A lot or facility (other than an aquatic animal production facility) where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and the animal confinement areas do not sustain crops, vegetation, forage growth, or postharvest residues in the normal growing season.

(2) Coastal Zone Act Reauthorization Amendments--The 1990 amendments to the federal Coastal Zone Act that created the Coastal Nonpoint Program under §6217, "Protecting Coastal Waters". Under §6217, all states with approved coastal zone management programs must develop a Coastal Nonpoint Program to control polluted runoff to coastal waters.

(3) Dry-litter poultry facility--A poultry animal feeding operation that does not use a liquid waste handling system.

(4) Clean Water Act--Federal Water Pollution Control Act, 33 USC, §§1251 - 1387 (1977, as amended).

(5) Field Office Technical Guide (FOTG)--The official Natural Resources Conservation Service guidelines, criteria, and standards for planning and applying conservation practices.

(6) Natural Resources Conservation Service (NRCS)--An agency of the United States Department of Agriculture which includes the agency formerly known as the Soil Conservation Service (SCS).

(7) Operating unit--Land or lands, whether contiguous or non-contiguous, owned and/or operated in a manner that contributes or has the potential to contribute agricultural or silvicultural nonpoint source pollution to water in the state. An operating unit must be determined through mutual agreement by the holder of the water quality management plan, the soil and water conservation district, and the State Board. When determining the applicability of an operating unit, the following criteria must be considered:

(A) Contiguous lands under the same ownership and/or operational control must be considered one operating unit.

(B) Non-contiguous lands under the same ownership and/or operational control may be considered as more than one operating unit when there is mutual agreement by the soil and water conservation district and the potential holder of the water quality management plan unless the lands are associated with an animal feeding operation.

(C) An operating unit, when designated for an animal feeding operation, must at a minimum encompass all land or lands owned and/or operated by the holder of the water quality management plan that are used to produce feed that is consumed by the animals, as well as all land or lands owned and/or operated by the potential holder of the water quality management plan where manures or other agricultural by-products are beneficially used as a source of nutrients to produce food or fiber for any use.

(D) Land or lands within the scope of an existing operating unit for a certified water quality management plan may not be separated from the existing operating unit to establish another operating unit unless a change of ownership has occurred.

(E) Where mutual agreement regarding an operating unit's consistency with these rules is not achieved by the potential holder of the water quality management plan, the soil and water conservation district, and the State Board, the State Board will make a final determination whether or not to certify the water quality management plan.

(8) Practice standard--A technical specification for a conservation practice within the NRCS FOTG that contains information on why and where the practice should be applied, and sets forth the minimum quality criteria that must be met during the application of that practice in order for it to achieve its intended purpose(s).

(9) Resource management system--a combination of conservation practices and resource management activities for the treatment of all identified resource concerns for soil, water, air, plants, animals, and humans that meets or exceeds the quality criteria in the NRCS FOTG for resource sustainability.

(10) Soil and water conservation district (SWCD)--A governmental subdivision of this state and a public body corporate and politic, organized pursuant to Chapter 201 of the Agriculture Code.

(11) State Board--The Texas State Soil and Water Conservation Board organized pursuant to Chapter 201 of the Agriculture Code.

(12) Status review--An audit performed by the State Board on a water quality management plan for the purpose of determining adherence to the plan's implementation schedule.

(13) Texas Nonpoint Source Management Program--The comprehensive management strategy to protect and restore water impacted by nonpoint sources of pollution jointly developed and administered by the Texas Commission on Environmental Quality and the State Board and approved by the Governor of the State of Texas and the United States Environmental Protection Agency.

(14) Texas surface water quality standards--The designation of water bodies for desirable uses and the narrative and numerical criteria deemed necessary to protect those uses established by the Texas Commission on Environmental Quality.

(15) Water in the state--Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico, inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(16) Water quality management plan--a site specific plan for agricultural or silvicultural lands which includes appropriate land treatment practices, production practices, management measures, technologies or combinations thereof which when implemented will achieve a level of pollution prevention or abatement determined by the State Board in consultation with the local SWCD and Texas Commission on Environmental Quality to be consistent with Texas surface water quality standards.

(c) [~~(a)~~] [~~A water quality management plan is a site specific plan for agricultural or silvicultural lands which includes appropriate land treatment practices, production practices, management measures, technologies or combinations thereof which when implemented will achieve a level of pollution prevention or abatement determined by the State Board in consultation with the local soil and water conservation district and Texas Commission on Environmental Quality to be consistent with state water quality standards.~~] To be certified, a water quality management plan must at a minimum meet the resource quality criteria for water quality at the resource management system level specified within the NRCS FOTG and encompass [~~cover~~] all lands whether contiguous or non-contiguous that constitutes an operating unit for agricultural or silvicultural nonpoint source pollution abatement purposes.

(d) [~~(b)~~] A water quality management plan should be modified when there is a land use change of any part of the operating unit; an addition or deletion of significant acreage to or from the operating unit covered by the water quality management plan; alteration of planned permanent practice measures including addition or deletion of such; changes identified by research and advanced technology as being needed to meet Texas surface water quality standards; or when more stringent measures become necessary to meet Texas surface water quality standards.

(e) [~~(c)~~] Process for obtaining a Water Quality Management Plan.

(1) Landowners and operators may request the development of a plan or plan modification by the local SWCD [~~soil and water conservation district~~]. Landowners and operators, following consultation with their SWCD [~~soil and water conservation district~~], will be encouraged and aided in working with the SWCD [~~district~~] in the preparation of a plan or plan modification based on standards adopted by the State Board to prevent or abate their nonpoint source pollution.

(2) The SWCD [~~soil and water conservation district~~] will determine the priority of plan development or plan modification and subsequently cause the development and approval of the plan or plan modification.

(3) Landowners and operators may appeal SWCD [~~district~~] decisions relative to practices and practice standards to the State Board in the manner prescribed by the State Board.

(4) When determined to be consistent with Texas surface [~~state~~]water quality standards, taking into account the state of existing technology, economic feasibility and water quality needs, the State Board will certify the plan or plan modification.

(f) [~~(d)~~] Practice selection.

(1) Practices eligible for water quality management planning will be selected by the State Board in consultation with the SWCD [~~soil and water conservation district~~].

(2) Practices will address activities determined by the State Board in consultation with the SWCD [~~soil and water conservation district~~] to be in need of pollution prevention or abatement.

(3) Insofar as practicable, those practices shall be consistent with the Texas [~~Agricultural and Silvicultural~~] Nonpoint Source Management Program developed by the State Board and the Texas Commission on Environmental Quality pursuant to the federal [~~Federal~~] Clean Water Act, §319 and Coastal Zone Act Reauthorization Amendments [~~CZARA~~] §6217.

(g) [~~(e)~~] Practice standards.

(1) Practice standards will be based on specific local conditions.

(2) Practice standards will be based on criteria in the NRCS FOTG [~~Natural Resources Conservation Service Field Office Technical Guide~~]; however, modification of those practice standards to ensure consistency with Texas surface [~~state~~] water quality standards and the Texas Nonpoint Source Management Program [~~state agricultural and silvicultural nonpoint source management program~~] will be made as necessary. It is the decision of the State Board that the implementation of a water quality management plan based on the NRCS FOTG, including all practices required to minimally meet the resource quality criteria for water quality at the resource management system level, represents the best available technology for meeting Texas surface water quality standards.

(3) Practice standards will be selected or developed in consultation with the local SWCD [~~soil and water conservation district~~], with assistance and advice of the NRCS [~~USDA, the Natural Resources Conservation Service~~], Texas AgriLife [~~Cooperative~~] Extension Service, Texas Forest Service, Texas AgriLife Research [~~Agricultural Experiment Station~~], Texas Commission on Environmental Quality, the local underground water conservation district and others as determined to be needed by the State Board.

(h) [~~(f)~~] Implementation schedule.

(1) A water quality management plan must contain an implementation schedule.

(2) The implementation schedule will, as far as is practicable, balance the state's need for protecting water quality with need of agricultural and silvicultural producers to have sufficient time to implement practices in an economically feasible manner.

(3) Highest priority will be given to the implementation of the most cost effective and most needed pollution abatement practices.

(4) The State Board in consultation with affected SWCD [~~soil and water conservation district~~] will conduct status reviews of plan implementation.

(5) The State Board in consultation with the local SWCDs [~~soil and water conservation districts~~] may withdraw certification of a water quality management plan that is not being implemented in accordance with its schedule. Prior to certification being withdrawn, a landowner will be notified and provided a reasonable period of time to implement the water quality management plan according to the schedule or a modified schedule approved by the SWCD [~~soil and water conservation district~~].

(6) The holder of a certified water quality management plan shall notify the local SWCD [~~soil and water conservation district~~] in the event he or she deviates from the implementation schedule.

(i) [~~(g)~~] Applicability of Texas surface [~~state~~] water quality standards. To the extent allowed by available technology, water quality management plan development, approval and certification will be based on Texas surface [~~state~~] water quality standards as established by the Texas Commission on Environmental Quality.

(j) [~~(h)~~] Water Quality Management Plans for Poultry Facilities.

(1) After September 1, 2001 in accordance with the schedule in paragraph (2) of this subsection, all poultry facilities producing poultry for commercial purposes will be required to develop and implement a certified water quality management plan covering the poultry operating unit.

(2) Poultry facilities must request development and certification of a water quality management plan according to the following: Figure: 31 TAC §523.3(j)(2)
[~~Figure: 31 TAC §523.3(h)(2)~~]

(3) Poultry facilities may obtain a water quality management plan as prescribed in subsections (a) - (h) [~~(f)~~].

(4) The State Board [~~Texas State Soil and Water Conservation Board (State Board)~~] will maintain a listing of poultry facilities that have requested a certified water quality management plan. The list will indicate date of plan approval by the SWCD [~~soil and water conservation district~~] and date of certification by the State Board. The listing will also indicate status of implementation.

(5) The State Board in consultation with the local SWCD [~~soil and water conservation district~~] will conduct status reviews of certified water quality management plans covering poultry facilities on a schedule determined by the State Board.

(6) The State Board, in consultation with the local SWCD [~~soil and water conservation district~~] may withdraw certification of a water quality management plan that is not being implemented according to its schedule. Prior to certification being withdrawn, the owner/operator of the facilities will be notified and provided a reasonable period of time, as determined by the State Board, to implement the water quality management plan, which may, at the discretion of

the local SWCD [district] in accordance with State Board guidance be modified to allow implementation to occur.

(7) The list developed and maintained under paragraph (4) of this subsection will be made available to the Texas Commission on Environmental Quality.

(8) Landowners and operators after consultation with the SWCD [district] may appeal SWCD [district] decisions to the State Board.

§523.4. Resolution of Complaints.

Complaints concerning the violation of a water quality management plan [Water Quality Management Plan] or a violation of a law or rule relating to nonpoint source pollution will be addressed as follows.

(1) The State Board will investigate complaints regarding:

(A) (No change.)

(B) operations with a certified water quality management plan [Water Quality Management Plan];

(C) operations that have applied for a water quality management plan [Water Quality Management Plan];

(D) nonpoint source problems related to operations needing a water quality management plan [Water Quality Management Plan]; and

(E) (No change.)

(2) Determination of the need for action.

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

(C) The State Board in consultation with the local soil and water conservation district will, based on complainant interviews and investigations, including a review of the water quality management plan [Water Quality Management Plan] on file with the State Board and/or the soil and water conservation district, determine whether or not the need for corrective action exists.

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

(3) Corrective action plan. Once the determination of the need for action is made, a corrective action plan will be developed.

(A) The corrective action plan must meet all requirements of a certified water quality management plan [Water Quality Management Plan].

(B) (No change.)

(C) The corrective action plan will be developed with the technical assistance from the Natural Resources Conservation Service, Texas AgriLife [Cooperative] Extension Service, Texas Forest Service, the local underground water conservation district, and/or State Board as appropriate.

(4) (No change.)

§523.6. Cost-Share Assistance for Soil and Water Conservation Land Improvement Measures.

(a) (No change.)

(b) Definitions. For the purposes of this section [these rules] the following definitions shall apply.

(1) Allocated funds--Funds budgeted through the State Board to a soil and water conservation district [SWCD] for cost-share assistance.

(2) Applicant--A person [person(s)] who applies for cost-share assistance from the soil and water conservation district [SWCD].

(3) (No change.)

(4) Conservation practice(s) [land treatment measure(s)]--The conservation land improvement measure(s) approved by the State Board and applied to the land to control soil erosion or improve the quality and/or quantity of water.

(5) Cost-share assistance--An award of money made to an eligible person for conservation land improvement measures pursuant to the terms of Agriculture Code §201.301 [Senate Bill 503, 73rd Texas Legislature].

(6) District director--A member of the governing board of a soil and water conservation district [SWCD].

(7) - (9) (No change.)

(10) Landowner--Any person, firm or corporation holding title to land lying within a soil and water conservation district [SWCD].

(11) Maintenance agreement--A written agreement between the eligible person and the soil and water conservation district [SWCD] wherein the eligible person(s) agrees, as a condition of the receipt of State cost-share funds, to implement and maintain all measures [measure(s)] in the certified water quality management plan consistent with its implementation schedule. The maintenance agreement shall remain in effect for a minimum period of two years after the certified water quality management plan is completely implemented for all practices except those cost-shared. The maintenance agreement shall remain in effect on cost-shared practices for the expected life of the practice as established by the State Board or for a period of two years after the certified water quality management plan is completely implemented, whichever period of time is longer. It is the expectation of the State Board that a water quality management plan be maintained by the landowner for an indefinite period of time. The maintenance agreement is only intended to ensure a minimum period of time during which the State of Texas can realize the conservation and water quality benefits of its investment of technical and financial assistance to a landowner.

(12) Obligated funds--Monies from a soil and water conservation district's [SWCD's] allocated funds which have been committed to an applicant after final approval of the application.

(13) Operating Unit--Land or lands, whether contiguous or non-contiguous, owned and/or operated in a manner that contributes or has the potential to contribute agricultural or silvicultural nonpoint source pollution to water in the state. An operating unit must be determined through mutual agreement by the holder of the water quality management plan, the soil and water conservation district, and the State Board. [Land, whether contiguous or noncontiguous, owned and/or operated by the applicant as an independent management unit for agricultural or silvicultural purposes.]

(A) Contiguous lands under the same ownership and/or operational control must be considered one operating unit.

(B) Non-contiguous lands under the same ownership and/or operational control may be considered as more than one operating unit when there is mutual agreement by the soil and water conservation district and the potential holder of the water quality management plan unless the lands are associated with an animal feeding operation.

(C) An operating unit, when designated for an animal feeding operation, must at a minimum encompass all land or lands owned and/or operated by the holder of the water quality management plan that are used to produce feed that is consumed by the animals, as well as all land or lands owned and/or operated by the potential holder of the water quality management plan where manures or other agri-

cultural by-products are beneficially used as a source of nutrients to produce food or fiber for any use.

(D) Land or lands within the scope of an existing operating unit for certified water quality management plan may not be separated from the existing operating unit to establish another operating unit unless a change of ownership has occurred.

(E) Where mutual agreement regarding an operating unit's consistency with these rules is not achieved by the potential holder of the water quality management plan, the soil and water conservation district, and the State Board, the State Board will make a final determination whether or not to certify the water quality management plan.

(14) Performance agreement--A written agreement between the eligible person and the soil and water conservation district [~~SWCD~~] wherein the eligible person agrees to perform conservation land improvement measures for which allocated funds are being paid.

(15) Practice standard--A technical specification for a conservation practice within the NRCS FOTG that contains information on why and where the practice should be applied, and sets forth the minimum quality criteria that must be met during the application of that practice in order for it to achieve its intended purpose(s).

(16) [~~(15)~~] Priority system--The system devised by the soil and water conservation district [~~SWCD~~], under guidelines of the State Board, for ranking approved conservation practices [~~land treatment measures~~] and for facilitating the disbursement of allocated funds in line with the soil and water conservation district's [~~SWCD's~~] priorities.

(17) [~~(16)~~] Program year--The period from September 1 to August 31.

(18) [~~(17)~~] Soil and water conservation district (SWCD)[~~, herein referred to as SWCD~~]--A governmental [~~government~~] subdivision of this state and a public body corporate and politic, organized pursuant to Chapter 201 of the Agriculture Code [~~of Texas~~].

(19) [~~(18)~~] State Board--The Texas State Soil and Water Conservation Board organized pursuant to [~~the provisions of~~] Chapter 201 of the Agriculture Code [~~of Texas~~].

(c) Responsibilities.

(1) The State Board shall:

(A) (No change.)

(B) Establish conservation practices [~~land treatment measures~~] eligible for cost-share and their standards, specifications, maintenance and expected life.

(C) Establish maximum cost-share rate for each conservation practice [~~land treatment measures~~] approved for cost-share.

(D) - (I) (No change.)

(2) The SWCDs shall:

(A) Designate, from State Board approved list, those conservation practices [~~land treatment measures~~] that will be eligible for cost-share in their SWCD.

(B) - (F) (No change.)

(G) Notify applicants of the SWCD's [~~district's~~] decisions on approval of applications.

(H) File approved [~~Approved~~] applications [~~will be filed~~] in the SWCD's [~~Districts~~] copy of the applicant's water quality management plan [~~Water Quality Management Plan~~].

(I) - (J) (No change.)

(K) Certify completed conservation practices [~~land treatment measures~~] to the State Board prior to payment.

(L) (No change.)

(d) Administration of Funds.

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

(3) Approval of Allocations. The State Board shall consider and approve, reject or adjust SWCD requests for allocations giving consideration to relative need for funding, SWCD workload and fund balances, as well as other information deemed necessary by the State Board. Only SWCDs [~~districts~~] for which the State Board has established an allocation are eligible to claim cost-share funds.

(4) Maximum Allowable Amount of Cost-Share Funds per Operating Unit. The maximum allowable amount of cost-share funds that may be applied to any single operating unit is $15,000. This provision applies only to general revenue funds appropriated by the Texas Legislature to assist program participants with the implementation of soil and water conservation land improvement measures as allowed by Agriculture Code §201.301.

(e) Eligibility for Cost-Share Assistance.

(1) (No change.)

(2) In accordance with the terms of the maintenance agreement an eligible person may receive cost-share [~~cost share~~] only once for an operating unit. The State Board on a case by case, project or watershed basis in consultation with the SWCD [~~soil and water conservation district~~] may grant a waiver to this requirement in situations where:

(A) Research and/or advanced technology indicate(s) [~~indicates~~] a plan modification to include additional measures to meet Texas surface water quality standards is needed

(B) the [~~The~~] operating unit is significantly increased in size by the addition of new land areas that require conservation practices [~~land treatment measures~~] in order to meet Texas surface water quality standards;

(C) more [~~More~~] stringent measures become necessary to meet Texas surface water quality standards;[~~.~~]

(D) a [~~A~~] landowner has assumed the responsibility of a maintenance agreement in cases where the landowner was not the applicant;[~~.~~]

(E) the life expectancy of a conservation practice or practices that was/were previously cost-shared through this program has/have expired and the practice or practices is/are mandated by state law or the laws, rules, or regulations of a political subdivision. This waiver is only applicable to the mandated practice or practices; or [~~The life expectancy of the previously cost-shared best management practice(s) has expired.~~]

(F) a landowner has previously received cost-share through this program but an additional practice or practices has/have been subsequently mandated by state law or the laws, rules, or regulations of a political subdivision. This waiver is only applicable to the mandated practice or practices.

(3) Eligible land. Any of the following categories of land shall be eligible for cost-share assistance:

(A) (No change.)

(B) Land leased by an eligible person over which he/she has adequate control and which land is utilized as a part of his/her [~~his~~] operating unit.

(C) (No change.)

(4) Ineligible lands. Allocated funds shall not be used:

(A) To reimburse other units of government for implementing conservation practices [~~land treatment measures~~].

(B) (No change.)

(5) Eligible purposes. Cost-share assistance shall be available only for those eligible practice [~~practices~~] measures included in an approved water quality management plan and determined to be needed by the SWCD to:

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

(6) Eligible practices. Conservation practices [~~land treatment measures~~] which the State Board has approved and which are included in the applicant's approved water quality management plan shall be eligible for cost-share assistance. The list of eligible practices will be approved as needed by the State Board [~~at the beginning of each fiscal year~~]. The SWCDs shall designate their list of eligible practices from those practices approved by the State Board. SWCDs may request the State Board's approval to offer cost-share assistance for conservation practices [~~land treatment measures~~] not included in the State Board's list of approved practices. The use of special conservation practices [~~land treatment measures~~] is limited to those measures that can solve unique problems in a SWCD and which conform [~~conforms~~] with one or more of the purposes of the cost-share program. Requests for special conservation practices [~~land treatment measures~~] will be filed in writing with the State Board in time to obtain action and notification in writing from the State Board of its decision(s) prior to announcing the cost-share program locally for the program year. Conservation practices [~~land treatment measures~~] may be included in a SWCD's list of eligible practices offered for cost-share assistance only as approved by the State Board.

(7) Requirement to file an application. In order to qualify for cost-share assistance, an eligible person shall file an application with the local SWCD [~~soil and water conservation district~~].

(8) (No change.)

(f) Cost-Share Assistance Processing Procedures.

(1) Responsibility of applicants. Applicants for cost-share assistance for conservation practices [~~land treatment measures~~] shall:

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

(C) After being notified of approval and obligation of funds by the SWCD [~~district~~], request technical assistance through the SWCD [~~district~~] to design and layout the approved practices or request approval of alternate sources of technical assistance.

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

(2) Responsibilities of SWCDs. SWCDs shall:

(A) - (E) (No change.)

(F) Obligate funds for the approved conservation practices [~~land treatment measures~~] that can be funded and notify the applicant(s) [~~applicants~~] that his/her conservation practices [~~land treatment measures(s)~~] has/have been approved for cost-share and to proceed with installation. Allocated funds must be obligated by the last day of April of the fiscal year allocated. All unobligated allocations shall revert back as of May 1st of that fiscal year.

(G) (No change.)

(3) Amended Applications for Allocated Funds.

(A) In the event that an adjustment to the estimated cost of conservation practice(s) [~~land treatment measure(s)~~] is necessitated by the final design, the applicant shall either agree to assume the additional cost or complete and submit an amendment to his/her application for allocated funds to the SWCD for approval or denial by the SWCD.

(B) The SWCD may elect to adjust the amount of funds obligated for the conservation practices [~~land treatment measures~~], provided funds are available, or to request additional funds from the State Board.

(C) In the event additional funds are not available, the conservation practice(s) [~~land treatment measure(s)~~] may be redesigned, if possible, to a level commensurate with available funds, provided the redesign still meets practice standards established by the State Board; or the applicant can agree to assume full financial responsibility for the portion of the cost of conservation practice(s) [~~land treatment measure(s)~~] in excess of the amount authorized.

(4) Performance Agreement. As a condition for receipt of cost-share assistance for conservation practices [~~land treatment measures~~], the eligible person receiving the benefit of such assistance shall agree to perform those measures in accordance with standards established by the [~~Texas State Soil and Water Conservation~~] Board. Completion of the performance agreement and the signature of the eligible person are required prior to payment.

(5) Maintenance Agreement. As a condition for receipt of cost-share assistance, the person(s) receiving the assistance shall agree to implement and maintain all measures in the certified water quality management plan consistent with its implementation schedule. The maintenance agreement shall remain in effect for a minimum period of two years after the certified water quality management plan is completely implemented for all practices except those cost-shared. The maintenance agreement shall remain in effect on cost-shared practices for the expected life of the cost-shared practice(s) as established by the State Board or for a period of two years after the certified water quality management plan is completely implemented, whichever period of time is longer. The landowner must sign the application for cost-share pursuant to subsection (e)(8)[~~(B)~~] of this section and assumes the responsibility of the maintenance agreement. Completion of the maintenance agreement and all appropriate signatures are required prior to payment.

(6) (No change.)

(7) Applications Held in Abeyance Because of Lack of Funds. In those cases where funds are not available, the applications will be held by the SWCD until allocated funds become available or until the end of the program year. When additional funds are received, the SWCD will obligate those funds. The SWCD may shift all unfunded applications held in abeyance because of lack of funds that are on hand at the end of a program year to the new program year or require all new applications as it deems appropriate.

(8) (No change.)

(9) Applications Withdrawn. An application may be withdrawn by the applicant at any time prior to receipt of cost-share assistance by notifying the SWCD in writing that withdrawal is desired. Applications withdrawn by the applicant shall be retained in the records of the SWCD [~~district~~] in accordance with the SWCD's established record retention policy.

(10) (No change.)

(g) Maintenance of Practices.

(1) Requirements for maintenance of practices applied using cost-share funds will be outlined in the eligible person's [~~persons~~] water quality management plan and reviewed with the eligible person at the time of application for cost-share.

(2) A properly executed maintenance agreement shall be signed by the successful applicant prior to receipt of payment of cost-share assistance from the SWCD for a conservation practice(s) [~~land treatment measure(s)~~] installed.

(3) The SWCD will require refund of any or all of the cost-share paid to an eligible person when the applied conservation practice(s) [~~land treatment measure(s)~~] has not been maintained in compliance with applicable design standards and specifications for the practice during its expected life as agreed to by the eligible person. The State Board may grant a waiver to this requirement on a case-by-case basis in consultation with the SWCD.

(4) Failed Practice Restoration.

(A) When conservation practices [~~land treatment measures~~] that have been successfully completed and which later fail as the result of floods, drought, or other natural disasters, and not the fault of the applicant; the applicant may apply for and SWCD [~~district~~] may allocate additional cost-share funds to restore them to their original design standards and specifications. These funds cannot exceed the amount of the original cost-share practice and must come from the SWCD's [~~district's~~] current program year allocation.

(B) When conservation practices [~~land treatment measures~~] that have been successfully completed and which later fail [~~fails~~] as the result of error or omission on the part of the State Board staff, the SWCD staff, or the Natural Resources Conservation Service staff while assisting the SWCD, land not the fault of the applicant; the State Board may approve additional cost-share funds to restore the measure(s) to the correct design standards and specifications, where an investigation approved by the Executive Director or his designee shows good cause. These funds cannot exceed the amount of the original cost-share practice and must come from the SWCD's [~~district's~~] current program year allocation.

(5) In cases of hardship, death of the participant, or at the time of transfer of ownership of land where a conservation practice(s) [~~land treatment measure(s)~~] has been applied using cost-share assistance and the expected life assigned the practice has not expired, the participant, heir(s), or buyer(s) respectively, must agree to maintain the practice(s) or the participant, heir(s) or the buyer by agreement with seller must refund all or a portion of the cost-share funds received for the practice as determined by the SWCD. The State Board on a case by case basis in consultation with the SWCD [~~soil and water conservation district~~] may grant a waiver to this requirement.

(h) - (i) (No change.)

(j) Pursuant to [~~the Texas~~] Agriculture Code[~~,~~] §201.311 [~~Section 201.311~~], one or more SWCDs [~~SWCD's~~] may be designated to administer portions of this section as determined by the State Board.

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

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE PROBATION COMMISSION

CHAPTER 344. EMPLOYMENT, CERTIFICATION AND TRAINING

The Texas Juvenile Probation Commission proposes new Chapter 344 rules §§344.100, 344.110, 344.120, 344.200, 344.210, §344.220, 344.230, 344.300, 344.310, 344.320, 344.330, 344.340, 344.400, 344.410, 344.500, 344.510, 344.520, 344.600, 344.610, 344.620, 344.630, 344.640, 344.650, 344.660, 344.670, 344.680, 344.700, 344.800, 344.810, 344.820, 344.830, 344.840, 344.850, 344.860, 344.870, 344.880, and 344.890, relating to employment, certification and training for juvenile officers. These new standards are being proposed in an effort to consolidate and streamline requirements related to employment, certification and training from several other chapters of the Commission's standards. This chapter also introduces several new requirements designed to enhance training and certification requirements for juvenile officers and to simplify the certification process.

Lisa Capers, Deputy Executive Director and General Counsel, has determined that for the first five year period the amendments are in effect, there will be no fiscal implications for state government or small businesses as a result of enforcement or implementation.

As for local government, the implementation of a requirement for participating in the electronic fingerprinting system through the Texas Department of Public Safety requires a fee of $9.95 per person fingerprinted. Local juvenile departments may choose to pay this fee on behalf of their applicants and employees or may choose to require individuals to pay the fee themselves. The amount of fiscal impact for a specific department will be dependent upon the number of staff who must be fingerprinted and upon how the department decides to arrange for payment of the fee. Additionally, it is expected that the reduction in staff time required to obtain and maintain fingerprint records will offset this new fee.

Changes in the number of required training hours and changes related to the classifications of staff who must receive required training may increase training costs. However, several initiatives are being implemented by the Commission to offset this increased cost. These initiatives include: availability of web-based training in live and videotaped formats; increased regional training opportunities; and enhanced website resources, including training curricula and materials for use at the local level.

The new standards also require successful completion of a competency exam for certification. The Texas Juvenile Probation Commission will attempt to implement this requirement at little or no cost to local departments, however it is possible that there will be travel or other costs associated with completion of the

exam. Departments may choose to defray these expenses to the individual test taker.

Ms. Capers has also determined that for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcement or implementation will be to ensure that qualified staff are able to provide services in a safe and effective manner to youth under the supervision of the juvenile court. There will be no impact on small business or individuals as a result of the amendments.

Public comments on the proposed amendments may be submitted to Kristy M. Almager at the Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas 78711-3547.

SUBCHAPTER A. DEFINITIONS AND APPLICABILITY

37 TAC §§344.100, 344.110, 344.120

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this new chapter.

§344.100. Definitions.

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

(1) Applicant--An individual applying for certification as a juvenile probation officer or juvenile supervision officer.

(2) Board--The governing board of the Texas Juvenile Probation Commission.

(3) Certified Officer--A juvenile probation officer or juvenile supervision officer who has met the minimum certification requirements and is currently certified by the Commission.

(4) Chief Administrative Officer--Regardless of title, the person hired by a juvenile board who is responsible for oversight of the day-to-day operations of a single juvenile probation department for a single county or a multi-county judicial district.

(5) Commission--The Texas Juvenile Probation Commission.

(6) Competency Examination--An examination or other assessment instrument required by any statute or Commission rule that governs an individual's certification as a juvenile probation officer or juvenile supervision officer.

(7) Continuing Education--Courses, programs, or organized learning experiences required to maintain certification and to enhance personal or professional goals.

(8) Facility Administrator--An individual designated by the chief administrative officer or governing board of a juvenile justice facility as the on-site program director or superintendent of a secure facility.

(9) Juvenile Justice Facility ("facility")--A facility, including its premises and all affiliated sites, whether contiguous or detached, operated wholly or partly by or under the authority of the governing board, juvenile board or by a private vendor under a contract with the governing board, juvenile board or governmental unit that serves juveniles under juvenile court jurisdiction. The term includes:

(A) A public or private juvenile pre-adjudication secure detention facility, including a short-term detention facility (i.e., holdover) required to be certified in accordance with Texas Family Code §51.12;

(B) A public or private juvenile post-adjudication secure correctional facility required to be certified in accordance with Texas Family Code §51.125, except for a facility operated solely for children committed to the Texas Youth Commission; and

(C) A public or private non-secure juvenile post-adjudication residential treatment facility housing juveniles under juvenile court jurisdiction.

(10) Juvenile Justice Program ("program")--A program or department operated wholly or partly by the governing board, juvenile board or by a private vendor under a contract with the governing board, or juvenile board that serves juveniles under juvenile court jurisdiction or juvenile board jurisdiction. The term includes a juvenile justice alternative education program and a non-residential program that serves juvenile offenders under the jurisdiction of the juvenile court or juvenile board jurisdiction and a juvenile probation department.

(11) Juvenile Probation Department ("department")--All physical offices and premises utilized by a county or district level governmental unit established under the authority of a juvenile board(s) to facilitate the execution of the responsibilities of a juvenile probation department enumerated in Title 3 of the Texas Family Code and Chapter 141 of the Texas Human Resources Code.

(12) Juvenile Probation Officer--An individual whose primary responsibility and essential job function is to provide juvenile probation services and supervision duties authorized under statutory and agency administrative law that can only be performed by an active certified juvenile probation officer in good standing with the Commission.

(13) Juvenile Supervision Officer--An individual whose primary responsibility and essential job function is the supervision of juveniles in a juvenile justice program or juvenile justice facility.

(14) Mandatory Topics--Specified training topics mandated in the Commission's administrative standards designed to provide officers the essential skills and knowledge necessary for certification and to fulfill the duties and responsibilities of a certified officer.

(15) NCIC--The National Crime Information Center (NCIC) is the Federal Bureau of Investigation's (FBI) database that utilizes fingerprints or other biometric identifiers to track an individual's criminal history in the United States.

(16) One Year of Graduate Study--As described in Texas Human Resources Code §141.061(a)(3)(A), successful completion of at least 18 post-graduate credit hours in criminology, corrections, counseling, law, social work, psychology, sociology, or other field of instruction approved by the Commission at a college or university accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board.

(17) TCIC--Texas Crime Information Center (TCIC) is the Texas Department of Public Safety's database that utilizes fingerprints or other biometric identifiers to track an individual's criminal history in the state of Texas.

(18) Training--An organized, planned and evaluated activity designed to achieve specific learning objectives.

§344.110. Interpretation and Applicability.

(a) Headings. The headings in this chapter are for convenience only and are not intended as a guide to the interpretation of the standards herein.

(b) Conflicting Standards. If a general provision contained in this chapter conflicts with a specific provision contained in another chapter of an administrative standard promulgated by the Commission, the specific language controls.

(c) Applicability. The language contained herein applies to all certifications granted on or after the effective date of this chapter.

(d) Criminal History. Any felony conviction, felony deferred prosecution, felony deferred adjudication, misdemeanor conviction, misdemeanor deferred prosecution, or misdemeanor deferred adjudication occurring before September 1, 2003 will not disqualify a certified officer who held an active certification on September 1, 2003.

§344.120. The Compliance Resource Manual and Implementation of Agency Policy.

The Commission may establish by administrative rule or other reasonable agency policy, the required guidelines, procedures and documentation necessary to ensure compliance and verification of the standards set forth in this chapter.

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

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Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
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For further information, please call: (512) 424-6710

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SUBCHAPTER B. QUALIFICATIONS FOR EMPLOYMENT

37 TAC §§344.200, 344.210, 344.220, 344.230

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

The following rules and standards are affected by this subchapter: §349.7 and §341.20 of this title; and Human Resources Code §141.065.

§344.200. General Qualifications for Employment.

(a) Juvenile Probation Officer. To be eligible for employment as a juvenile probation officer, supervisor or chief administrative officer, an applicant shall:

(1) be at least 21 years of age;

(2) be of good moral character and have no disqualifying criminal history as described in this chapter;

(3) have acquired a bachelor's degree conferred by a college or university accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board;

(4) possess the work experience or graduate study required in §344.210; and

(5) never have had any type of certification revoked by lawful authority of the Commission and not be currently under an order of suspension as described in §344.840(d) of this chapter.

(b) Juvenile Supervision Officer. To be eligible for employment as a juvenile supervision officer, an applicant shall:

(1) be at least 21 years of age;

(2) be of good moral character and have no disqualifying criminal history as described in this chapter;

(3) have acquired a high school diploma or equivalent; and

(4) never have had any type of certification revoked by lawful authority of the Commission and not currently be under an order of suspension as described in §344.840(d) of this chapter.

(c) Facility Administrator. To be eligible for employment as a facility administrator, an applicant shall:

(1) meet the minimum requirements to become a juvenile probation officer as described in §344.200(a) of this chapter; and

(2) maintain an active certification as a juvenile supervision officer.

§344.210. Work Experience.

(a) In lieu of the graduate study requirement in §344.500(a)(2) of this chapter, an applicant for the position of juvenile probation officer shall have one year of experience in full-time case work, counseling, community or group work:

(1) in a social service, community, corrections, or juvenile agency that deals with offenders or disadvantaged persons; and

(2) that the Commission has determined provides the kind of experience necessary to meet this requirement.

(b) Internships may be counted toward meeting one year's experience when the duties performed were related to the field of juvenile justice.

§344.220. Exemptions from Qualifying Work Experience.

(a) The juvenile board, chief administrative officer or designee shall submit to the Commission a request for exemption of the requirement of one year experience or one year graduate study prior to the employment of an applicant who does not meet the one year experience or education requirements for the position of juvenile probation officer.

(b) The exemption request shall be made using the form provided by the Commission and shall document that diligent efforts were made to employ an applicant who meets the work experience requirement.

(c) The chief administrative officer shall provide written notification to the chair of the juvenile board of a request for exemption under this section prior to employment of the applicant.

(d) The Commission shall review and may approve or deny the request.

§344.230. Persons Who May Not Act as Chief Administrative Officers, Juvenile Probation Officers, or Juvenile Supervision Officers.

A peace officer, prosecuting attorney, or other person who is employed by or who reports directly to a law enforcement or prosecution official may not act as a chief administrative officer, juvenile probation officer, or juvenile supervision officer or be made responsible for supervising a juvenile in a juvenile justice facility or program.

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

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SUBCHAPTER C. CRIMINAL HISTORY SEARCHES

37 TAC §§344.300, 344.310, 344.320, 344.330, 344.340

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

The following rules and standards are affected by this subchapter: §§349.8; 343.302; 343.304; and 343.306 of this title.

§344.300. Criminal History Searches for Positions Requiring Certification.

(a) Fingerprint Search.

(1) Fingerprints shall be submitted through the Texas Department of Public Safety (DPS) Fingerprint Applicant Services of Texas (FAST) system.

(2) The juvenile board, chief administrative officer, facility administrator or designee shall complete a criminal history search and review the criminal history report prior to the first day of employment to confirm that the applicant has no disqualifying criminal history.

(b) Criminal History Clearinghouse. The Commission and the juvenile board or designee shall participate in the electronic clearinghouse and subscription service operated by the DPS. This service, known as the Fingerprint-based Applicant Clearinghouse of Texas (FACT), provides criminal history record information to the Commission, juvenile probation departments and juvenile boards who subscribe to the system. The system notifies the Commission and the chief administrative officer or designee of any disqualifying criminal conduct that may occur subsequent to the date of employment or certification.

(c) Military History. Applicants with prior military experience shall provide a copy of the DD-214 Discharge Form for each tour of duty. In the event a DD-214 reflects character of service as anything other than honorable discharge, the juvenile probation department shall obtain release of information authorization from the applicant and shall request additional information from the appropriate governmental entity to determine whether the reason for discharge was the result of disqualifying criminal conduct.

§344.310. Criminal History Searches for Positions Not Requiring Certification.

(a) Criminal history searches shall be conducted for all personnel providing services in juvenile justice facilities or programs who may have direct unsupervised access to juveniles in the facility or program. Prior to being granted access to juveniles in facilities or programs, criminal history searches shall be completed for the following:

(1) Non-Certified Staff. The chief administrative officer or designee shall conduct criminal history searches in accordance with the requirements set forth in §344.300 of this chapter for staff employed full or part-time by a juvenile justice program or juvenile justice facility in positions that do not require certification.

(2) Volunteers and Interns. The chief administrative officer or designee shall conduct criminal history searches in accordance with the requirements set forth in §344.300 of this chapter for volunteers and interns who provide services in juvenile justice programs and facilities.

(3) Service Providers. Service providers include public or private vendors who provide goods and/or services for the operation, management or administration of juvenile probation services and juvenile justice programs and facilities.

(A) Licensed Service Providers. Programs or facilities licensed by the Texas Department of Family and Protective Services, Texas Department of State Health Services or other state agency are exempt from the requirement to provide documentation of criminal history searches for staff employed in the program or facility. The chief administrative officer or designee shall obtain documentation confirming that the provider's license is in good standing with the licensing entity. The facility or program shall not contract for services with a provider whose license is not in good standing.

(B) Non-Licensed Service Providers. The chief administrative officer or designee shall obtain documentation from the provider's employing entity confirming that fingerprint-based criminal history searches of criminal information databases maintained by the Federal Bureau of Investigation and by the state of Texas have been completed within two years prior to the date of the most recent contract for services.

(b) Department policy shall prohibit direct unsupervised access to juveniles in a juvenile justice program or facility by any person with a disqualifying criminal history as described in §344.400 of this chapter.

(c) The juvenile board may grant an exemption to §344.310(b) of this chapter for personnel described in this subsection whose criminal history report reflects class B misdemeanor activity. Exemptions shall be reviewed and granted on a case-by-case basis.

(d) The requirements of this section do not apply to family members or other individuals listed as a juvenile's approved visitors.

(e) The criminal history searches described in this subsection shall apply to individuals who begin employment or service provision on or after September 1, 2009.

§344.320. Criminal History Searches for Position and Departmental Transfers.

(a) Criminal history searches shall be completed by the employing juvenile justice program or facility in accordance with §344.300 of this chapter when:

(1) an individual who was not previously certified accepts a position requiring certification; or

(2) a certified officer employed in a juvenile probation program or facility accepts simultaneous or subsequent employment in a program or facility operated by or under contract with a different department.

(b) For individuals whose fingerprints are already in the Fingerprint Applicant Services of Texas (FAST) system, the searches may be conducted using the existing prints.

§344.330. Criminal History Searches for Secure Contract Facility Employees.

(a) The juvenile probation department in the county in which a secure pre or post-adjudication facility registered by the Commission and operated by a private vendor under contract with a juvenile board is located shall conduct criminal history searches for facility applicants for certified and uncertified positions as required under §344.300 of this chapter.

(b) The contract facility shall provide the juvenile board or designee with identifying information necessary to conduct the required criminal history searches.

(c) The chief administrative officer or designee shall review the criminal history report and provide a copy of the report to a facility with whom they have a written agreement that:

(1) specifically authorizes access to the information;

(2) limits the use of information to the purposes for which it is given;

(3) ensures the security and confidentiality of the information; and

(4) provides for sanctions if a requirement in paragraphs (1), (2) or (3) of this subsection is violated.

(d) The facility administrator or designee shall contact the referring criminal justice agency to obtain information regarding any arrest for which a disposition has not been reported.

(e) The chief administrative officer or designee shall review the criminal history report to confirm that the applicant has no disqualifying criminal history prior to the applicant's first day of employment.

§344.340. Criminal History Records Retention.

A copy of the initial criminal history report required in this section and any reports reflecting subsequent criminal activity shall be maintained for monitoring purposes for the duration of an individual's employment. These records shall be maintained as long as they are administratively valuable or in accordance with the county's established records retention schedule after the monitoring purpose has been fulfilled.

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

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SUBCHAPTER D. DISQUALIFYING CRIMINAL HISTORY

37 TAC §344.400, §344.410

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

The following rules and standards are affected by this subchapter: §§349.7; 349.10; 341.23; and 343.320 of this title.

§344.400. Disqualifying Criminal History.

(a) An individual with the following criminal history shall not be eligible for continued employment or certification:

(1) a felony conviction against the laws of this state, another state, or the United States within the past ten (10) years;

(2) a deferred adjudication for a felony against the laws of this state, another state, or the United States within the past ten (10) years;

(3) a current felony deferred adjudication, probation or parole;

(4) a jailable misdemeanor conviction against the laws of this state, another state or the United States within the past five (5) years;

(5) a deferred adjudication for a jailable misdemeanor against the laws of this state, another state, or the United States within the past five (5) years;

(6) a current jailable misdemeanor deferred adjudication, probation or parole; or

(7) the requirement to register as a sex offender under Chapter 62 of the Texas Code of Criminal Procedure.

(b) The offense disposition date shall be used to determine applicable time frames.

§344.410. Variance of Disqualifying Criminal History.

A variance under §349.2 of this title may not be requested for any Class A misdemeanor or felony unless the person received a pardon based upon proof of innocence or the reversal of a finding of guilt by a trial or appellate court.

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

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SUBCHAPTER E. EDUCATION REQUIREMENTS FOR EMPLOYMENT AND CERTIFICATION

37 TAC §§344.500, 344.510, 344.520

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by these amendments.

§344.500. Education Requirements.

(a) Juvenile Probation Officer. An applicant for employment as a juvenile probation officer must meet the following educational requirements:

(1) have acquired a bachelor's degree conferred by a college or university accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board; and

(2) have one year of graduate study in criminology, corrections, counseling, law, social work, psychology, sociology, or other field of instruction approved by the Commission or qualifying work experience as specified in §344.210.

(b) Juvenile Supervision Officer. An applicant for employment as a juvenile supervision officer must meet one of the following educational requirements:

(1) possess a high school diploma;

(2) a general equivalency diploma from a high school or issuing authority within the United States of America;

(3) a United States military record that indicates the education level received is equivalent to a United States high school diploma or general equivalency diploma;

(4) a foreign high school or home schooling diploma that meets the validation requirements established by the Commission; or

(5) be granted unconditional acceptance into an accredited college or university accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board.

§344.510. Persons Not Subject to Minimum Qualifying Educational Requirements.

(a) Individuals employed as juvenile probation officers prior to September 1, 1981 and who have maintained continuous certification since that date shall not be subject to the minimum educational requirements set forth in Texas Human Resources Code §141.061(a) and in this chapter.

(b) An interruption or lapse of certification under this section shall result in a requirement for the officer to meet all current applicable employment, certification and training requirements.

§344.520. Verification of Education Requirements.

The applicant for employment as a juvenile probation officer or juvenile supervision officer shall provide the department or facility with official documentation that verifies that the applicant meets the educational requirements for certification.

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

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SUBCHAPTER F. TRAINING AND CONTINUING EDUCATION

37 TAC §§344.600, 344.610, 344.620, 344.630, 344.640, 344.650, 344.660, 344.670, 344.680

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

The following rules and standards are affected by this subchapter: §§349.7; 349.15; and 343.16 of this title.

§344.600. Minimum Requirements for Certification.

An applicant for certification as a juvenile probation officer or juvenile supervision officer shall receive a minimum of 80 hours of training including training in mandatory topics described in §344.620 of this chapter prior to certification.

§344.610. Relevance of Training and Standardized Curriculum.

(a) Training must be relevant to the knowledge and skills required in the performance of the officer's job duties to be considered for certification or continuing education credit.

(b) Training in the mandatory topics shall be conducted by training providers who have received specialized training in the curriculum from the Commission or from the employing department.

(c) The standardized curriculum provided by the Commission shall be used in the provision of training on the mandatory topics.

(d) The Commission reserves the right to refuse to approve or grant credit for training hours that do not comply with this standard.

§344.620. Required Training for Certification.

(a) Mandatory Topics. Successful completion of a competency exam based on the following topics is required for certification.

(1) Juvenile Probation Officer.

(A) Role of the probation officer;

(B) Case planning and management;

(C) Recognizing and supervising youth with mental health issues;

(D) Officer safety and mechanical restraints;

(E) Texas Family Code and related laws;

(F) Legal liabilities;

(G) Courtroom proceedings and presentation;

(H) Code of ethics, disciplinary and revocation hearing procedures;

(I) Identifying and reporting abuse, neglect, and exploitation;

(J) Prison Rape Elimination Act; and

(K) Suicide prevention and intervention.

(2) Juvenile Supervision Officer.

(A) Juvenile rights;

(B) Texas Family Code and related laws;

(C) Identifying and reporting abuse, neglect, and exploitation;

(D) Prison Rape Elimination Act;

(E) Suicide prevention and intervention;

(F) Legal liabilities;

(G) Recognizing and supervising youth with mental health issues;

(H) Adolescent physical development and exercise related health risks;

(I) HIV/AIDS and other communicable diseases;

(J) Code of ethics, disciplinary and revocation procedures.

(b) Additional Requirements for Juvenile Supervision Officer Certification.

(1) Prior to providing resident supervision, all juvenile supervision officers shall receive training and maintain current certification in:

(A) Cardiopulmonary Resuscitation (CPR);

(B) First Aid; and

(C) A Personal Restraint Technique approved by the Commission.

(2) Juvenile supervision officers working in juvenile justice facilities shall receive training in the following additional topics for certification:

(A) Behavior observation and recording;

(B) Behavior management;

(C) Risk management, safety and security;

(D) Medical and health services;

(E) Departmental security, emergency and evacuation procedures;

(F) Facility's suicide prevention plan;

(G) Department procedures for reporting abuse, neglect and exploitation;

(H) Recognizing and responding to medical and mental health needs of residents;

(I) Supervising residents in seclusion;

(J) Facility's fire drill procedures;

(K) Grievance procedures;

(L) Confidentiality of information;

(M) Cultural diversity;

(N) Use of restraints; and

(O) Transportation.

§344.630. On-the-Job Training Requirements.

(a) A juvenile justice program or juvenile justice facility may implement a structured on-the-job training program for use in meeting certification and continuing education requirements.

(b) The training program shall utilize the format developed by the Commission or an equivalent format developed by the department to document the provision of on-the-job training.

(c) The chief administrative officer, facility administrator or designee shall select staff, based on experience, qualifications and/or education, to provide on-the-job training.

(d) A maximum of 40 hours of on-the-job training provided in accordance with §344.630 of this chapter may be used to meet the certification or continuing education requirement in a given reporting period.

§344.640. Continuing Education Requirements for Maintaining Certification.

(a) A juvenile probation officer or juvenile supervision officer shall complete a minimum of 80 hours training every 24 months in topics related to the officer's job duties and responsibilities in order to maintain an active certification;

(1) For juvenile supervision officers, this training shall include training in the facilities' suicide prevention plan and training required to maintain certification in CPR, First Aid and personal restraint technique approved by the Commission.

(2) For chief administrative officers and facility administrators, this training shall include a minimum of 20 hours of management training.

(b) A maximum of 20 hours of training credit that exceeds the minimum requirement in a specific reporting period may be applied to the next reporting period.

(c) Documentation of the required continuing education shall be submitted to the Commission through the Commission's automated certification information system within 24 months of the initial certification date and every 24 months thereafter based on the officer's birth month.

§344.650. Non-Compliance with Training and Continuing Education Requirements.

(a) Failure to comply with §344.640 shall result in the following:

(1) the officer's certification shall be placed on inactive status;

(2) the officer shall be restricted from performing the duties of a certified officer; and

(3) the officer shall be ineligible for salary adjustment funding from the Commission.

(b) The officer's certification will be returned to active status upon receipt of documentation that the required continuing education has been completed.

§344.660. Approval and Review of Training Topics.

(a) Approval of Training Topics. All certification and continuing education training shall be approved by the Commission. Training that is not applicable to the duties of a certified officer shall not be applied to the individual's certification or continuing education requirements.

(b) Review of Topics. A juvenile probation department may request a review of the Commission's decision to not approve a topic for certification credit. In support of the request, the juvenile probation department shall describe how the topic relates to the job duties and responsibilities of the officer. The Commission may request additional documentation to evaluate the appropriateness of the topic.

§344.670. Training Methods and Limitations.

(a) Limits on Topics.

(1) Repetitive Training. Credit shall not be allowed for training that is duplicative in nature unless the training is required to maintain certification, such as for CPR or First Aid, or is required to maintain an understanding of the officer's job duties and responsibilities. Topics listed in §344.620 are exempt from this limitation.

(2) Review of Policy and Procedure. Credit for policy and procedure review shall be allowed when documentation reflects that the review was part of a structured training event.

(3) Human Resources Training. Training on employment related benefits and plans shall not be accepted for certification purposes unless the officer is a supervisor and the training relates to supervisory duties or the training is being provided as part of a formal leadership development program.

(b) Limitations on Training Methods. The limits in this subchapter apply to continuing education credits earned in a given 24 month period.

(1) Correspondence Courses. A maximum of 40 hours of continuing education credit may be earned for the successful completion of correspondence courses provided by recognized criminal justice organizations or accredited colleges or universities. Correspondence courses may not be used to meet the requirement for training in the mandatory training topics.

(2) Video-Conferencing and Web-Based Training. Credit for a combined total of 40 hours of video conferencing and web-based training methods may be applied toward certification and continuing education requirements.

(3) Video Training. A maximum of 20 hours of video training that is part of a structured training program may be applied to certification or continuing education requirements.

(4) Training Hours for Curriculum Development. A maximum of 10 hours of credit in a given continuing education period may be allowed for the development of training curriculum.

(5) Training Providers. Training providers may claim actual training time up to a maximum of 10 hours for the provision of training. The credit under this section is allowed only for the provision of training in topics listed in §344.620 of this chapter.

(6) Meetings/Staff Meetings. Meetings shall not be considered a training activity unless supporting documentation indicates that all or part of the meeting was designated solely for the purpose of training.

(7) College Courses. Up to 40 hours of continuing education credit may be applied for successful completion of a three-hour college course in a topic relevant to the officer's job duties and that is provided by a college or university accredited by an organization recognized by the Texas Higher Education Coordinating Board and approved by the Commission. Classes for which less than three hours of college credit is earned may be considered for continuing education credit. If approved, continuing education hours will be based on the number of classroom hours.

§344.680. Documentation.

Documentation of all training received shall be maintained in the department or facility's files for monitoring purposes. Documentation may include sign-in sheets, agendas, certificates of completion, correspondence from the instructor, registration receipts, and/or exam results. The chief administrative officer or designee shall, upon request, submit training records to a juvenile probation department in which an officer has obtained subsequent employment.

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

Filed with the Office of the Secretary of State on August 8, 2008.

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Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 424-6710

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SUBCHAPTER G. COMPETENCY EXAMINATION

37 TAC §344.700

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by these amendments.

§344.700. Competency Examination Requirement.

(a) A juvenile probation officer or juvenile supervision officer shall pass the competency exam prescribed by the Commission in order to be eligible for certification.

(b) A juvenile probation officer or juvenile supervision officer shall complete the mandatory training required in §344.620(a)(1) or §344.620(a)(2) of this chapter prior to attempting the competency exam.

(c) The Commission shall establish a plan for the administration of the examination, including any required fees.

(d) The Commission shall determine the satisfactory level of performance.

(e) Scores shall be sent electronically or by other means established by the Commission to the examinee and the chief administrative officer or designee upon completion of the exam.

(f) The Commission shall maintain a record of competency examination results.

(g) The requirements of this subchapter apply to applicants for positions requiring certification who begin employment as juvenile probation officers on or after September 1, 2011 or who begin employment as juvenile detention officers on or after September 1, 2012.

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

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SUBCHAPTER H. CERTIFICATION

37 TAC §§344.800, 344.810, 344.820, 344.830, 344.840, 344.850, 344.860, 344.870, 344.880, 344.890

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

The following rule is affected by this subchapter: §349.8 of this title.

§344.800. Positions Requiring Certification.

Certain positions require certification by the Commission in order to perform the job functions of the position. Positions requiring certification are specified in applicable chapters under Title 37.

§344.810. Eligibility for Certification.
To be eligible for certification, an individual must:

(1) be twenty-one years of age or older;

(2) have achieved the level of education required for the certification, or been granted an exemption from this requirement;

(3) be of good moral character and have no disqualifying criminal history as described in this chapter;

(4) not be currently under an order of suspension issued under the lawful authority of the Commission;

(5) never have had any type of certification revoked by lawful authority of the Commission;

(6) have satisfactorily completed all pre-service training required by the Commission;

(7) have passed the competency examination as required by the Commission; and

(8) be employed by a governmental unit or a public or private vendor under contract with a governmental unit.

§344.820. Length of Certification.
The Commission may issue a non-expiring certification to individuals who meet the eligibility requirements under this chapter.

§344.830. Certification Renewal Period.
The employing juvenile justice program or facility shall submit, within 24 months of the initial certification date and every 24 months thereafter based on the officer's birth month, documentation that:

(1) the officer has completed the continuing education requirements in §344.640, and

(2) the criminal history search requirements in §344.300 have been met.

§344.840. Certification Status.

(a) Active. An officer shall be required to maintain an active certification in order to perform the duties of a juvenile probation officer or juvenile supervision officer. The individual and the employing department shall ensure that all requirements under this chapter are met in order to maintain the certification in active status. An active certification status requires that the officer shall have:

(1) no disqualifying criminal history;

(2) no current suspension or revocation of certification under the lawful authority of the Commission; and

(3) met the continuing education requirements set forth in §344.640.

(b) Inactive. An officer's certification shall be placed on inactive status in the event that the certification application is found to have a defect or flaw, the officer fails to meet reporting requirements or is no longer employed by a juvenile probation department. An individual whose certification is inactive is not eligible to perform the duties of a certified officer or to receive salary adjustment funds from the Commission. The juvenile probation department shall submit documentation through the Commission's automated certification system that an officer has completed all reporting requirements in accordance with §344.830 in order to reactivate the officer's certification.

(c) Provisional. The Commission may issue a provisional certification for a period not to exceed 180 calendar days to an individual whose educational credentials require evaluation or verification. During the provisional certification period, the officer may perform the duties of a certified officer. In the event that the education validation is denied or is not validated within the 180 calendar day period, the individual is no longer eligible to perform the duties of a juvenile probation or supervision officer.

(d) Suspended. An officer who is currently under an order of suspension is not eligible for certification by the Commission and shall not perform the duties of a certified officer. A suspension order shall be in effect until the date determined in the disciplinary hearing held by the Commission. In the event of suspension for failure to pay child support under §232.003 of the Texas Family Code, the suspension shall remain in effect until the Commission receives an order staying or vacating the suspension.

(e) Revoked. An officer who has had a certification revoked by lawful authority of the Commission is no longer eligible for employment or certification as a juvenile probation officer or juvenile supervision officer.

§344.850. Employment by a Governmental Unit.

A juvenile probation officer or juvenile supervision officer with a certification issued by the Commission under this chapter shall be employed by a governmental unit or a private provider under a contract with a governmental unit to maintain active status. The Commission shall place the officer's certification on inactive status upon receiving notification of the individual's resignation or termination from employment from the governmental unit.

§344.860. Certification Process.

(a) Submission of Applications. All certification applications shall be submitted through the Commission's automated certification information system.

(1) Chief Administrative Officers. The juvenile board or designee shall review the certification documentation and approve in writing the submission of the certification application for a chief administrative officer prior to submission of the application to the Commission.

(2) Facility Administrators. The juvenile board or the chief administrative officer shall review the certification documentation and approve in writing the submission of the certification application for a facility administrator prior to submission of the application to the Commission.

(3) Juvenile Probation Officer. The chief administrative officer or designee shall submit the certification application for a juvenile probation officer.

(4) Juvenile Supervision Officer. The chief administrative officer, facility administrator, or designee shall submit the certification application for a juvenile supervision officer.

(b) Timeline for Submission. The certification application shall be submitted to the Commission no more than 180 calendar days from the date of initial employment.

(1) An individual whose application for certification has not been submitted within this time frame:

(A) shall not perform the duties of a certified officer; and

(B) shall not count toward the program's staff to child ratios.

(2) An extension of up to 90 days may be allowed for part time staff who have not completed the required training.

(c) Valid Criminal History Searches. Criminal history searches shall have been completed within 180 days prior to submission of the certification application. Dates of return shall be included in the certification application.

(d) Approval of Applications. The Commission shall review information contained in an application to determine certification eligibility. The Commission shall reserve the right to request additional information or documentation. The juvenile probation department will be notified of certification decisions through the Commission's automated certification information system. Any officer whose application is denied shall not perform the duties of a certified officer.

(e) Juvenile Officer Training Tracking System (JOTTS). The juvenile probation department shall utilize the Commission's training and tracking system or an equivalent automated system to document training and continuing education received by certified officers. Training information shall be included in the certification application and submitted through the Commission's automated certification system.

§344.870. Requests for Extension.

(a) The Commission may grant an extension in the event of an unexpected extended absence from employment to allow a certified officer additional time to obtain training necessary to maintain active certification status.

(b) Approved extensions will be granted in increments up to 90 calendar days from the date the certification renewal information was due. Additional time may be requested in special circumstances such as leave under the Family Medical Leave Act (FMLA) or worker's compensation leave.

(c) An officer whose absence is due to leave for military duty will be granted an amount of time equal to the amount of military leave up to a maximum of 24 months.

(d) An officer who does not satisfy all requirements necessary to maintain active status within the extension period shall not perform the duties of a certified officer or receive salary adjustment funds from the Commission.

§344.880. Transfer or Reactivation of Certification.

(a) The employing juvenile justice program or facility shall request through the commission's automated certification system that an officer's certification be transferred or reactivated when an officer is hired who is currently certified and employed in another juvenile probation department or is returning from inactive status.

(b) Active Certification.

(1) The juvenile board, chief administrative officer or designee shall request a transfer of certification when an officer with an active certification obtains employment in a position for which certification is required.

(2) The request for transfer shall include verification that all criminal history searches have been completed in accordance with §344.300 of this chapter.

(c) Inactive Certification.

(1) The juvenile board, chief administrative officer or designee shall request a transfer of certification when an officer whose certification is inactive obtains employment in a position for which certification is required.

(2) The request for transfer shall include verification that all criminal history searches have been conducted in accordance with §344.300 of this chapter.

(3) Completion of 80 hours of continuing education within the 24 months prior to employment shall be confirmed and documentation included in the officer's personnel file prior to submission of the transfer request.

(d) Training Records. The juvenile board, chief administrative officer, facility administrator, or designee shall forward a certified officer's training records to the employing facility or program, upon request, when an officer's certification is transferred.

§344.890. Termination of Employment.

The juvenile board, chief administrative officer, or designee shall notify the Commission of the resignation or termination of individuals employed in positions requiring certification within 10 working days of the date of their separation from employment. Upon receipt of notice, the Commission shall place the certified officer's certification on inactive status.

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

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Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
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For further information, please call: (512) 424-6710

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CHAPTER 350. INVESTIGATING ABUSE, NEGLECT, EXPLOITATION, DEATH AND SERIOUS INCIDENTS

37 TAC §§350.100, 350.110, 350.120, 350.200, 350.210, 350.220, 350.300, 350.400, 350.500, 350.600, 350.610, 350.620, 350.700, 350.800, 350.900 - 350.904

The Texas Juvenile Probation Commission proposes new Chapter 350 rules §§350.100, 350.110, 350.120, 350.200, 350.210, 350.220, 350.300, 350.400, 350.500, 350.600, 350.610, 350.620, 350.700, 350.800, and 350.900 - 350.904, relating to investigating abuse, neglect, exploitation, death and serious incidents by the Texas Juvenile Probation Commission. These new rules are being proposed in an effort to ensure that the agency's investigators have the ability to conduct comprehensive investigations in a more timely and efficient manner.

Lisa Capers, Deputy Executive Director and General Counsel, has determined that for the first five year period the new rules are in effect, there will be no fiscal implications for state government, local government or small businesses as a result of enforcement or implementation.

Ms. Capers has also determined that for each year of the first five years the new rules in effect, the public benefit expected as a result of enforcement or implementation will be the ability to conduct more efficient and comprehensive investigations which will provide a greater level of safety for the juveniles and communities we serve. There will be no impact on small business or individuals as a result of the amendments.

Public comments on the proposed amendments may be submitted to Kristy M. Almager at the Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas 78711-3547.

These rules are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

As a result of this new chapter, §§349.42 - 349.51 of this title will be repealed.

§350.100. Definitions.

(a) The terms used in this Chapter apply to the investigations of allegations of abuse, neglect, exploitation, death and serious incidents conducted by the Commission and to the Commission's procedures relating to serious incidents.

(b) Terms used in this Chapter shall have the following meanings unless otherwise expressly defined within the Chapter.

(1) Abuse, Neglect and Exploitation--The definitions of "abuse", "neglect" and "exploitation" shall have the meanings defined in Texas Family Code §261.001 and §261.401. This term also includes the definitions of serious physical abuse and sexual abuse herein.

(2) Administrator--The chief administrative officer of a juvenile probation department, a public or private juvenile justice program or an administrator of a public or private juvenile justice facility.

(3) Administrative Designee--The role assigned to the administrator, when at the conclusion of a comprehensive investigation, it was determined that the proximate cause of the allegation was based on policies and procedures under the direct control of the administrator.

(4) Alleged Perpetrator--A person alleged as being responsible for the abuse, neglect or exploitation of a juvenile through the person's actions or failure to act.

(5) Alleged Victim--A juvenile under the jurisdiction of the juvenile court or participating in a program operated under the authority of the governing board or juvenile board who is alleged to be a victim of abuse, neglect or exploitation.

(6) Attempted Suicide--Any voluntary and intentional action that could reasonably result in taking one's own life.

(7) Call Line--The toll-free line made available by the Commission to juveniles, professionals and private citizens for the purpose of reporting allegations of abuse, neglect, exploitation and serious incidents within the juvenile justice system.

(8) Commission--The Texas Juvenile Probation Commission.

(9) Death--The permanent cessation of vital bodily functions.

(10) Designated Perpetrator--The individual responsible for the abuse, neglect or exploitation of a juvenile who has not exhausted the right to administrative review.

(11) Designated Victim--The juvenile who was abused, neglected or exploited.

(12) Escape--"Escape" means:

(A) The voluntary, unauthorized departure, or attempt to depart, by an individual who is in custody; or

(B) Failure to return to custody following an authorized temporary leave for a specific purpose or limited period.

(13) Incident Report Form--The required form used to report to the Commission allegations of abuse, neglect, exploitation, death and serious incidents.

(14) Internal Investigation Report--The written report submitted to the Commission that summarizes the steps taken and the evidence collected during an internal investigation of an allegation of abuse, neglect, exploitation or death.

(15) Juvenile--A person who is under the jurisdiction of the juvenile court, confined in a juvenile justice facility, or participating in a juvenile justice program.

(16) Juvenile Justice Facility ("facility")--A facility, including its premises and all affiliated sites, whether contiguous or detached, operated wholly or partly by or under the authority of the governing board, juvenile board or by a private vendor under a contract with the governing board, juvenile board or governmental unit that serves juveniles under juvenile court jurisdiction. The term includes, but is not limited to:

(A) A public or private juvenile pre-adjudication secure detention facility, including a short-term detention facility (i.e., holdover) required to be certified in accordance with Texas Family Code §51.12;

(B) A public or private juvenile post-adjudication secure correctional facility required to be certified in accordance with Texas Family Code §51.125, except for a facility operated solely for children committed to the Texas Youth Commission; and

(C) A public or private non-secure juvenile post-adjudication residential treatment facility housing juveniles under juvenile court jurisdiction.

(17) Juvenile Justice Program ("program")--A program or department operated wholly or partly by the governing board, juvenile board or by a private vendor under a contract with the governing board, or juvenile board that serves juveniles under juvenile court jurisdiction or juvenile board jurisdiction. The term includes a juvenile justice alternative education program and a non-residential program that serves juvenile offenders under the jurisdiction of the juvenile court or juvenile board jurisdiction and a juvenile probation department.

(18) Juvenile Probation Department ("department")--All physical offices and premises utilized by a county or district level governmental unit established under the authority of a juvenile board(s) to facilitate the execution of the responsibilities of a juvenile probation department enumerated in Title 3 of Texas Family Code and Chapter 141 of Texas Human Resources Code.

(19) Peace Officer--A person elected, employed, or appointed as a peace officer under Code of Criminal Procedure, Article 2.12.

(20) Preponderance of Evidence--A standard of judging evidence to determine whether an issue of fact is more probable than not probable. Preponderance is based on the more convincing evidence and its probable truth or accuracy and not on the amount of evidence.

(21) Report--Formal notification to the Commission of an allegation of abuse, neglect, exploitation or death or of a serious incident.

(22) Reportable Injury--Any injury sustained accidentally, intentionally, recklessly or otherwise that:

(A) Requires medical treatment; or

(B) Results from a physical, mechanical or chemical restraint.

(23) Serious Incident--Any incident that is an attempted escape, attempted suicide, escape, reportable injury, youth-on-youth physical assault or youth sexual conduct.

(24) Serious Physical Abuse--Bodily harm or condition that resulted directly or indirectly from the conduct that formed the basis of an allegation of abuse, neglect or exploitation, if the bodily harm or condition requires medical treatment.

(25) Sexual Abuse--Conduct committed by any person against a juvenile that includes sexual abuse by contact or sexual abuse by non-contact. A juvenile, regardless of age, may not affirmatively or impliedly consent to the acts as defined herein under any circumstances.

(26) Sexual Abuse by Contact--Any physical contact with a juvenile that includes: intentional touching of the genitalia, anus, groin, breast, inner thigh or buttocks with the intent to abuse, arouse or gratify sexual desire; deviate sexual intercourse; sexual contact; sexual intercourse; or sexual performance as those terms are defined below.

(A) "Deviate sexual intercourse" means:

(i) any contact between any part of the genitals of one person and the mouth or anus of another person; or

(ii) the penetration of the genitals or the anus of another person with a hand, finger or other object.

(B) "Sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

(i) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a person; or

(ii) any touching of any part of the body of a person, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

(C) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

(D) "Sexual performance" means acts of a sexual or suggestive nature performed in front of one or more persons including simulated or actual sexual intercourse, deviate sexual intercourse, bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

(27) Sexual Abuse by Non-Contact--Any sexual behavior, conduct, harassment or actions other than those defined by sexual abuse by contact, which are exhibited, performed or simulated:

(A) in the presence of a juvenile or with reckless disregard for the presence of a juvenile;

(B) with the intent to arouse or gratify the sexual desire of any person;

(C) including repeated verbal statement or comments of a sexual nature; and

(D) including demeaning references to gender, derogatory comments about body or clothing or profane or obscene language or gestures.

(E) These behaviors, conduct and actions include indecent exposure, voyeurism, distribution or exhibition of pornographic or sexually explicit material or sexual performance as defined in §350.100(b)(26)(D) of this section.

(28) Substantial Evidence--The standard of proof that is more than a scintilla but less than preponderance. The evidence is, reasonable, credible, solid, compels a conclusion one way or the other; the quantum of evidence which reasonable minds could accept as adequate.

(29) Sustained Perpetrator--A designated perpetrator who has already been offered the right to an administrative review and the designated perpetrator's rights to the administrative review have expired or the disposition was upheld.

(30) TCLEOSE--Texas Commission on Law Enforcement Officer Standards and Education.

(31) Youth-on-Youth Physical Assault--A physical altercation between two or more juveniles that results in any of the involved parties sustaining an injury that requires medical treatment.

(32) Youth Sexual Conduct--Two or more juveniles, regardless of age, who engage in deviate sexual intercourse, sexual contact, sexual intercourse, sexual performance as those terms are defined in paragraph (26) of this subsection or sexual behavior, conduct or actions which are exhibited, performed or simulated as those terms are defined in paragraph (27) of this subsection. A juvenile may not consent to the acts as defined herein under any circumstances. Consent may not be implied regardless of the age of the juvenile.

§350.110. Interpretation.

(a) Headings. The headings in this Chapter are for convenience only and are not intended as a guide to the interpretation of the standards herein.

(b) Including. The word, "including" when following a general statement or term, is not to be construed as limiting the general statement or term to any specific item or manner set forth or to similar items or matters, but rather as permitting the general statement or term to refer also to all other items or matters that could reasonably fall within its broadest possible scope.

§350.120. Applicability.

Unless otherwise noted, these standards apply to the investigations conducted by the Commission of all allegations of abuse, neglect and exploitation, death and serious incidents involving a juvenile and an employee, intern, volunteer, contractor or service provider.

(1) Texas Family Code §261.405(b) gives the Commission the authority to conduct abuse, neglect and exploitation investigations in any juvenile justice department, program or facility. The investigations conducted by the Commission are governed by Texas Family Code Chapter 261.

(2) Investigations of abuse, neglect, exploitation and death are conducted by investigators specifically trained to conduct investigations in juvenile justice departments, programs and facilities. The primary objective of each investigation is to ensure the health, safety and well being of the alleged victim and other juveniles under the jurisdiction of the juvenile court. Investigations also serve to assess additional risk potential and compliance with applicable administrative standards.

§350.200 Abuse, Neglect, Exploitation and Death.

Upon receipt of an allegation of abuse, neglect, exploitation or death, Commission investigators shall assess the allegation to determine the assignment of the initial priority level, which thereby determines the timeframe for initiating the investigation.

§350.210. Assessment.

An assessment shall be completed on all reports of allegations of abuse, neglect, exploitation or death received by the Commission.

(1) Allegations within the Commission's investigative jurisdiction shall, regardless of the source, or severity or perceived lack thereof, be assigned for investigation.

(2) Allegations not within the Commission's investigative jurisdiction shall be referred to the appropriate division within the Commission or other agency having jurisdiction.

§350.220. Prioritization, Activation and Initiation.

(a) Prioritization. All reports of allegations of abuse, neglect, exploitation or death shall be assigned a priority level.

(b) Activation. Investigations are activated when the Commission makes the initial notification to law enforcement.

(c) Initiation. Investigations are initiated when the assigned investigator contacts or attempts to contact, via phone, fax, e-mail or in person a representative of the department, program, facility, governing board, juvenile board; law enforcement agency; the reporter; or any person with knowledge of the alleged incident.

§350.300. Investigations.

Investigations shall be conducted to ensure the health, safety and well being of juveniles, employees, interns, volunteers, contractors and service providers. Investigations are also conducted to determine if the alleged incident occurred and to determine if the elements of the alleged incident correspond to the statutory definitions in Texas Family Code Chapter 261.

§350.400. Notification and Referral.

(a) Notification of Disposition. At the conclusion of a case assigned for investigation, notification of the disposition shall be forwarded to the appropriate parties.

(b) Notice to Prosecutor. Notifications to the district or county attorney's office prosecuting criminal matters in the jurisdiction in which the Commission conducted the investigation, shall be forwarded in accordance with applicable Commission policies and procedures.

(c) Non-Compliance Citation Report. A Non-Compliance Citation Report (NCCR) shall be issued when, during the course of an investigation, a violation of Title 37, Part 11, Texas Administrative Code occurred.

(d) Notice of Technical Assistance. A "Notice of Technical Assistance" (NTA) shall be issued regarding any information received during the course of a Commission investigation in which substantial evidence demonstrates that circumstances exists that pose or may pose a potential risk to juveniles and/or staff, but in which it does not appear as though a violation of the Texas Administrative Code occurred.

(e) Referrals. Information received by the Commission that is determined not to be an allegation of abuse, neglect, exploitation or death or that does not fall within the investigation unit's purview shall be routed to the appropriate division within the Commission or to the agency, department, program or facility in which the incident is alleged to have occurred.

§350.500. Requests for Disciplinary Action.

Requests for disciplinary action shall be submitted in accordance with applicable agency administrative standards, policies and procedures.

§350.600. Retention, Release and Redaction of Commission Records.

(a) Record Development. In accordance with Texas Family Code §261.402, the Commission shall develop and maintain a record of each reported alleged incident of abuse, neglect, exploitation or death.

(b) Database. The Commission shall maintain an electronic database containing information regarding all reports of alleged incidents of abuse, neglect, exploitation, death and serious incidents.

(c) Preservation of Recordings and Transcripts. Recorded interviews and transcripts of recorded interviews maintained by the Commission shall be preserved in accordance with the Commission's record retention schedule and other applicable laws.

(d) Record Retention. The investigation records maintained by the Commission are confidential and shall be retained in accordance with the retention schedule adopted by the Commission or other applicable laws.

§350.610. Release of Confidential Information.

Confidential information shall be released in accordance with the Commission's policies and procedures and other applicable statutory provisions governing the disclosure of confidential information.

§350.620. Redaction of Records.

In certain cases, an alleged perpetrator's identifying information may be redacted from the Commission's records.

(1) Automatic Redaction. The Commission shall, in cases in which the disposition is baseless, automatically and permanently redact the alleged perpetrator's identifying information from the Commission's case record.

(2) Request for Redaction. The alleged perpetrator may request that his or her identifying information be redacted from the Commission's records if:

(A) The Commission's final disposition of the case in which the alleged perpetrator was involved is "Ruled Out";

(B) The alleged perpetrator submits the request for redaction in writing to the Commission's Legal Division;

(C) The alleged perpetrator submits the request for redaction within 30 calendar days of the last day of the corresponding limitation period described in this paragraph;

(D) The alleged perpetrator has been continuously employed within the Texas juvenile justice system for the time period as specified in this paragraph; and

(E) The alleged perpetrator has not been named as the subject of investigation in a subsequent case of abuse, neglect or exploitation.

(3) Limitation Periods. A request for redaction may only be made if all requirements of paragraph (1) of this section are met and if:

(A) Two years has expired from the date of the Commission's final disposition of "Ruled Out", and if, notwithstanding a violation of the Texas Administrative Code, the investigation of the alleged abuse, neglect or exploitation did not produce evidence of a violation of laws of this state or of the United States;

(B) Three years has expired from the date of the Commission's final disposition of "Ruled Out", if the allegation does not meet the elements of paragraph (1) or (3) of this section; or

(C) Five years has expired from the date of the Commission's final disposition of "Ruled Out", if the allegation involved serious physical abuse as defined by §358.100(b)(24) of this title or sexual conduct as defined by §358.100(b)(25), (26) or (27) of this title.

§350.700. Call Line.

To facilitate the reporting of allegations of abuse, neglect, exploitation, death and serious incidents, the Commission shall make available a

toll-free call line to juveniles, parents, juvenile justice professionals and other concerned citizens.

§350.800. Serious Incidents.

An assessment shall be completed on all reported serious incidents received by the Commission to determine jurisdiction, classification and if follow-up action is needed. Based on the information received by the Commission, any report of a serious incident may be reclassified and assigned for investigation.

§350.900. Training and Quality Assurance.

Commission investigators shall receive current and relevant training in the discipline of investigating allegation of abuse, neglect, exploitation and death. Quality assurance measures shall be implemented to help ensure that Commission investigations are conducted in accordance with the rules contained herein and in accordance with the Commission's Abuse and Neglect Division's policies and procedures.

§350.901. Pre-Service Training.

Investigators shall receive pre-service training hours in the laws, statutes, administrative rules and agency policies and procedures governing and relevant to conducting administrative investigations of abuse, neglect, exploitation and death of juveniles within the juvenile justice system. Pre-service training, including structured and applied on-the-job training, shall be relevant to the knowledge and skills required for the performance of the investigator's job duties. All training shall be received from credible sources, knowledgeable in the specific training course.

§350.902. Competency Testing.

Investigators shall demonstrate through written examination, a minimum proficiency in select topics received during pre-service training.

§350.903. Continuing Education.

Continuing education shall consist of topics relevant to conducting investigations of abuse, neglect, exploitation and death of juveniles within the juvenile justice system and topics relevant to the practices of juvenile justice professionals.

(1) Investigators shall successfully complete a minimum number of hours of continuing education training every training unit.

(2) In addition to the requirements of paragraph (1) of this section, investigators licensed as peace officer shall adhere to the training requirements in accordance with the administrative rules as established by TCLEOSE in Title 37, Part 7 of the Texas Administrative Code.

§350.904. Quality Assurance.

During each fiscal year internal quality assurance reviews of active and completed investigations shall be conducted.

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

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Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
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CHAPTER 358. IDENTIFYING, REPORTING AND INVESTIGATING ABUSE, NEGLECT, EXPLOITATION, DEATH AND SERIOUS INCIDENTS

37 TAC §§358.100, 358.120, 358.140, 358.200, 358.220, 358.300, 358.320, 358.400, 358.420, 358.440, 358.460, 358.480, 358.500, 358.600, 358.620, 358.640, 358.660, 358.680, 358.700, 358.720, 358.740, 358.760, 358.780, 358.800, 358.820, 358.840, 358.900, 358.920

The Texas Juvenile Probation Commission proposes new Chapter 358 rules §§358.100, 358.120, 358.140, 358.200, 358.220, 358.300, 358.320, 358.400, 358.420, 358.440, 358.460, 358.480, 358.500, 358.600, 358.620, 358.640, 358.660, 358.680, 358.700, 358.720, 358.740, 358.760, 358.780, 358.800, 358.820, 358.840, 358.900 and 358.920, relating to indentifying, reporting and investigating abuse, neglect, exploitation, death and serious incidents in departments, programs and facilities. These new rules are being proposed to provide the departments, programs and facilities more comprehensive and well-formulated guidelines for identifying and reporting allegations of abuse, neglect and exploitation.

Lisa Capers, Deputy Executive Director and General Counsel, has determined that for the first five year period the new rules are in effect, there will be no fiscal implications to small businesses as a result of enforcement or implementation. The fiscal implications for state government, in particular, the Texas Juvenile Probation Commission will be minimal. The Texas Juvenile Probation Commission will provide the signage the facilities will be required to post regarding a juvenile's right and ability to report allegations of abuse, neglect and exploitation under §358.480. The fiscal impact to the local (county) government, if any, will be minimal. Local governments may opt to install a special phone line to accommodate the call-line as described under §358.440; however, taking such action is not a requirement of the rule and would be a voluntary expenditure.

Ms. Capers has also determined that for each year of the first five years the new rules are in effect, the public benefit expected as a result of enforcement or implementation will be to provide additional protections for the juveniles served throughout the juvenile justice system. There will be no impact on small business or individuals as a result of the amendments.

Public comments on the proposed amendments may be submitted to Kristy M. Almager at the Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas 78711-3547.

These rules are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

The following rules will be repealed as a result of the adoption of new Chapter 358, including: §341.1(1) and (4); Subchapter D of §§341.15; 343.1(1) and (2); 343.3; 348.16; 348.17; 351.1(1) and (2); and 351.3 of this title.

§358.100. Definitions.

Terms used in this Chapter shall have the following meanings unless otherwise expressly defined within the Chapter.

(1) Abuse, Neglect, or Exploitation--The definitions of "abuse", "neglect" and "exploitation" shall have the meaning ascribed under Texas Family Code §261.001 and §261.401. This term also includes the definitions of serious physical abuse and sexual abuse herein.

(2) Administrator--The chief administrative officer of a juvenile probation department, a public or private juvenile justice program or an administrator of a public or private juvenile justice facility.

(3) Alleged Victim--A juvenile under the jurisdiction of the juvenile court or participating in a program operated under the authority of the governing board or juvenile board who is alleged to be a victim of abuse, neglect or exploitation.

(4) Attempted Suicide--Any voluntary and intentional action that could reasonably result in taking one's own life.

(5) Call Line--The toll-free line made available by the Commission to juveniles, professionals and private citizens for the purpose of reporting allegations of abuse, neglect, exploitation and serious incidents within the juvenile justice system.

(6) Commission--The Texas Juvenile Probation Commission.

(7) Death--The permanent cessation of all vital bodily functions.

(8) Escape--"Escape" means:

(A) The voluntary, unauthorized departure, or attempt to depart, by an individual who is in custody; or

(B) Failure to return to custody following an authorized temporary leave for a specific purpose or limited period.

(9) Founded--The finding assigned to an internal investigation when the evidence indicates that the conduct, which formed the basis of an allegation of abuse, neglect or exploitation, occurred.

(10) Incident Report Form--The required form used to report to the Commission allegations of abuse, neglect, exploitation, death and serious incidents.

(11) Inconclusive--The finding assigned to an internal investigation when the evidence does not clearly indicate whether or not the conduct, which formed the basis of an allegation of abuse, neglect or exploitation, occurred.

(12) Internal Investigation--A formalized and systematic inquiry conducted by the administrator or designee of a juvenile probation department, juvenile justice program or juvenile justice facility in response to an allegation of abuse, neglect, exploitation or death.

(13) Internal Investigation Report--The written report submitted to the Commission that summarizes the steps taken and the evidence collected during an internal investigation of an alleged incident of abuse, neglect, exploitation or death.

(14) Juvenile--A person who is under the jurisdiction of the juvenile court, confined in a juvenile justice facility, or participating in a juvenile justice program.

(15) Juvenile Justice Facility ("facility")--A facility, including its premises and all affiliated sites, whether contiguous or detached, operated wholly or partly by or under the authority of the governing board, juvenile board or by a private vendor under a contract with the governing board, juvenile board or governmental unit that serves juveniles under juvenile court jurisdiction. The term includes, but is not limited to:

(A) A public or private juvenile pre-adjudication secure detention facility, including a short-term detention facility (i.e., holdover) required to be certified in accordance with Texas Family Code §51.12;

(B) A public or private juvenile post-adjudication secure correctional facility required to be certified in accordance with Texas Family Code §51.125, except for a facility operated solely for children committed to the Texas Youth Commission; and

(C) A public or private non-secure juvenile post-adjudication residential treatment facility housing juveniles under juvenile court jurisdiction.

(16) Juvenile Justice Program ("program")--A program or department operated wholly or partly by the governing board, juvenile board or by a private vendor under a contract with the governing board, or juvenile board that serves juveniles under juvenile court jurisdiction or juvenile board jurisdiction. The term includes a juvenile justice alternative education program and a non-residential program that serves juvenile offenders under the jurisdiction of the juvenile court or juvenile board jurisdiction and a juvenile probation department.

(17) Juvenile Probation Department ("department")--All physical offices and premises utilized by a county or district level governmental unit established under the authority of a juvenile board(s) to facilitate the execution of the responsibilities of a juvenile probation department enumerated in Title 3 of the Texas Family Code and Chapter 141 of the Texas Human Resources Code.

(18) Medical Treatment--Medical care, processes and procedures that are performed by a physician, physician assistant, licensed nurse practitioner, emergency medical technician (EMT), paramedic or dentist. Diagnostic procedures are excluded unless further intervention beyond basic first aid is required.

(19) Reasonable Belief--A belief that would be held by an ordinary and prudent person in the same circumstances as the reporter.

(20) Report--Formal notification to the Commission of an allegation of abuse, neglect, exploitation or death or of serious incident.

(21) Reportable Injury--Any injury sustained by accidentally, intentionally, recklessly or otherwise that:

(A) Requires medical treatment; or

(B) Results from a physical, mechanical or chemical restraint.

(22) Serious Incident--Any incident that is an attempted escape, attempted suicide, escape, reportable injury, youth-on-youth physical assault or youth sexual conduct.

(23) Serious Physical Abuse--Bodily harm or condition that resulted directly or indirectly from the conduct that formed the basis of an allegation of abuse, neglect or exploitation, if the bodily harm or condition requires medical treatment.

(24) Sexual Abuse--Conduct committed by any person against a juvenile that includes sexual abuse by contact or sexual abuse by non-contact. A juvenile, regardless of age, may not affirmatively or impliedly consent to the acts as defined herein under any circumstances.

(25) Sexual Abuse by Contact--Any physical contact with a juvenile that includes: intentional touching of the genitalia, anus, groin, breast, inner thigh or buttocks with the intent to abuse, arouse or gratify sexual desire; deviate sexual intercourse; sexual contact; sexual intercourse; or sexual performance as those terms are defined below.

(A) "Deviate sexual intercourse" means:

(i) any contact between any part of the genitals of one person and the mouth or anus of another person; or

(ii) the penetration of the genitals or the anus of another person with a hand, finger or other object .

(B) "Sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

(i) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a person; or

(ii) any touching of any part of the body of a person, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

(C) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

(D) "Sexual performance" means acts of a sexual or suggestive nature performed in front of one or more persons including simulated or actual sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

(26) Sexual Abuse by Non-Contact--Any sexual behavior, conduct, harassment or actions other than those defined by sexual abuse by contact, which are exhibited, performed or simulated:

(A) in the presence of a juvenile or with reckless disregard for the presence of a juvenile;

(B) with the intent to arouse or gratify the sexual desire of any person;

(C) repeated verbal statement or comments of a sexual nature; and

(D) including demeaning references to gender, derogatory comments about body or clothing or profane or obscene language or gestures.

(E) These behaviors, conduct and actions include indecent exposure, voyeurism, distribution or exhibition of pornographic or sexually explicit material or sexual performance as defined in §358.100(25)(D) of this section.

(27) Subject of Investigation--A person alleged as being responsible for the abuse, neglect or exploitation of a juvenile through the person's own actions or failure to act.

(28) Unfounded--The finding assigned to an internal investigation when the evidence indicates the conduct, which formed the basis of an allegation of abuse, neglect or exploitation, did not occur.

(29) Youth-on-Youth Physical Assault--A physical altercation between two or more juveniles that results in any of the involved parties sustaining an injury that requires medical treatment.

(30) Youth Sexual Conduct--Two or more juveniles, regardless of age, who engage in deviate sexual intercourse, sexual contact, sexual intercourse, sexual performance as those terms are defined in §358.100(25) of this section or sexual behavior, conduct or actions which are exhibited, performed or simulated as those terms are defined in §358.100(26) of this section. A juvenile may not consent to the acts as defined herein under any circumstances. Consent may not be implied regardless of the age of the juvenile.

§358.120. Interpretation.

(a) Headings. The headings in this Chapter are for convenience only and are not intended as a guide to the interpretation of the standards herein.

(b) Including. The word, "including" when following a general statement or term, is not to be construed as limiting the general statement or term to any specific item or manner set forth or to similar items or matters, but rather as permitting the general statement or term to refer also to all other items or matters that could reasonably fall within its broadest possible scope.

§358.140. Applicability.

Unless otherwise noted, these standards apply to all alleged incidents of abuse, neglect and exploitation, death and serious incidents involving a juvenile and an employee, intern, volunteer, contractor or service provider (hereafter referred to as "any person" or "all persons") in a juvenile probation department ("department"), juvenile justice program ("program") or juvenile justice facility ("facility"), regardless of the location of the alleged incident of abuse, neglect, exploitation, death or serious incident.

§358.200. Policy and Procedure.

Departments, programs and facilities shall have written policies and procedures for reporting serious incidents to the Commission and for reporting allegations of abuse, neglect and exploitation, including death to local law enforcement, the Commission and other appropriate governmental units.

§358.220. Data Collection.

(a) Departments, programs and facilities shall fully and promptly provide requested data pertinent to alleged incidents of abuse, neglect, exploitation, death and serious incidents to the Commission.

(b) The data shall be submitted in the electronic format requested or supplied by the Commission.

(c) The data shall include:

(1) Alleged victim(s) name;

(2) Alleged victim(s) PID;

(3) Name of subject(s) of investigation;

(4) Date of birth and Texas driver's license or state issued identification number of subject(s) of investigation;

(5) Date of incident;

(6) Time of incident;

(7) Date the incident was reported to the Commission;

(8) Type of incident (i.e., abuse, neglect or exploitation (ANE), death or serious incident (SI));

(9) Type of injury, if applicable;

(10) Restraint related, if so, what type (i.e., physical, mechanical or chemical);

(11) Disposition of internal investigation (i.e., Founded, Unfounded, Inconclusive); and

(12) County generated case identification number.

(d) The data shall be supplied at least annually or as required by Commission.

(e) The effective date of this section is September 1, 2009.

§358.300. Serious Incidents.

(a) Duty to Report. Any person who witnesses, learns of, receives an oral or written statement from a juvenile or other person with

knowledge of or who has a reasonable belief as to the occurrence of a serious incident involving a juvenile shall report to the Commission.

(b) Time to Report. A report of a serious incident under subsection (a) of this section shall be made within 24 hours from the time a person gains knowledge of or suspects the serious incident occurred.

(c) Methods of Reporting Serious Incidents.

(1) The report shall be made by phone, or by faxing or e-mailing a completed Incident Report Form to the Commission.

(2) If the report is made by phone, a completed Incident Report Form shall be subsequently submitted to the Commission within 24 hours of the phone report.

§358.320. Medical Documentation for Serious Incidents.

A treatment discharge form or other medical documentation that contains evidence of medical treatment pertinent to the reported incident shall be submitted to the Commission within 24 hours of receipt.

§358.400. Abuse, Neglect and Exploitation.

(a) Duty to Report. Any person who witnesses, learns of, receives an oral or written statement from an alleged victim or other person with knowledge of or who has a reasonable belief as to the occurrence of an alleged incident of abuse, neglect or exploitation involving a juvenile shall report to the Commission and local law enforcement.

(b) Non-Delegation of Duty to Report. In accordance with Texas Family Code §261.101, the duty to report cannot be delegated to another person.

(c) Time to Report. A report of the alleged incident of abuse, neglect or exploitation under subsection (a) of this section, other than death and allegations involving serious physical abuse or sexual abuse, shall be made within 24 hours from the time a person gains knowledge of or suspects the alleged incident of abuse, neglect or exploitation.

(d) Methods for Reporting Abuse, Neglect and Exploitation.

(1) The report shall be made by phone, or by faxing or e-mailing a completed Incident Report Form to the Commission.

(2) If the report is made by phone, a completed Incident Report Form shall be subsequently submitted to the Commission within 24 hours of the phone report.

§358.420. Allegations Occurring Outside the Juvenile System.

Any person who witnesses, learns of, receives an oral or written statement from an alleged victim or other person with knowledge or who has a reasonable belief as to the occurrence of an alleged incident of abuse, neglect or exploitation involving a juvenile, but that is not alleged to involve an employee, intern, volunteer, contractor or service provider of a department, program or facility, shall be reported law enforcement and to the appropriate governmental unit as required in Texas Family Code Chapter 261.

§358.440. Reporting of Allegations by Juveniles.

(a) Right to Report. Juveniles in a facility shall have the right to report to the Commission alleged incidents of abuse, neglect and exploitation, including death and allegations of serious physical abuse and sexual abuse.

(1) Juveniles shall be advised in writing during orientation into the facility of their right to report alleged incidents under this subsection; and

(2) Juveniles shall be advised in writing during orientation into the facility of the Commission's toll-free number available for reporting alleged incidents under this subsection.

(b) Policy and Procedure. Departments, programs and facilities shall have written policies and procedures that address a juvenile's reasonable, free and confidential access to the Commission for reporting alleged incidents under subsection (a) of this section.

(c) Access to the Commission. Upon the request of a juvenile, staff shall facilitate the juvenile's unimpeded access to the Commission to report alleged incidents under subsection (a) of this section.

(d) Effective date. The effective date of this section is January 1, 2009.

§358.460. Parental Notification.

(a) Notification. Notification, or diligent efforts to notify, shall be made to the parents, guardians and custodians of a juvenile who has died or who is the alleged victim of an alleged incident of abuse, neglect or exploitation, including allegations of serious physical abuse or sexual abuse.

(b) Time of Notification. The notification, or the diligent efforts to make the notification under subsection (a) of this section, shall be made as soon as possible, but no later than 24 hours from the time a person gains knowledge of or suspects the alleged abuse, neglect, exploitation or death occurred.

(c) Method of Notification. The notification under subsection (a) of this section shall be made by phone, in writing or in person by the administrator or designee.

(d) Documentation of Notification. The notification, or the diligent efforts to make the notification under subsection (a) of this section, shall be documented on the Commission's Incident Report Form or in the internal investigation report.

§358.480. Signage.

(a) Departments, programs and facilities shall prominently display signage provided by the Commission regarding a zero-tolerance policy concerning abuse of juveniles.

(b) Signage under subsection (a) of this section shall be posted in all of the following places:

(1) Lobby or visitation areas of the department, program or facility to which the public has access;

(2) Youth housing and common areas;

(3) Common medical treatment areas;

(4) Common educational areas; and

(5) Other common areas.

(c) Signage under subsection (a) of this section shall be posted in both English and Spanish.

(d) The effective date of this section is January 1, 2009.

§358.500. Serious Physical Abuse and Sexual Abuse.

(a) Duty to Report. Any person who witnesses, learns of, receives an oral or written statement from an alleged victim or other person with knowledge or who has a reasonable belief as to the occurrence of an alleged incident of serious physical abuse or sexual abuse involving a juvenile shall report to the Commission and local law enforcement.

(b) Time to Report.

(1) A report of alleged serious physical abuse or sexual abuse under subsection (a) of this section shall be made to local law enforcement immediately, but no later than one (1) hour from the time a person gains knowledge of or suspects the alleged serious physical abuse or sexual abuse; and

(2) A report of alleged serious physical abuse or sexual abuse under subsection (a) of this section shall be made to the Commission immediately, but no later than four (4) hours from the time a person gains knowledge of or suspects the alleged serious physical abuse or sexual abuse.

(c) Methods for Reporting Serious Physical Abuse and Sexual Abuse.

(1) The initial report shall be made to law enforcement;

(2) The initial report shall be made by phone or e-mail to the Commission; and

(3) Within 24 hours of the report by phone or e-mail of an alleged incident of serious physical abuse or sexual abuse, the completed Incident Report Form shall be submitted to the Commission by fax or e-mail.

§358.600. Death.

(a) Duty to Report. The administrator or designee shall report to the Commission and local law enforcement the death of a juvenile that occurs:

(1) On the premises of a department, program, facility; or

(2) Emanates from an illness, incident or injury that occurred on the premises of a department, program or facility; or

(3) Occurs while in the presence of a department, program or facility employee, intern, volunteer, contractor or service provider, regardless of the location.

(b) Time to Report.

(1) A report of a death shall be made to local law enforcement immediately, but no later than one (1) hour of the discovery or notification of the death; and

(2) A report of a death shall be made to the Commission immediately, but no later than four (4) hours from the discovery or notification of the death.

(c) Methods for Reporting Death.

(1) The initial report shall be made by phone to law enforcement;

(2) The initial report shall be made by phone or e-mail to the Commission; and

(3) Within 24 hours of the report by phone or e-mail of the death of a juvenile the completed Incident Report Form shall be submitted to the Commission by fax or e-mail.

§358.620. Custodial Death Investigation in a Facility.

Upon the death of a juvenile residing in a facility, the administrator shall:

(1) In accordance with Texas Code of Criminal Procedure Article 49.18(b) conduct an investigation of the death; and

(2) The investigation shall be conducted in accordance with §358.700 of this chapter.

§358.640. Custodial Death Investigation Report.

Upon the conclusion of the internal investigation of the custodial death of a juvenile in a facility, the administrator shall:

(1) In accordance with Texas Code of Criminal Procedure Article 49.18(b), file a written report of the cause of death with the state Attorney General no later than 30 days after the juvenile's death;

(2) Submit a copy of the death investigation report in subsection (a) to the Commission within 10 calendar days of completion; and

(3) Complete an internal investigation report in accordance with §358.800 of this chapter.

§358.660. Custodial Death Investigation in a Department or Program.

Upon the death of a juvenile in custody that occurs in a department or program as described under §358.600(a) of this chapter, the administrator or designee shall:

(1) Immediately initiate an internal investigation in accordance with §358.700 of this chapter; and

(2) Upon the conclusion of the internal investigation, complete an internal investigation report in accordance with §358.800 of this chapter.

§358.680. Non-Custodial Death Investigation in a Department or Program.

Upon the death of a juvenile not in custody that occurs in a department or Program as described under §358.600(a) of this chapter, the administrator or designee shall:

(1) Immediately initiate an internal investigation in accordance with §358.700 of this chapter; and

(2) Upon the conclusion of the internal investigation, complete an internal investigation report in accordance with §358.800 of this chapter.

§358.700. Internal Investigation.

(a) Investigation Requirement. An internal investigation shall be conducted by a person qualified by experience or training to conduct a comprehensive investigation in cases in which an incident of abuse, neglect, exploitation or death is alleged to have occurred. The effective date of this subsection shall be September 1, 2009.

(b) Policy and Procedure. Departments, programs and facilities shall have written policies and procedures for conducting internal investigations of allegations of abuse, neglect, exploitation and death.

(c) Conducting the Investigation. The internal investigation shall be conducted in accordance with the policies and procedures of the department, program or facility.

(d) Initiation of Investigation. The internal investigation shall be initiated immediately upon the administrator or designee gaining knowledge of the alleged abuse, neglect, exploitation or death.

(e) Timeframe for Internal Investigation. The internal investigation shall be completed within 30 business days of the initial report to the Commission. The Commission may extend this timeframe upon request. If an extension is granted, the Commission may request submission of all information compiled to date or a statement of the status of the investigation.

§358.720. Reassignment or Administrative Leave During the Internal Investigation.

(a) Until the finding of the internal investigation is determined, any person alleged to have abused, neglected or exploited a juvenile shall immediately be placed on administrative leave or reassigned to a position having no contact with the alleged victim, relatives of the alleged victim, or other juveniles.

(b) Until the finding of the internal investigation is determined, the person(s) alleged to have abused, neglected or exploited a juvenile

resigns or is terminated from employment, the Commission shall be notified no later than the second business day after the resignation or termination.

(c) If an individual under subsection (b) of this section obtains employment in another jurisdiction prior to the finding of the internal investigation being determined, the person(s) under investigation shall not be placed in a position having any contact with any juveniles until the disposition of the internal investigation is finalized in the county of previous employment.

§358.740 Written and Electronically Recorded Statements.
During the internal investigation, diligent efforts shall be made to obtain written or electronically recorded oral statements from all persons with direct knowledge of the alleged incident.

§358.760. Juvenile Board Responsibilities.
If the administrator is the person alleged to have abused, neglected or exploited a juvenile and the administrator is the highest ranking department, program or facility official, the juvenile board shall:

(1) Conduct the internal investigation in accordance with §358.700 of this chapter; or

(2) Appoint an individual to conduct the internal investigation in accordance with §358.700 of this chapter who is not one of the following:

(A) The person alleged to have abused, neglected or exploited a juvenile;

(B) A subordinate of the person alleged to have abused, neglected or exploited a juvenile; or

(C) A law enforcement officer currently acting in the capacity as a criminal investigator for the alleged incident of abuse, neglect, exploitation or death of a juvenile.

§358.780. Corrective Measures.
At the conclusion of the internal investigation, the governing board, the juvenile board, administrator or designee shall take appropriate corrective measures, if warranted, that may include, but are not limited to:

(1) A review of the policies and procedures pertinent to the alleged incident;

(2) Revision or modification of any policies or procedures as needed;

(3) Administrative disciplinary action or appropriate personnel actions against all persons found to have abused, neglected or exploited a juvenile; and

(4) The provision of additional training for all appropriate persons to ensure the safety of the juveniles, employees, interns, volunteers, contractors and service providers.

§358.800. Internal Investigation Report.
An internal investigation report shall be completed at the conclusion of all internal investigations resulting from an alleged incident of abuse, neglect, exploitation or death of a juvenile.

§358.820. Internal Investigation Report Components.
The internal investigation report shall include:

(1) The date the internal investigation was initiated;

(2) The date the internal investigation was completed;

(3) The date the alleged victim's parent, guardian or custodian was notified of the allegation, or documentation that diligent efforts to provide the notification were made;

(4) A summary of the original allegation;

(5) Relevant policies and procedures related to the incident;

(6) A summary or listing of the steps taken during the internal investigation;

(7) A written summary of the content of all oral interviews conducted;

(8) A listing of all evidence collected during the internal investigation, including all audio and/or video recordings, polygraph examinations, etc.;

(9) Relevant findings of the investigation that support the disposition;

(10) The assigned disposition of the internal investigation:

(A) Founded;

(B) Unfounded; or

(C) Inconclusive.

(11) The administrative disciplinary action or corrective measures taken to date, if applicable (e.g., termination, suspension, retrained, returned to duty or none, etc.);

(12) The date the internal investigation report was completed;

(13) The names of all persons who participated in conducting the internal investigation; and

(14) The name and signature of the person who submitted the internal investigation report.

§358.840. Submission of Internal Investigation Report.

(a) A copy of the internal investigation report shall be submitted to the Commission within five calendar days following its completion.

(b) The following documentation collected during the internal investigation shall be submitted to the Commission with the internal investigation report:

(1) Written statements;

(2) Relevant medical documentation, if the release is authorized by law;

(3) Training records, if applicable; and

(4) Any other documentation used to reach the disposition of the internal investigation.

§358.900. Cooperation with Commission Investigation.

(a) The juvenile board, administrator or designee shall fully and promptly cooperate with a Commission investigation of an alleged incident of abuse, neglect, exploitation or death of a juvenile by providing all evidence requested by the Commission in the format requested.

(b) All persons shall fully cooperate with any Commission investigation of an alleged incident of abuse, neglect, exploitation or death of a juvenile.

(c) The juvenile board, administrator or designee shall make a diligent effort to identify and make available for questioning all persons with knowledge of the alleged incident of abuse, neglect, exploitation or death which is the subject of a Commission investigation.

§358.920. Redaction of Records.

(a) Request for Redaction. The subject of investigation may request that his or her identifying information be redacted from the Commission's records if:

(1) The Commission's final disposition of the case in which the subject of investigation was involved is "Ruled Out";

(2) The subject of investigation submits the request for redaction in writing to the Commission's Legal Division;

(3) The subject of investigation submits the request for redaction within 30 calendar days of the last day of the corresponding limitation period described in subsection (b) of this section;

(4) The subject of investigation has been continuously employed within the Texas juvenile justice system for the time period as specified in subsection (b) of this section; and

(5) The subject of investigation has not been named as the subject of investigation in a subsequent case of abuse, neglect or exploitation.

(b) Limitation Periods. A request for redaction may only be made if all requirements of subsection (a) of this section are met and if:

(1) Two years has expired from the date of the Commission's final disposition of "Ruled Out", and if, notwithstanding a violation of the Texas Administrative Code, the investigation of the alleged abuse, neglect or exploitation did not produce evidence of a violation of laws of this state or of the United States;

(2) Three years has expired from the date of the Commission's final disposition of "Ruled Out", if the allegation does not meet the elements of paragraph (1) or (3) of this subsection; or

(3) Five years has expired from the date of the Commission's final disposition of "Ruled Out", if the allegation involved serious physical abuse as defined by §358.100(23) of this chapter or sexual conduct as defined by §358.100(24) - (26) of this chapter.

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

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804193
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 21, 2008
For further information, please call: (512) 424-6710

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 7. BANKING AND SECURITIES

PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 84. MOTOR VEHICLE INSTALLMENT SALES

SUBCHAPTER G. EXAMINATIONS

7 TAC §§84.707 - 84.709

The Office of Consumer Credit Commissioner withdraws the proposed new §§84.707 - 84.709 which appeared in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5185).

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804218
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: August 8, 2008
For further information, please call: (512) 936-7621

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §1.16

The Texas Higher Education Coordination Board withdraws the proposed amendment to §1.16 which appeared in the June 13, 2008, issue of the *Texas Register* (33 TexReg 4587).

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804242
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: August 8, 2008
For further information, please call: (512) 427-6114

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 11. GENERAL ADMINISTRATION

1 TAC §354.1189

The Texas Health and Human Services Commission (HHSC) adopts new §354.1189, concerning the implementation of an acute care Medicaid billing coordination system with changes to the proposed text as published in the May 23, 2008, issue of the *Texas Register* (33 TexReg 4058). The text of the rule will be republished.

Background and Justification

Section 2 of Senate Bill 10, 80th Legislature, Regular Session, 2007, amends Government Code §531.02413, Billing Coordination System. Section 531.02413 requires HHSC to implement, if cost effective and feasible, an acute care Medicaid billing coordination system for the fee-for-service and primary care case management delivery models. When an acute care claim is billed to Medicaid, the billing coordination system would identify, within 24 hours, whether another entity has primary payor responsibility for the claim and submit the claim to that payor.

New §354.1189 implements §531.02413, Government Code.

Comments

The 30-day comment period ended June 23, 2008. During this period, HHSC received comments regarding the proposed new rule from representatives of the following state and national insurance trade associations and insurance entities: Property Casualty Insurers Association of America; Wellcare Health Care Plans, Inc; Unicare; American Council of Life Insurers (ACLI); American Family Life Assurance Company of Columbus (AFLAC); America's Health Insurance Plans; Texas Association of Health Plans (TAHP); Texas Association of Business; National Association of Dental Plans; Equitable Life and Casualty Insurance Company; Delta Dental Insurance; American Insurance Association (AIA); and HCC Life Insurance Company. Some commenters submitted additional comments that did not relate to the proposed rule. A summary of the comments relating to the proposed rule and HHSC's responses follows.

Comment: TAHP asked that language be added to clarify that the proposed rule does not apply to non-Medicaid enrollees. Similarly, Equitable Life and Casualty Insurance Company asked that the requirement that HHSC access eligibility databases apply only to Texas residents who are Medicaid recipients. The commenter requested this be specified in the rule or the Memorandum of Understanding (MOU) with the insuring entities.

Response: The transfer of information required by S.B. 10 is not limited to Medicaid recipients. Under its new rule, however, HHSC will use eligibility information for billing coordination only for Medicaid enrollees. The rule language was not changed in response to the comment.

Comment: HHSC received a number of comments asking that property and casualty insurers in general, and workers' compensation insurers in particular, be excluded from the requirements in the rule.

The Property Casualty Insurers Association of America stated that the cost effectiveness of including property and casualty insurers in this program is questionable because: (1) these funds can already be collected through subrogation, so the amount of additional funds collected would be small; (2) workers' compensation would be the largest property and casualty line affected; and (3) by definition, the recipients of workers' compensation benefits are employed and, therefore, unlikely to be eligible for Medicaid. The commenter noted that the cost of gathering this information would far outweigh any additional amounts collected through the workers' compensation program. Furthermore, the commenter stated that S.B. 10 was intended to coordinate billing between Medicaid and what are commonly recognized as "health insurance" companies and was not intended to include property and casualty insurers, which includes workers' compensation insurers. The commenter requested that proposed §354.1189(1) be amended to specify types of licensees subject to this rule to clarify that property and casualty insurers are not subject to the proposal.

The Texas Association of Business (TAB) commented that there are already adequate means of protecting and coordinating Medicaid claims against workers' compensation insurers through subrogation and the tort system. Requiring workers' compensation carriers to open their databases unnecessarily and be forced to defend issues of compensability would be costly to insurance carriers as well as the State. The TAB asserted that any price increase incurred by carriers will be paid by employers, who are the ultimate payors of the workers' compensation system.

The American Insurance Association (AIA) also advocated for excluding workers' compensation insurers. The AIA contended that in the very rare instances that a Medicaid insured might find him/herself eligible for workers' compensation coverage, that coverage would be primary and would step in to pay before Medicaid ever becomes involved. Moreover, in AIA's opinion, it is unlikely that the billing coordination system could determine,

within a 24-hour period, whether the rare Medicaid insured who is also covered by workers' compensation insurance would, on that fact alone, be an eligible claimant for a compensable claim.

The Texas Association of Business also remarked it would be impossible for the State's billing coordination system to identify within 24 hours whether a workers' compensation carrier is responsible for a claim merely because a Medicaid claimant has workers' compensation insurance. Although workers' compensation is similar to health insurance in that it pays for health care services, workers' compensation is limited to workplace injuries. A workplace injury is reported to the employer and the appropriate carrier is also alerted, at which time compensability is determined. The Texas Association of Business opined that there is no feasible way that compensability could be determined by workers' compensation carriers opening their databases to HHSC. The commenter requested that workers' compensation carriers and workers' compensation certified self-insured employers be exempt from this rulemaking process.

Response: This rule is not intended to include property and casualty insurers (including workers' compensation insurers). To clarify what entities are required to comply with this regulation, HHSC has added language to paragraph (1) of the rule.

Comment: Delta Dental Insurance stated that transfer of information is already supplied through a monthly eligibility feed, on behalf of all or a portion of its Texas enrollment, to HHSC via Health Management Solutions (a TMHP third party recovery subcontractor).

Response: HHSC currently performs data matching (transfer of information) via multiple avenues in order to identify entities that have the primary responsibility for paying a claim. The existing processes will remain in effect after the implementation of the billing coordination system. Because the billing coordination system is a new process and a different means of transferring information, a memorandum of understanding must be executed between HHSC or its designee and the insuring entity for the billing coordination system transfer of information. The rule language was not changed in response to the comment.

Comment: HHSC received a number of comments questioning the cost effectiveness and feasibility of the billing coordination system.

The National Association of Dental Plans stated that its members cover less than one percent of total Texas Medicaid enrollees and accessing its databases to verify Medicaid eligible children enrolled under private insurance will be extremely difficult. The commenter stated that due to the minimal number of Medicaid enrollees that may also be enrolled under its private insurance, it may not be cost effective to require access to its member databases.

Wellcare Health Care Plans, Inc., expressed concern that the proposed rule and preamble did not provide sufficient information on the cost effectiveness and feasibility of the proposed billing coordination system to allow the public to provide meaningful comment.

Unicare also expressed concern about whether HHSC had conducted the cost benefit and feasibility analysis required by S.B. 10. The commenter expressed concern that the cost-benefit/flexibility language of the statute reflects the 80th Legislature's awareness that implementation of the S.B. 10 billing coordination system is without precedent in any other state Medicaid program and that analysis of the project could show the system to be neither cost effective nor feasible, and therefore not in the best interest of the citizens of Texas.

Response: HHSC has reviewed the cost effectiveness and feasibility of the Medicaid billing coordination system, and has determined that the system is cost effective and feasible. The rule language was not changed in response to these comments.

Comment: Delta Dental Insurance requested that the rule further define "acute care" so that limited-benefit or specialized insurance carriers can better determine the applicability and scope of the proposed rule should specialty services, such as dental procedures, fall under the definition.

Response: Providing a definition of "acute care services" in the rule, to help determine applicability to carriers, is not necessary with the additional wording to be added to §354.1189(1) which now states, "An entity holding a permit, license, or certificate of authority issued by a state regulatory agency must allow HHSC or its designee to access databases that enable it to carry out the purposes of this section. Entities subject to this section are those entities that are, by statute, contract or agreement, legally responsible for the payment of a claim for a health care item or service."

Comment: HCC Life Insurance Company asked that HHSC add to the rule a paragraph to exempt appropriately authorized health insurance carriers that write medical stop-loss insurance with a specific attachment point of $5,000 or more from the requirements of the rule as it relates to this particular product only. The commenter also stated that there is a material discrepancy between the requirements for medical stop-loss policies to report eligibility under the proposed rule. Medical stop-loss policies reinsure a company for excess losses incurred by their self-funded employee benefit plan established under ERISA. It is a standard industry practice to not require documentation of individual eligibility under the employer's self-funded plan until the point in time when a claim is submitted for reimbursement. Therefore, no data for eligibility of the employer's population is maintained by the commenter for these medical stop-loss policies.

Response: The billing coordination system rule does not require that data be submitted for stop-loss policies. The rule language was not changed in response to the comment.

Comment: Unicare stated that the Centers for Medicare and Medicaid Services (CMS) has recently issued guidelines for how state Medicaid agencies should implement efforts related to eligibility determination and claims coordination. The commenter asserts that nothing in the CMS guidelines contemplates direct access to private insurance carrier and other private payor databases.

Response: Provisions in the federal Deficit Reduction Act (DRA) of 2005 (Pub.L. 109-171) give HHSC authority to obtain the database information required by this rule. The rule language was not changed in response to the comment.

Comment: One commenter stated that not all entities that hold a permit, license or certificate of authority issued by a state regulatory agency have information in their databases that would enable HHSC's contractor to carry out the purpose of the statute. The commenter suggested that §354.1189(1) be clarified to state: "An entity holding a permit, license or certificate of authority issued by a state regulatory agency *that is a primary payor and maintains information in its databases about the identity of an entity that has primary payor responsibility for*

the fee-for-service or primary care case management delivery models must allow HHSC's contractor to access its databases to enable it to carry out the purposes of this section." (The commenter's recommended new language is italicized.)

Response: An entity that holds a permit, license or certificate of authority issued by a state regulatory agency may not have in its databases the information that would enable HHSC's contractor to carry out the purpose of the statute. The entity's information that would enable HHSC's contractor to carry out the purpose of the statute may be in the possession of the entity's third party administrator's database. The wording "provide access to their databases or their administrator's databases" will be added to the MOU. The rule language was not changed in response to the comment.

Comment: HHSC received several comments relating to privacy and the confidentiality of database information. WellCare of Texas, Inc., pointed out that many of the entities that hold permits, licenses or certificates of authority issued by the state regulatory agency are covered by the Health Insurance Portability and Accountability Act (HIPAA). WellCare further commented that, while the proposed rule cites HIPAA regulations and requires that the contractor ensure the security of information obtained and maintain the confidentiality of the client's health records, the proposed HHSC rule does not require the same protection for the protected health information of other individuals whose information is in the databases. Further, the HIPAA rules do not permit covered entities to disclose protected health information (PHI) for individuals who are not enrolled in the Medicaid program. Wellcare of Texas, Inc., recommended that: access should be limited to information necessary to determine whether a particular entity has primary responsibility; the privacy protections should be broader; and the rule should specifically require the contractor to enter into a HIPAA business associate agreement with each HIPAA-covered entity.

WellCare of Texas, Inc., also stated that many entities that hold permits, licenses or certificates of authority develop and maintain systems and databases through confidential and proprietary means, including entering into licensing and confidentiality agreements with third parties. In addition, the data in the databases is owned by the entity. Wellcare of Texas, Inc., recommended that the proposed rule should include protections for the entities' confidential and proprietary information and ownership interests. The commenter also recommended that the contractor: should be required to obtain consent from any third party that has a proprietary interest before using or accessing the databases; and should be required to enter into agreements with HHSC or its designee and the particular entity that would include: an acknowledgement that the entity owns the data; an agreement to return or destroy the data once the purpose for obtaining the data is accomplished; an agreement to maintain the confidentiality of the entity's confidential and proprietary information; and to use the confidential and proprietary information solely for determining whether a particular entity has primary responsibility.

WellCare of Texas, Inc., further stated that adopted rule 354.1189 should include details about the contractor's responsibilities, such as specifying a reliable process for the contractor to identify an entity with primary responsibility for paying a claim. It should also specify the type of information that should be in the report from the entity and the method for providing the report (e.g. electronic file).

America's Health Insurance Plans and Unicare expressed that the implementation of these provisions as currently drafted creates significant concerns related to maintaining compliance with the "minimum necessary" requirements under the federal HIPAA privacy standards, as well as the HIPAA information security standards and the information technology records maintenance requirements of the Sarbanes Oxley law. The commenters also expressed concern that the proposed changes could have serious HIPAA implications and would create a less efficient approach to coordination of Medicaid benefits.

America's Health Insurance Plans also recommended that HHSC consider an alternative approach that builds on the current system and avoids the privacy implications that are created by the broad approach adopted in the proposed rule. The suggested alternative approach obligates the entity to disclose the necessary information related to the entity's Medicaid fee-for-service and primary care case management business to HHSC, or its designee, within a reasonable timeframe after receiving a request for the data. Many insurance companies already have systems and processes in place to provide state regulators with information on the company's policyholders through an electronic file transfer. The commenter believes this approach allows the insurance company to remain in compliance with federal standards while, at the same time, providing the state with the necessary information to coordinate benefits for Medicaid beneficiaries.

The Texas Association of Business requested that there be an option for appropriate entities to transfer files to the appropriate HHSC contractor. Much of the information in a carrier's databases is proprietary and unnecessary for HHSC to determine whether another entity has primary payor responsibility. The commenter believes that through a determined file transfer methodology, appropriate privacy can be maintained while still giving the State the needed information.

Response: HHSC's contractor, in consultation with the insuring entity, will determine how the data transfers will operate. This information will be detailed in the MOU between HHSC and the insuring entity. The new final rule is in the interest of assuring correct payments for Medicaid services and is in compliance with HIPAA regulations. Language will be added to the MOU relating to the Business Associate Agreement. Entities must enter into a Business Associate Agreement with HHSC's contractor (AIM), acting on behalf of HHSC. The rule language was not changed in response to these comments.

Comment: The American Council of Life Insurers asked that the MOU allow a regulated entity to affirm that it does not pay claims for acute care services that would otherwise be paid for by Medicaid and that its databases would not contain the type of information sought by HHSC.

Response: The cover letter to be sent with the MOU will allow an entity to claim/confirm that its coverage does not pay claims for the types of acute care services provided under the Medicaid program. HHSC or its designee will address each occurrence. The rule language was not changed in response to this comment.

Comment: Unicare stated its belief that the billing coordination system in Section 2 of S.B. 10 was sought by a potential vendor of the billing coordination services. The commenter remarked that such had been the case in several other states in which similar legislation had been defeated. Unicare believes that this fact calls into question the "special interest" nature of this proposal

and whether or not it is in the best interest of the state's Medicaid recipients, HHSC, and the tax paying public.

Response: Based on S.B. 10, passed by the 80th Texas Legislature (2007) and HHSC's determination that the Medicaid billing coordination system is cost effective and feasible, HHSC plans to implement the system in September 2008. The rule language was not changed in response to the comment.

Comment: HHSC received a number of comments concerning the scope of entities and policies potentially covered by the rule.

Equitable Life & Casualty stated that neither the rule nor the MOU is clear about insurance policies that are considered secondary or supplemental coverage. The commenter asked HHSC to clarify whether the rule intends to include Medicare Supplement policies, individuals with multiple active coverages, and limited benefit policies, such as a hospital indemnity policy.

The ACLI asked that the scope of the proposed rule be limited to products that would pay for items and services that would otherwise be paid for by Medicaid. The commenter stated that its member companies doing business in Texas are regulated entities for purposes of S.B. 10 and the proposed rule, but the products sold by its member companies in Texas are not designed to pay claims for the types of acute care services provided under the Medicaid program. ACLI contended that its member companies participation in the billing coordination system places undue burdens and costs on these insurers while providing no useful, productive data to HHSC's billing coordination system.

AFLAC is a carrier offering hospital indemnity, specified disease, accident-only, and disability income insurance policies in Texas. Hospital indemnity, specified disease, accident-only, and disability income insurance policies are not considered traditional health insurance or health benefit plan coverage. The commenter believes the legislative intent behind S.B. 10 provides sufficient guidance to limit the applicability of the rule to those entities that may in fact have primary payor responsibility. Because the federal Deficit Reduction Act of 2005 (DRA) is the basis for S.B. 10, the commenter believes there is sufficient statutory intent to incorporate the DRA's definition of the entities that may have primary payor responsibility. AFLAC stated that this is further supported by the language of Texas Government Code §531.02413(b), which outlines the purpose of the system as identifying an entity that "may have a contractual responsibility to pay for the types of acute care services provided under the Medicaid program." In light of this, the commenter recommended revising the proposed rule by adding the following DRA language to the end of Section 354.1189(l): "Entities subject to this section are those entities that are, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service."

Unicare stated that, in its opinion, S.B. 10 contemplates access to data on new classes of health benefit coverage entities, such as third party administrators, workers' compensation carriers, and auto liability and other property and casualty insurers and asked that HHSC consider this interpretation.

The Texas Association of Business stated its belief that the language in the rule, as well as the legislation, casts too wide a net by requiring every entity licensed by the Texas Department of Insurance to be subject to the legislation. The commenter believes it is neither cost effective nor feasible to open the databases of every licensed entity. It believes that it is most cost effective and most appropriate to include first tier health care providers only.

Response: HHSC will add a sentence to §354.1189(1) to clarify that "Entities subject to this section are those entities that are, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service.

Comment: Equitable Life & Casualty stated that the final rule or the MOU should state that the parties will work cooperatively to agree to the frequency, method, and form of the data supplied. The commenter's preferred method is an FTP site where it could upload a file.

WellCare of Texas, Inc., stated that, given the reporting requirement in Texas Government Code §531.02413(b), it is not clear that access to databases is necessary. WellCare also expressed concern that the proposed rule does not contain any guidance on the nature, the amount or the type of access the contractor will have to the databases, nor does the rule acknowledge the differences between different entities' databases. Because the Legislature conditioned access on cost-effectiveness and feasibility, the rule should include some limits.

Unicare stated that the implementation of a direct data access system that would attempt to determine Medicaid eligibility and or primary responsibility for health benefit claims would present a logistical nightmare for the agency. The commenter disagreed that access to the data of millions of privately insured individuals would result in anything more than the data match system currently in place and that the system, if feasible, would be far less efficient than the data match system currently in place.

America's Health Insurance Plans believes that the proposed rule, as currently drafted, requires "an entity holding a permit, license, or certificate of authority issued by a state regulatory agency" to grant HHSC, or its designee, access to the entity's databases. The commenter expressed concern that this language could be interpreted to require carriers to provide broad access to databases, which could include information outside of the Medicaid fee-for-service and primary care case management arena.

Response: The "frequency, method and form of data to be determined by HHSC or its designee" will be added to the language of the MOU. The rule language was not changed in response to these comments.

Comment: TAHP asked for clarification that the information collected may be used only for the limited purpose of the statute.

Response: This is addressed in §354.1189(1), which states "An entity holding a permit, license, or certificate of authority issued by a state regulatory agency must allow HHSC or its designee to access databases that enable it to carry out the purposes of this section." Information will be used only for purposes of the acute care billing coordination system. The rule language was not changed in response to the comment.

The new rule is adopted under the 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.

§354.1189. Acute Care Billing Coordination System.

The Acute Care Billing Coordination System is mandated by the Government Code §531.02413. The Health and Human Services Commission (HHSC or Commission) will develop and implement an acute care Medicaid billing coordination system for the fee-for-service and pri-

mary care case management delivery models that identifies whether another entity has primary payor responsibility.

(1) An entity holding a permit, license, or certificate of authority issued by a state regulatory agency must allow HHSC or its designee to access databases that enable it to carry out the purposes of this section. Entities subject to this section are those entities that are, by statute, contract or agreement, legally responsible for the payment of a claim for a health care item or service.

(2) HHSC shall refer any entity that violates this rule to the regulatory agency issuing the permit, license, or certificate of authority for possible administrative sanction.

(3) After September 1, 2008, no public funds shall be expended on entities not in compliance with this section unless a memorandum of understanding is entered into between the entity and the Commission.

(4) Information obtained under this section must be secure and maintain the confidentiality of the client's health records in compliance with security and privacy rules adopted by the U.S. Department of Health and Human Services under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F.R. §§164.302 - 164.318 and §§164.500 - 164.534.

(5) The administrator of the acute care Medicaid billing coordination system shall be determined by HHSC. The administrator shall be responsible for meeting all requirements of the acute care Medicaid billing coordination system.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804250
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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Proposal publication date: May 23, 2008
For further information, please call: (512) 424-6900

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1 TAC §354.1190

The Texas Health and Human Services Commission (HHSC) adopts new §354.1190, regarding the Medicaid Provider Database, in Title 1, Part 15, Chapter 354, Subchapter A, Division 11, concerning General Administration for Purchased Health Services. This rule is adopted without changes to the proposed text as published in the May 23, 2008, issue of the *Texas Register* (33 TexReg 4060), and will not be republished.

Pursuant to House Bill 2042, 80th Legislature, Regular Session, 2007, new §354.1190 establishes an electronic, searchable Internet-based database of all participating providers in the Texas Medicaid program. House Bill 2042 required HHSC to develop an electronic database of physicians, hospitals, and other health care providers participating in the state Medicaid program. HHSC had already developed a provider database that satisfies the requirements of House Bill 2042 pursuant to one of the requirements of the Frew Corrective Action Order. HHSC implemented this database on December 1, 2007.

This database will help Medicaid providers and recipients to determine which physicians and other providers participate in Medicaid, and of those who are, which are accepting new patients. The online provider lookup is located on the Texas Medicaid & Healthcare Partnership (TMHP) web site at www.tmhp.com.

The 30-day comment period ended June 23, 2008, during which HHSC did not receive any comments on the proposed rule.

The new rule is adopted 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 authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2008.

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For further information, please call: (512) 424-6900

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CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER J. PURCHASED HEALTH SERVICES
DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8061, §355.8069

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.8061, concerning payment for hospital services, and §355.8069, concerning supplemental payments to certain rural public hospitals, in Title 1, Part 15, Chapter 355, Subchapter J, Division 4, concerning Medicaid Hospital Services.

Section 355.8061 is adopted without changes to the proposed text as published in the April 18, 2008, issue of the *Texas Register* (33 TexReg 3095). However, the text of the rule will be republished. The April 18th proposal added new subsection (a)(4)(C) to §355.8061. However, while the April 18th amendment was still pending, HHSC inadvertently published a second amendment to §355.8061 in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4279). The May 30th amendment revised subsection (a)(1), was adopted in the July 25, 2008, issue of the *Texas Register* (33 TexReg 5913) without changes, and was not republished. Section 355.8061 is being republished here in its entirety to reflect the April 18th amendment and to show the incorporation of the May 30th amendment. The May 30th amendment became effective August 3, 2008. Although adopted without changes to the April 18th and the May 30th proposed amendments, the rule is being republished as a convenience to the public and does not nullify the adoption or the effective date of the May 30th amendment.

Section 355.8069 is also adopted without changes to the proposed text as published in the April 18, 2008, issue of the *Texas Register* (33 TexReg 3095) and will not be republished.

The purpose of the amendments is to make changes to the Non-State-Owned Rural Public Hospital supplemental payment program (also known as the upper payment limit, or UPL, program for rural public hospitals). As a result of these amendments, the State will obtain additional federal revenue for non-state-owned rural public hospitals that participate in the Medicaid program.

The amendment to §355.8061 adds outpatient services to the supplemental payment calculation for non-state-owned rural public hospitals. Outpatient services are being added to the supplemental payment calculation for rural public hospitals because they are part of the Texas Medicaid safety net hospitals. This amendment will support these hospitals in their mission to serve Medicaid recipients. The intergovernmental transfer (IGT) to support the non-federal share of the outpatient supplemental payment will be provided by the individual eligible hospitals.

The amendment to §355.8069 changes the Medicaid charge deficit criteria from 1 percent to 0.5 percent for inpatient services. Currently, certain rural public hospitals whose Medicaid deficit (the difference between Medicaid fee-for-service billed charges and total Medicaid payments) is at least 1 percent of the total Medicaid deficit for all participating rural public hospitals provide the IGTs for the rural public hospital UPL program. Changing the deficit criteria from 1 percent to 0.5 percent allows for an increase in the number of qualified providers who would provide intergovernmental transfers and, therefore, increases the amount of supplemental payments to eligible providers.

HHSC submitted the state plan amendment containing these changes to the Centers for Medicare and Medicaid Services (CMS) on August 28, 2007. The associated amendment will be implemented on the effective date of this rule, which will be September 1, 2007.

The 30-day comment period for these amendments closed on May 19, 2008. HHSC received one comment from the Texas Organization of Rural & Community Hospitals (TORCH), which was in support of the proposed changes to these rules.

The amendments are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; 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, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursement.

§355.8061. Payment for Hospital Services.

(a) The Health and Human Services Commission (commission) or its designated agent shall reimburse hospitals approved for participation in the Texas Medical Assistance Program for covered Title XIX hospital services provided to eligible Medicaid recipients. The Texas Title XIX State Plan for Medical Assistance provides for reimbursement of covered hospital services to be determined as specified in paragraphs (1) - (4) of this subsection.

(1) The amount payable for inpatient hospital services shall be determined as specified in §355.8052 of this title (relating to Inpatient Hospital Reimbursement Methodology); §355.8054 of this title (relating to Children's Hospital Reimbursement Methodology); §355.8056 of this title (relating to State-Owned Teaching Hospital Reimbursement Methodology) and §355.8063 of this title (relating to Reimbursement Methodology for Inpatient Hospital Services).

(2) The amount payable for outpatient hospital services shall be determined under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982 through July 31, 2000, by Public Law 97-248, except as may be otherwise specified by the Health and Human Services Commission. For the period of September 1, 1999 through and including September 30, 2001, payments to all providers were at 80.3% of allowed costs. For the period beginning October 1, 2001, Medicaid reimbursement for outpatient hospital services for high-volume providers, as defined by the commission, shall be at 84.48% of allowable cost. For the remaining providers, reimbursement for outpatient hospital services shall be at 80.3% of allowable cost. For the purpose of establishing the proposed discount factor, a high-volume provider is defined as one, which is paid at least $200,000 during calendar year 2004. Any subsequent changes to the discount will require HHSC to hold a public hearing on proposed reimbursements before the HHSC approves any changes. The purpose of the hearing is to give interested parties an opportunity to comment on the proposed reimbursements. Notice of the hearing will be provided to the public. The notice of the public hearing will identify the name, address, and telephone number to contact for the materials pertinent to the proposed reimbursements. At least ten working days before the public hearing takes place, material pertinent to the proposed change will be made available to the public. This material will be furnished to anyone who requests it. After the public hearing, if negative comments are received, a summary of the comments made during the public hearing will be presented to the HHSC. Reimbursement for outpatient hospital surgery is limited to the lesser of the amount reimbursed to ambulatory surgical centers (ASCs) for similar services, the hospital's actual charge, the hospital's customary charge, or the allowable cost determined by the commission or its designee.

(3) Variances shall be accounted for in the Texas State Plan for Medical Assistance or as otherwise specified by the commission.

(4) Notwithstanding other provisions of this chapter and subject to the availability of funds, supplemental payments will be made each state fiscal year in accordance with this paragraph to eligible hospitals that serve high volumes of Medicaid and uninsured patients.

(A) Supplemental payments are available under this paragraph for outpatient hospital services provided by a non-state owned or operated, publicly-owned hospital or hospital affiliated with a hospital district in Bexar, Dallas, Ector, El Paso, Harris, Lubbock, Nueces, Tarrant, and Travis counties on or after July 6, 2001. Supplemental payments will be made for outpatient services on or after June 11, 2005, for Midland, Potter, and Randall Counties.

(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, all hospitals that are eligible to receive funding under §355.8063(t)(4) of this title shall also be eligible to receive funding under this paragraph. Supplemental payments will be made for outpatient services on or after June 11, 2005, for hospitals in Hidalgo, Maverick, Montgomery, Travis, Bexar, and Webb counties. Supplemental payments will be made for outpatient services on or after November 12, 2005, for eligible hospitals in all other counties in the State of Texas.

(C) Notwithstanding the provisions of subparagraphs (A) and (B) of this paragraph, all hospitals that are eligible to receive funding under §355.8069 of this title (relating to Supplemental Payments to Certain Rural Public Hospitals) shall also be eligible to

receive funding under this paragraph. Supplemental payments are available under this section for outpatient hospital services provided by certain rural public hospitals on or after September 1, 2007.

(D) State funding for supplemental payments authorized under this paragraph will be limited to and obtained through intergovernmental transfers of local or hospital district funds. State funding for supplemental payments authorized under subparagraph (B) of this paragraph will be limited to and obtained through intergovernmental transfers of local governmental entity or hospital district funds or transfer of State General Revenue. The supplemental payments described in this subsection will be made in accordance with the applicable regulations regarding the Medicaid upper payment limit provisions codified at 42 C.F.R. §447.321.

(E) The non-state owned or operated, publicly-owned hospital or hospital affiliated with a hospital district in a county listed in subparagraph (A) of this paragraph that incurs the greatest amount of cost for providing services to Medicaid and uninsured patients will be eligible to receive supplemental payments. Any hospital eligible under subparagraph (B) of this paragraph will be eligible to receive supplemental payments. The supplemental payments authorized under this subsection are subject to the following limits:

(i) In each state fiscal year the amount of inpatient supplemental payments and outpatient supplement payments may not exceed the hospital's "hospital specific limit," as determined under §355.8065(f)(2)(E) of this title (relating to Reimbursement to Disproportionate Share Hospitals (DSH)) for DSH hospitals; and

(ii) The amount of outpatient supplemental payments and fee-for-service Medicaid outpatient payments the hospital receives in a state fiscal year may not exceed Medicaid billed charges for outpatient services provided by the hospital to fee-for-service Medicaid recipients in accordance with 42 C.F.R. §447.325.

(F) An eligible hospital will receive quarterly supplemental payments. The quarterly payments will be limited to one-fourth of the difference between the hospital's Medicaid fee-for-service outpatient Medicaid payments received and 100% of Medicaid allowable outpatient hospital cost. Medicaid payments and cost will be based on a twelve consecutive-month period of fee-for-service claims data selected by HHSC.

(G) For purposes of calculating the "hospital specific limit" under this paragraph, the "cost of services to uninsured patients" and "Medicaid shortfall," as defined by §355.8065(b)(5) and (16) of this title, will be adjusted as follows:

(i) the amount of Medicaid payments (including inpatient and outpatient supplemental payments) that exceed Medicaid cost will be subtracted from the "Medicaid Shortfall."

(ii) The amount of the "Medicaid shortfall," as adjusted in accordance with clause (i) of this subparagraph, will be subtracted from the "cost of services to uninsured patients" to ensure that, during any state fiscal year, a hospital does not receive more in total Medicaid payments (inpatient and outpatient payments, graduate medical education payments, supplemental payments and disproportionate share hospital payments) than its cost of serving Medicaid patients and patients without health insurance.

(5) Notwithstanding other provisions of this attachment, supplemental payments will be made each state fiscal year in accordance with this subsection to state government-owned or operated hospitals for outpatient services provided to Medicaid patients.

(A) Supplemental payments are available under this subsection for outpatient hospital services provided by state government-owned or operated hospitals on or after December 13, 2003. To qualify for a supplemental payment, the hospital must be owned or operated by the state of Texas.

(B) The aggregate supplemental payment amount will be the annual difference between the aggregate upper payment limit and the outpatient fee-for-service Medicaid payments made to the state government-owned or operated hospitals under this attachment. The aggregate upper payment limit will be calculated, based on Medicare payment principles and in accordance with the federal upper limit regulations at 42 CFR §447.321, using the most recent cost report data available.

(C) The amount of the supplemental payment made to each state government-owned or operated hospital will be determined by:

(i) dividing each hospital's fee-for-service Medicaid payments by the sum of the Medicaid fee-for-service payments of all state government-owned of operated hospitals; and

(ii) multiplying the percentage calculated in clause (i) of this subparagraph by the aggregate supplemental payment calculated in subparagraph (B) of this paragraph.

(D) Supplemental payments determined under this subsection will be calculated annually and paid quarterly.

(E) Supplemental payments made under this subsection when combined with other outpatient payments made under this attachment shall not exceed the maximum amounts allowable under applicable federal regulations at 42 CFR §447.325.

(b) Title XIX providers may not carry forward those unreimbursed costs attributed to either the lower costs or charge limitations authorized by 42 Code of Federal Regulations §405.455 et seq., effective for all accounting periods beginning on or after January 1, 1982.

(c) The direct and indirect costs of caring for charity patients shall have no relationship to eligible recipients of the Texas Medical Assistance program and are not allowable costs under the Texas Title XIX Medical Assistance program. Obligations by hospitals to provide free care, under the Hill-Burton Act or any other arrangement as a condition to secure federal grants or loans, are not recognized as a cost under the Texas Medical Assistance program.

(d) The contents of subsections (a) - (c) of this section do not describe the amount, duration, or scope of services provided to eligible recipients under the Texas Medical Assistance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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1 TAC §355.8065

The Health and Human Services Commission (HHSC) adopts an amendment to §355.8065, concerning additional reimbursement

to disproportionate share hospitals (DSH), with changes to the proposed text as published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5115), and will be republished. The rule changes clarify current practices as well as make changes to the processes used to determine, review, and audit DSH payments. The adopted rule will become effective on September 1, 2008.

One of the purposes of the rule is to more equitably distribute federal DSH funds among Texas hospitals. Since there is a set amount of aggregate DSH money available to Texas hospitals, if one hospital receives more DSH money, other hospitals receive less. HHSC proposes to standardize a number of DSH program elements among hospitals participating in the DSH program to create consistent requirements for all hospitals.

In subsections (d)(5) and (e)(5), HHSC proposed to lower the threshold by which small urban hospitals qualify for DSH funding, which will allow some hospitals that serve as important safety nets in their areas to qualify for funding.

In subsection (f)(4)(C), HHSC proposed to lower weights used in the current DSH formula that are applied to certain hospital districts' Medicaid and low-income days. The effect of this change is to emphasize in the formula each DSH provider's actual number of inpatient days for Medicaid and low-income patients.

The rule also incorporates assurances given by HHSC to the Centers for Medicare and Medicaid Services (CMS). After an audit by the federal Health and Human Services Office of Inspector General, HHSC agreed to add DSH rule language to codify its administrative practices relating to: calculating cost-to-charge ratios, handling Medicaid profits in calculating a hospital's Medicaid shortfall, and calculating uninsured costs.

In conjunction with an amendment to 1 Texas Administrative Code §355.8063(u), which discontinues high volume payments made annually to approximately 60 private urban hospitals, the amended rule removes conversion factors to restore DSH funds to these same hospitals. The amendment to §355.8063(u) was proposed in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4280).

Finally, the changes in subsections (f)(2) and (i) relate to Medicaid reform initiatives at Chapter 531 of the Texas Government Code, Subchapter N, Texas Health Opportunity Pool Trust Fund. HHSC submitted a Medicaid reform waiver request to CMS on April 16, 2008, with a comprehensive plan to transform health care in Texas by providing more people with insurance, reducing reliance on expensive emergency room visits for basic care, and making it easier for the working poor to buy into employer-sponsored health coverage. HHSC proposes to use a portion of the DSH funds that are the subject of these amendments to help finance the reform.

Comments

HHSC received 18 written comments during the 30-day comment period from hospitals, hospital systems and hospital advocacy organizations. These comments came from Wadley Hospital, DeTar Healthcare Systems, Community Healthcare System, Shannon Medical Center, the Texas Organization of Rural and Community Hospitals (TORCH), the Texas Association of Public and Nonprofit Hospitals (TAPNH), the Texas Coalition of Transferring Hospitals, St. Joseph Regional Hospital, the Travis County Healthcare District (TCHD), the Texas Hospital Association (THA), Texas Health Resources, Trinity Mother Frances Healthcare System, Trinity Mother Frances Jacksonville, Cedar Crest Hospital, Scott & White Hospital, Baylor University Medical Center, the Catholic Health Association of Texas and the Hospital Corporation of America. A summary of the comments and HHSC's responses follows.

Comment: HHSC received comments supporting its plan to redistribute DSH funds following recoupment after an overpayment to a DSH provider.

Response: HHSC appreciates the support of this rule change and believes that the new rule language will be beneficial to HHSC and the provider community. The rule language was not changed in response to this comment.

Comment: HHSC received comments opposing its plan in subsection (i) to withdraw funds from the DSH program when a DSH provider voluntarily withdraws from the DSH program. The commenters seek, instead, to have these DSH funds redistributed to other DSH providers. One commenter believes that the plan to make a hospital that voluntarily withdraws from the DSH program ineligible for DSH funding for three years is excessive, punitive and without purpose.

Response: The proposed change to subsection (i) is contingent on HHSC's successfully obtaining federal approval of its Medicaid reform waiver. The proposed amendment supports HHSC's Medicaid reform efforts to transform health care in Texas by providing more people with insurance, reducing reliance on expensive emergency room visits for basic care, and making it easier for the working poor to buy into employer-sponsored health coverage. Should the waiver be approved, hospitals that remain in the DSH program will receive the same amount in DSH funding that they would have received had the exiting hospital remained in the DSH program. HHSC believes that the three-year ineligibility period protects the hospitals remaining in the program by stabilizing the DSH allocation for the remaining DSH hospitals for a period of three years. The rule language was not changed in response to these comments.

Comment: HHSC received comments opposed to using the Centers for Medicare and Medicaid Services (CMS) Prospective Payment System (PPS) Market Basket Index exclusively for DSH inflationary rates. The commenters asked that HHSC continue to use the greater of the PPS Market Basket Index or the Texas-specific medical care component of the Consumer Price Index. Commenters requested that HHSC clarify that the PPS Market Basket Index would not reflect any decreases to that figure required by Congress.

Response: HHSC has employed the greater of the CMS PPS Market Basket Index and the Texas-specific medical component of the Consumer Price Index in the past for hospital reimbursement. However, applying the greater of the two indexes may have skewed the rates higher or lower over time. HHSC decided to use the CMS PPS Market Basket Index because CMS uses this index as the trend factor for inflationary cost. HHSC will use the CMS PPS Market Basket Index as published by CMS for the inpatient cost-of-living increase calculations. The rule language was not changed in response to the comment.

Comment: HHSC received comments strongly supporting significant liquidated damages for fiscal intermediaries that submit late or inaccurate data to the state.

Response: HHSC will consider this comment when it develops provisions for liquidated damages for fiscal intermediaries. The rule language was not changed as a result of this comment.

Comment: HHSC received comments recommending it share the methods used to determine sample size with the audited hospitals for their review of the sampling methodology.

Response: HHSC will consider this comment when it develops the methods to determine audit sample sizes. The rule language was not changed in response to the comment.

Comment: HHSC received several comments stating that it was premature to include Medicaid reform language in the proposed rule.

Response: The language related to Medicaid reform was included here to facilitate timely implementation of the waiver should CMS approve the waiver. The proposed language related to Medicaid reform is contingent on HHSC's successfully obtaining federal approval of its Medicaid reform waiver. If CMS does not approve the waiver, these provisions will not impact DSH hospitals. The rule language was not changed in response to this comment.

Comment: HHSC received several comments stating that it should provide more detail to assure that hospitals will be held harmless during Medicaid reform.

Response: HHSC will work with hospitals to ensure that a hospital's DSH funds will not decrease by more than its increase in Medicaid inpatient or outpatient hospital payment rates. HHSC will share hospital-specific detail with specific hospitals and the hospital industry when it becomes available. The rule language was not changed in response to this comment.

Comment: HHSC received several comments urging it not to proceed with its Medicaid reform proposals until it convenes a hospital industry workgroup to examine operational and policy issues in more detail.

Response: The language related to Medicaid reform was included here to facilitate timely implementation of the waiver should CMS approve the waiver. HHSC has coordinated with the hospital industry on the proposed rule, and will continue to work with the hospital industry on future operational and policy issues. The rule language was not changed in response to this comment.

Comment: HHSC received several comments criticizing the plan to include outpatient funds as a mechanism to fund the Health Opportunity Pool.

Response: The proposed change to include outpatient funds as a mechanism to fund the Health Opportunity Pool is contingent on HHSC's successfully obtaining federal approval of its Medicaid reform waiver. The proposed amendment supports HHSC's Medicaid reform efforts to transform health care in Texas by providing more people with insurance, reducing reliance on expensive emergency room visits for basic care, and making it easier for the working poor to buy into employer-sponsored health coverage. The rule language was not changed in response to this comment.

Comment: HHSC received comments criticizing it for planning to reduce DSH providers' DSH funds in exchange for inpatient funding increases, while non-DSH providers would retain inpatient funding increases.

Response: Senate Bill 10, 80th Legislature, Regular Session, 2007, lays out how the Health Opportunity Pool (HOP) may be funded. Senate Bill 10 allows HHSC to use DSH funds to fund the HOP if hospital rates are increased. Based on this authority, DSH funds will be moved to the HOP only if there are corresponding rate increases to DSH hospitals. Senate Bill 10 does not, however, provide authority for HHSC to fund the HOP based on rate increases to non-DSH hospitals. The rule language was not changed in response to this comment.

Comment: HHSC received a comment opposing its plan to substitute increased Medicaid reimbursement for DSH funding because increasing inpatient payment rates would not hold Travis County Hospital District harmless, because the leased University Medical Center at Brackenridge would get the funding increase rather than the hospital district.

Response: HHSC believes that this issue is one that may be resolved by the Travis County Hospital District and the company that leases the University Medical Center at Brackenridge. The rule language was not changed in response to this comment.

Comment: HHSC received a comment criticizing its plan to substitute increased Medicaid reimbursement for DSH funding because rebased inpatient Medicaid rates are not guaranteed to increase. The commenter believes future utilization will show if any increase rates actually balance out the loss of DSH funding.

Response: HHSC will work with hospitals to ensure that a hospital's DSH funds will not decrease by more than its increase in Medicaid inpatient or outpatient hospital payment rates. DSH funds will not be recouped from a DSH provider who does not receive an increase in its Medicaid inpatient standard dollar amount (SDA). The rule language was not changed in response to this comment.

Comment: HHSC received a comment supporting its use of adjudicated data rather than billed data in DSH calculations.

Response: HHSC appreciates the support of this rule change and believes that the new rule language will be beneficial to HHSC and the provider community. The rule language was not changed in response to this comment.

Comment: HHSC received several comments supporting its elimination of six conditions of participation.

Response: HHSC appreciates the support of this rule change and believes that the new rule language will be beneficial to HHSC and the provider community. The rule language was not changed in response to this comment.

Comment: HHSC received comments pointing out that its language in §355.8065(d)(3), "a low-income utilization rate exceeding 25 percent but not more than 100 percent" would prohibit a hospital with a low income utilization rate above 100 percent from qualifying for DSH reimbursement.

Response: Based on this comment, HHSC revised §355.8065(d)(3) to read "a low-income utilization rate exceeding 25 percent." The language "but not more than 100 percent" was removed from the adopted rule language.

Comment: HHSC received comments pointing out that its definition of "total state and local revenue" in §355.8065(d)(3)(A) is inconsistent with its definition of "total state and local revenue" in §355.8065(b)(26), which defines "total state and local revenue" as "payments a hospital received for inpatient care."

Response: Based on this comment, HHSC revised §355.8065(d)(3)(A) to clarify that "total state and local revenue" is limited to payments for inpatient care. This is consistent with the definition in of "state and local revenue" in §355.8065(b)(26).

Comment: HHSC received comments supporting its elimination of conversion factors.

Response: HHSC appreciates the support of this rule change and believes that the new rule language will be beneficial to HHSC and the provider community. The rule language was not changed in response to this comment.

Comment: HHSC received many comments opposing the weights used for Medicaid days and low-income days in §355.8065(f)(4)(C). Many commenters asked that HHSC revise the weights for Medicaid inpatient days and low-income days.

Response: Based on these comments, HHSC reviewed and changed some of the weights in §355.8065(f)(4)(C). Metropolitan Statistical Areas (MSAs) with populations greater than or equal to 121,000 and less than 300,000 are weighted at 2.5. MSAs with populations greater than or equal to 300,000 and less than 1,000,000 are weighted at 2.75. MSAs with populations greater than or equal to 1,000,000 and less than 3,000,000 are weighted at 3.0. MSAs with populations greater than or equal to 3,000,000 are weighted at 3.5.

Comment: HHSC received comments supporting its decision to drop the qualifying threshold for small urban hospitals from 75 to 70 percent of the sum of the mean Medicaid days and one standard deviation of Medicaid days for urban hospitals in counties with populations under 250,000 persons.

Response: HHSC appreciates the support of this rule change and believes that the new rule language will be beneficial to HHSC and the provider community. The rule language was not changed in response to this comment.

Comment: HHSC received comments suggesting alternative language in §355.8065(d)(5) in support of its decision to drop the qualifying threshold for small urban hospitals from 75 to 70 percent of the sum of the mean Medicaid days and one standard deviation above the mean Medicaid inpatient days for urban hospitals in counties with populations under 250,000 persons.

Response: Proposed §355.8065(d)(5) reads, in part, "Total Medicaid inpatient days at least 70 percent of a figure calculated by adding the mean Medicaid inpatient days plus one standard deviation above the mean Medicaid inpatient days for." The suggested language reads, in part, "Total Medicaid inpatient days at least 70 percent of a figure calculated by adding the mean Medicaid inpatient days and one standard deviation thereof." Suggested language is not materially different from proposed language. The rule language was not changed in response to the comment.

Comment: HHSC received comments suggesting alternative language in §355.8065(e)(5) in support of its decision to drop the qualifying threshold for small urban hospitals from 75 to 70 percent of the sum of the mean Medicaid days and one standard deviation above the mean Medicaid inpatient days for urban hospitals in counties with populations under 250,000 persons.

Response: Proposed §355.8065(e)(5) reads, in part, "HHSC arrays each remaining hospital's total Medicaid inpatient days in descending order. HHSC selects hospitals, located in urban counties with populations of 250,000 persons or less, whose total Medicaid inpatient days is at least 70 percent of a figure calculated by adding the mean Medicaid inpatient days plus one standard deviation above the mean Medicaid inpatient days for all hospitals." The suggested language reads, in part, "HHSC arrays each remaining hospital's total Medicaid inpatient days in descending order. HHSC selects hospitals, located in urban counties with populations of 250,000 persons or less, whose total Medicaid inpatient days is at least 70 percent of a figure calculated by adding the mean Medicaid inpatient days and one standard deviation thereof, for all hospitals." Suggested language is not materially different from proposed language. The rule was not changed in response to the comment.

Comment: HHSC received one comment supporting its decision to exempt hospitals located in counties with fewer than 50,000 persons from being included in the reductions for inpatient funding.

Response: HHSC appreciates the support of this rule change and believes that the new rule language will be beneficial to HHSC and the provider community. The rule language was not changed in response to this comment.

Comment: HHSC received comments supporting its decision to revise the appeal language in the rule.

Response: HHSC appreciates the support of this rule change and believes that the new rule language will be beneficial to HHSC and the provider community. The rule language was not changed in response to this comment.

Comment: HHSC received comments on its treatment of Children's Health Insurance Funds (CHIP) in its definition of "total state and local revenue." Commenters recommended revising §355.8065(b)(26) by deleting the language "payments that are funded entirely with general revenue" and adding clarifying language directing hospitals to include all CHIP non-federal funds.

Response: Throughout the history of the Texas Medicaid DSH program, hospitals have been instructed that payment sources containing federal dollars are not to be included as "state and local revenue." Since Title XXI CHIP program payments contain federal dollars, the rule amendment clarifies that no portion of the payments for Title XXI CHIP clients are to be included as "state and local revenue." The rule language was not changed in response to this comment.

Comment: HHSC received a comment in support of its treatment of Medicaid profit in its calculation of non-reimbursed Medicaid cost.

Response: HHSC appreciates the support of this rule change and believes that the new rule language will be beneficial to HHSC and the provider community. The rule language was not changed in response to this comment.

Comment: HHSC received a comment in support of its calculation of cost-to-charge ratios.

Response: HHSC appreciates the support of this rule change and believes that the new rule language will be beneficial to HHSC and the provider community. The rule language was not changed in response to this comment.

Comment: HHSC received one comment opposing its decision to exclude residential treatment center costs from its calculation of cost-to-charge ratios.

Response: Proposed §355.8065(f)(4)(D)(ii) reads, in part, "The cost-to-charge ratio is an all-payer ratio. HHSC removes from the calculation of the cost-to-charge ratio non-hospital services including, but not limited to, ambulance, rural health clinics, primary home care, home health agencies, hospice, skilled nursing facilities, and residential treatment centers." The commenter asked that HHSC remove residential treatment centers from the list of non-hospital services that will be excluded from the calculation of the cost-to-charge ratio. HHSC is not prepared at this time to accept or reject the request that residential treat-

ment center (RTC) costs not be excluded from the calculation of related disproportionate share hospital (DSH) cost-to-charge ratios. However, HHSC is deleting "residential treatment centers" from §355.8065(f)(4)(D)(ii) pending further research and policy clarification. Removing RTCs from the list of non-hospital services should not be construed to mean that HHSC has determined that RTC services are hospital services or that RTC costs should be included in DSH cost-to-charge ratio calculations.

Legal Authority

The amendment is adopted 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.

§355.8065. Additional Reimbursement to Disproportionate Share Hospitals.

(a) Introduction. Hospitals participating in the Texas Medical Assistance (Medicaid) program that meet the conditions of participation and that serve a disproportionate share of low-income patients are eligible for additional reimbursement from the disproportionate share hospital (DSH) fund. DSH funds are available only to an entity licensed as a hospital by the state. HHSC or its designee shall establish each hospital's eligibility for and amount of reimbursement as specified in this section. For purposes of Medicaid disproportionate share eligibility determination, a multi-site hospital is considered as one provider unless it has separate Medicaid cost reports for each site. Each year, HHSC will mail a DSH application packet to all active Medicaid hospitals. The application packet may request self-reported data HHSC deems necessary to supplement the AHA/THA/DSHS annual hospital survey and the fiscal intermediary data. A hospital may apply for DSH funds annually by completing the application packet by the deadline specified by HHSC in the packet's cover letter. A hospital that fails to submit a complete application by the deadline specified by HHSC will not be eligible to receive DSH funds that year. This section applies to all hospitals that participate in the DSH program other than state-owned teaching hospitals, whose DSH requirements are outlined in §355.8067 of this title (relating to Disproportionate Share Hospital Reimbursement Methodology for State-Owned Teaching Hospitals).

(b) Definitions. For purposes of this section, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) Adjudicated--A hospital claim that is approved or denied for payment by HHSC or its designee, or another payer in the case of non-HHSC programs.

(2) Adjusted hospital specific limit--A hospital specific limit trended forward to account for an inflation update factor since the base year.

(3) Charity care--The unreimbursed cost to a hospital of providing, funding, or otherwise financially supporting health care services on an inpatient or outpatient basis to a person classified by the hospital as financially or medically indigent or providing, funding, or otherwise financially supporting health care services provided to financially indigent patients through other nonprofit or public outpatient clinics, hospitals, or health care organizations.

(4) Charity charges--Total amount of hospital charges for inpatient and outpatient services attributed to charity care in a hospital fiscal year. These charges do not include bad debt charges, contractual allowances or discounts (other than for indigent patients not eligible for medical assistance under the approved Medicaid state plan); that is, reductions or discounts in charges given to other third party payers such as, but not limited to, health care maintenance organizations, Medicare or Blue Cross. The amount of total charity charges must be consistent with the amount reported on the Department of State Health Services (DSHS) annual hospital survey.

(5) Cost of services to uninsured patients--Inpatient and outpatient charges to patients who have no health insurance or other source of third party payment for services provided during the year, multiplied by the hospital's ratio of costs to charges (inpatient and outpatient), less the amount of payments made by or on behalf of those patients. Uninsured patients are patients who have no health insurance or other source of third party payments for services provided during the year. Uninsured patients include those patients who do not possess health insurance that would apply to the service for which the individual sought treatment.

(6) Cost-to-charge ratio (inpatient only)--Total adjudicated inpatient charges for each hospital from all payers, which are converted to cost by dividing the total cost by the total gross patient charges. The cost-to-charge ratio is an all-payer ratio that covers all applicable hospital costs and charges relating to patient care. This ratio does not distinguish between payer types such as Medicare, Medicaid or private pay.

(7) Cost-to-charge ratio (inpatient and outpatient)--Total adjudicated inpatient and outpatient charges for each hospital from all payers, which are converted to cost by dividing the total cost by the total gross patient charges. The cost-to-charge ratio is an all-payer ratio that covers all applicable hospital costs and charges relating to patient care. This ratio does not distinguish between payer types such as Medicare, Medicaid or private pay.

(8) Financially indigent--An uninsured or underinsured person who is accepted for care with no obligation or a discounted obligation to pay for the services rendered based on the hospital's eligibility system.

(9) Gross inpatient revenue--Amount of gross inpatient revenue (charges) reported by the hospital in the appropriate part of the Medicaid cost report it submitted for its fiscal year ending in the previous calendar year. Gross inpatient revenue excludes revenue related to the professional services of hospital-based physicians, swing bed facilities, skilled nursing facilities, intermediate care facilities, and other revenue that is unidentified. The latest available Medicaid cost report will be used in the absence of the cost report for the hospital fiscal year ending in the previous calendar year.

(10) Hospital eligibility criteria--The financial criteria used by a hospital to determine if a patient is eligible for charity care. The system includes income levels and means testing indexed to the federal poverty guidelines; provided, however that a hospital may not establish an eligibility system that sets the income level eligible for charity care lower than that required by counties under the Texas Health and Safety Code, §61.023, or higher, in the case of the financially indigent, than 200 percent of the federal poverty guidelines. A hospital may determine that a person is financially or medically indigent pursuant to the hospital's eligibility system after health care services are provided.

(11) Hospital specific limit--The sum of the following two measurements:

(A) the Medicaid shortfall; and

(B) cost of services to uninsured patients.

(12) Inflation update factor--HHSC or its designee applies a cost of living index to a hospital's unreimbursed Medicaid costs and its cost of treating uninsured patients based on the Centers for Medicare

and Medicaid Services (CMS) Prospective Payment System Hospital Market Basket Index.

(13) Low-income days--Number of days derived by multiplying a hospital's total inpatient census days by its low-income utilization rate.

(14) Low-income utilization rate--The result of the following computation: ((Title XIX inpatient hospital payments plus inpatient payments received from state and local governments) divided by (gross inpatient revenue multiplied by cost-to-charge ratio)) plus ((total inpatient charity charges minus inpatient payments received from state and local governments) divided by (gross inpatient revenue)).

(15) Medicaid inpatient utilization rate--Fraction expressed as a percentage, the numerator of which is the hospital's number of inpatient days attributable to patients who (for these days) were eligible for medical assistance under the Medicaid state plan, and the denominator of which is the total number of the hospital's inpatient days in that period. The term "inpatient day" includes each day in which an individual (including a newborn) is an inpatient in the hospital, whether or not the individual is in a specialized ward and whether or not the individual remains in the hospital for lack of suitable placement elsewhere.

(16) Medicaid shortfall--The cost of services (inpatient and outpatient) furnished to Medicaid patients, less the amount paid under the non-disproportionate share hospital payment method under the state plan.

(17) Medically indigent--A person whose medical or hospital bills after payment by third-party payers exceed a specified percentage of the patient's annual gross income, determined in accordance with the hospital's eligibility system, and the person is financially unable to pay the remaining bill.

(18) Medicare inpatient utilization rate--Medicare inpatient days divided by total inpatient census days.

(19) Payments received--Payments received from uninsured patients from or on behalf of uninsured patients as defined in paragraph (5) of this subsection.

(20) Rural area--Area outside a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA). MSA and PMSA are defined by the United States Office of Management and Budget.

(21) Total inpatient census days--Total number of a hospital's inpatient census days during its fiscal year ending in the previous calendar year.

(22) Total inpatient charity charges--Total amount (excluding bad debt charges) of the hospital's charges for inpatient hospital services attributed to charity care (care provided to individuals who have no source of payment, third-party or personal resources) in a cost reporting period. The total inpatient charges attributable to charity care does not include contractual allowances and discounts (other than for indigent patients not eligible for medical assistance under an approved Medicaid State Plan); that is, reduction or discounts, in charges given to other third-party payers such as but not limited to HMOs, Medicare, or Blue Cross. The amount of total inpatient charity charges must be consistent with the amount reported on HHSC or its designee's annual hospital survey.

(23) Total Medicaid inpatient days--Total number of Title XIX inpatient days based on the latest available state fiscal year adjudicated claims data for patients eligible for Title XIX benefits. The term excludes days for patients who are covered for services which are fully or partially reimbursable by Medicare. The term includes Medicaid-eligible days of care adjudicated by managed care organizations. Total Medicaid inpatient days includes days that were denied payment for reasons other than eligibility. The term excludes days attributable to Medicaid patients between the ages of 21 and 65 who live in an institution for mental diseases. The term includes adjudicated days attributable to individuals eligible for Medicaid in other states. Total Medicaid inpatient days includes days with adjudicated dates between September 1 and August 31 (state fiscal year).

(24) Total Medicaid inpatient hospital payments--Total amount of Title XIX funds, excluding Medicaid disproportionate share funds, a hospital received for adjudicated claims during the latest available state fiscal year for inpatient services. The term includes dollars received by a hospital for inpatient services from managed care organizations. The term includes Medicaid inpatient payments received by a hospital for patients eligible for Medicaid in other states. Total Medicaid inpatient hospital payments includes payments associated with adjudicated claims between September 1 and August 31 (state fiscal year).

(25) Total operating costs--Total operating costs of a hospital during its fiscal year ending in the calendar year before the start of the current federal fiscal year, according to the hospital's Medicaid cost report (tentative, or final audited cost report, if available).

(26) Total state and local revenue--Total amount of state and local payments a hospital received for inpatient care, excluding all Title XIX payments, during its fiscal year ending in the previous calendar year including, but not limited to, County Indigent Health Care, Children with Special Health Care Needs, Kidney Health Care, Children's Health Insurance Program (CHIP) payments that are funded entirely with state general revenue, and tax funds. Payment sources containing federal dollars are not to be included in state and local payments. These sources include, but are not limited to: Children's Health Insurance Program (CHIP) payments funded under Title XXI, Substance Abuse and Mental Health Services Administration, Ryan White Title I, Ryan White Title II, Ryan White Title III, and TRICARE Foundation Health, Medicare, and Medicare/Medicaid contractual funds and allowances. HHSC or its designee adjusts tax dollars for hospitals that report all or none of their tax dollars received as inpatient tax dollars. To make adjustments, HHSC or its designee uses the appropriate parts of the latest available Medicaid cost report in the absence of the cost report for the hospital fiscal year ending in the previous calendar year.

(27) Urban--Area inside an MSA or PMSA.

(28) Weighted low-income days--Low-income days multiplied by an appropriate weighing factor.

(29) Weighted Medicaid days--Medicaid days multiplied by an appropriate weighing factor.

(c) Conditions of participation. Before the beginning of each federal fiscal year, which begins October 1, HHSC or its designee shall survey Medicaid hospitals to determine which hospitals meet the state's conditions of participation.

(1) Trauma system. Disproportionate share hospitals must actively participate in the development of a regional trauma system, which includes obtaining trauma facility designation as defined in the state trauma laws (Health and Safety Code, §§773.111 - 773.120) and Department of State Health Services (DSHS) rules. This condition shall apply only if rules and procedures to designate trauma facilities have been adopted. Exceptions: The following hospitals are exempt from the trauma system condition: State mental and state chest hospitals; psychiatric hospitals licensed by DSHS; and certain hospitals licensed as "special" by DSHS (i.e., long term care hospitals, ventilator hospitals, burn institutes, and alcohol-chemical dependency hospitals);

rehabilitation hospitals; maternity hospitals; college infirmaries; contagious disease hospitals; and hospitals for the terminally ill.

(A) Hospitals qualifying for the disproportionate share program for the first time must meet the regional trauma system development participation requirement in the first year of their participation in the disproportionate share program, regional trauma system development participation and application for trauma facility designation in the second year of their participation in the disproportionate share program, regional trauma system development participation and confirmation that a consultation survey has been scheduled or a complete designation application packet has been submitted to the Office of EMS/Trauma Systems Coordination in the third year of their participation in the disproportionate share program, regional trauma system development participation and confirmation that a verification or designation survey has been scheduled in the fourth year of their participation in the disproportionate share program and continued participation and completed verification or designation survey in the fifth year of their participation in the disproportionate share program, continued participation and trauma facility designation in the sixth year of their participation in the disproportionate share program, and continued participation and maintenance of trauma facility designation in their subsequent years of participation in the disproportionate share program. By March 1 of each year, the Office of EMS/Trauma Systems Coordination reports hospital participation in regional trauma system development, application for trauma facility designation, and trauma facility designation status to the disproportionate share program.

(B) Hospitals shall be designated as trauma facilities under four levels that range from "basic" (stabilization and transfer of major and severe trauma patients) to "comprehensive" (care and management of all trauma patients, plus education and research).

(2) Maintenance of effort. Hospital districts and city/county hospitals with greater than 250 licensed beds in the state's largest MSAs and PMSAs are not eligible for disproportionate share payments if local revenues are reduced as a result of disproportionate share funds received. MSAs with populations greater than or equal to 121,000, according to the most recent decennial census, are considered "the largest MSAs."

(3) Two-physician requirement. In order to qualify for disproportionate share hospital payments, each hospital must have at least two physicians (M.D. or D.O.) who have hospital staff privileges and who have agreed to provide non-emergency obstetrical services to Medicaid recipients. The two-physician requirement does not apply to hospitals whose inpatients are predominantly under 18 years old or that did not offer nonemergency obstetrical services as of December 22, 1987.

(4) Each hospital must have a Medicaid inpatient utilization rate of at least one percent.

(5) A hospital eligible for DSH reimbursement must allow HHSC or its designee to have access to its hospital records and accounting systems during regular business hours.

(d) Qualifying formulas for determining disproportionate share status. HHSC will use the following formulas to identify the qualifying Medicaid disproportionate share providers from among the hospitals that meet the two-physician requirement and the state's other conditions of participation in subsection (c) of this section. In the case of hospitals that have merged to form a single Medicaid provider, HHSC or its designee will aggregate the data points from the individual hospitals that now make up the single provider to determine whether the single Medicaid provider qualifies as a Medicaid disproportionate share hospital. Medicaid disproportionate share hospitals will receive payments if they merge with other hospitals during the fiscal year, if they continue to meet the conditions of participation in subsection (c) of this section. Children's hospitals that do not otherwise qualify as disproportionate share hospitals will be deemed disproportionate share hospitals. The formulas are as follows:

(1) a Medicaid inpatient utilization rate at least one standard deviation above the mean Medicaid inpatient utilization rate for all hospitals participating in the Medicaid program: Title XIX Inpatient Days/Total Inpatient Census Days;

(2) for rural hospitals, a Medicaid inpatient utilization rate greater than the mean Medicaid inpatient utilization rate for all hospitals participating in the Medicaid program; or

(3) a low-income utilization rate exceeding 25 percent. For a hospital, the low-income utilization rate is the sum (expressed as a percentage) of the fractions calculated as follows:

(A) the total Medicaid inpatient payments plus the total state and local revenue paid to the hospital for inpatient care in a hospital's fiscal year, divided by a hospital's gross inpatient revenue multiplied by the hospital's inpatient-only cost-to-charge ratio for the same cost-reporting period: (Title XIX Inpatient Hospital Payments + Total State and Local Revenue)/(Gross Inpatient Revenue x Cost to Charge Ratio).

(B) the total amount of the hospital's charges for inpatient hospital services attributable to charity care (care provided to individuals who have no source of payment, third-party or personal resources), excluding bad debt charges, in a cost reporting period, minus the amount of payments for inpatient hospital services received directly from state and local governments, excluding all Title XIX payments, in a hospital fiscal year, divided by the total amount of the hospital's charges for inpatient services in the hospital in the same period. The total inpatient charges attributable to charity care will not include contractual allowances and discounts (other than for indigent patients not eligible for medical assistance under an approved Medicaid state plan); that is, reductions or discounts in charges given to other third-party payers such as but not limited to HMOs, Medicare, or Blue Cross: (Total Inpatient Charity Charges - Total State and Local Payments)/Gross Inpatient Revenue.

(4) Total Medicaid inpatient days at least one standard deviation above the mean Medicaid inpatient days for all hospitals participating in the Medicaid program.

(5) Total Medicaid inpatient days at least 70 percent of a figure calculated by adding the mean Medicaid inpatient days plus one standard deviation above the mean Medicaid inpatient days, for all hospitals participating in the Medicaid program in urban counties with populations of 250,000 persons or less, according to the most recent decennial census.

(e) Determining disproportionate share status. To determine Medicaid disproportionate share status:

(1) HHSC arrays each hospital's Medicaid utilization rate in descending order. HHSC first selects hospitals whose Medicaid utilization rates are at least one standard deviation above the mean Medicaid inpatient utilization rate for all hospitals participating in the Medicaid program. The state considers these hospitals to be Medicaid disproportionate share hospitals;

(2) HHSC arrays each rural hospital's Medicaid utilization rate in descending order. HHSC then selects rural hospitals whose Medicaid utilization rate is above the mean Medicaid utilization rate for all hospitals participating in the Medicaid program. The state considers these hospitals to be Medicaid disproportionate share hospitals;

(3) HHSC then arrays each remaining hospital's low income utilization rate in descending order. HHSC selects hospitals whose low income utilization rates are greater than 25 percent. The state considers these hospitals to be Medicaid disproportionate share hospitals.

(4) HHSC arrays each remaining hospital's total Medicaid inpatient days in descending order. HHSC selects hospitals whose total inpatient Medicaid days is at least one standard deviation above the mean Medicaid inpatient days for all hospitals participating in the Medicaid program. The state considers these hospitals to be Medicaid disproportionate share hospitals.

(5) HHSC arrays each remaining hospital's total Medicaid inpatient days in descending order. HHSC selects hospitals, located in urban counties with populations of 250,000 persons or less, whose total Medicaid inpatient days is at least 70 percent of a figure calculated by adding the mean Medicaid inpatient days plus one standard deviation above the mean Medicaid inpatient days, for all hospitals participating in the Medicaid program in urban counties of 250,000 persons or less, according to the most recent decennial census. The state considers these hospitals to be Medicaid disproportionate share hospitals.

(f) Reimbursing Medicaid disproportionate share hospitals. HHSC shall reimburse Medicaid disproportionate share hospitals on a monthly basis. Monthly payments will equal one twelfth of annual payments unless it is necessary to adjust the amount because payments will not be made for a full 12-month period, to comply with the annual state disproportionate share hospital allotment, or to comply with other state or federal disproportionate share hospital program requirements. Before the start of the next federal fiscal year, HHSC determines the size of the available funds to reimburse disproportionate share hospitals for the next federal fiscal year, which begins each October 1.

(1) The funds available to reimburse the state chest hospitals equal the total of their adjusted hospital specific limits. The DSH funds available to reimburse state institutes for mental disease (IMDs) are equal to the total of their adjusted hospital specific limit within available DSH funds. If sufficient DSH funds are not available to fully fund adjusted hospital specific limits, then each hospital's funding is adjusted within the DSH funds available under federal law. After DSH funds have been allocated to state chest hospitals and state IMDs, the remaining DSH funds are available for allocation to other qualifying hospitals. The available DSH funds for the remaining hospitals equal the lesser of the funds remaining in the state's annual disproportionate share allotment or the sum of qualifying hospitals' adjusted hospital specific limits.

(2) If HHSC obtains a federal waiver under Section 1115 of the Social Security Act to implement the Medicaid reform provisions in Chapter 531 of the Texas Government Code, Subchapter N, Texas Health Opportunity Pool Trust Fund:

(A) HHSC will subtract from the amount of aggregate DSH funds in a federal fiscal year and subsequent years the estimated aggregate dollar value increase in hospital payments resulting from an increase in Medicaid inpatient or outpatient hospital payment rates for non-state DSH providers approved during the federal fiscal year, if needed to implement the Texas Health Opportunity Pool Trust Fund for the duration of the waiver.

(B) The adjustment prescribed by this subparagraph does not apply to:

(i) a children's hospital,

(ii) an institute for mental disease (IMD),

(iii) a hospital located in a county with 50,000 or fewer persons,

(iv) a hospital that is a Medicare-designated Rural Referral Center (RRC) or Sole Community Hospital (SCH) that is not located in a Metropolitan Statistical Area (MSA) as defined by the U.S. Office of Management and Budget, or

(v) a hospital that is a Medicare-designated Critical Access Hospital (CAH).

(3) Payments for state chest hospitals and state institutes for mental disease (IMDs) are made in the following manner, unless HHSC determines the hospital's proposed reimbursement has exceeded its specific limit.

(A) A state chest hospital that meets the requirements for disproportionate share status and provides inpatient hospital services receives annually up to 100 percent of its adjusted hospital specific limit.

(B) A state IMD that meets the requirements of disproportionate share status and provides inpatient psychiatric services receives up to 100 percent of its adjusted hospital specific limit within available DSH funds. If sufficient DSH funds are not available to fully fund adjusted hospital specific limits, then each hospital's funding is adjusted pro rata within the DSH funds available under federal law. Aggregate payments made to IMD facilities statewide are subject to federally mandated reimbursement limits.

(4) Payments for the remaining hospitals will be made in the following manner, unless HHSC determines the hospital's proposed reimbursement has exceeded its specific limit. Payments will be made based on both weighted inpatient Medicaid days and weighted low-income days. HHSC weights each hospital's total inpatient Medicaid days and low-income days by the appropriate weighting factor. HHSC defines a low-income day as a day derived by multiplying a hospital's total inpatient census days from its fiscal year ending the previous calendar year by its low-income utilization rate. Hospital districts and city/county hospitals with greater than 250 licensed beds in the state's largest MSAs shall receive weights based proportionally on the MSA population according to the most recent decennial census. MSAs with populations greater than or equal to 121,000, according to the most recent decennial census, are considered "the largest MSAs." Children's hospitals also shall receive weights because of the special nature of the services they provide. All other hospitals receive weighting factors of 1.0. The inpatient Medicaid days of each hospital shall be based on the latest available state fiscal year data for patients entitled to Title XIX benefits. The available fund shall be divided into two parts. One half of the available fund will reimburse each qualifying hospital by its percent of the total inpatient Medicaid days. One-half of the available fund will reimburse each qualifying hospital by its percent of low income days. HHSC determines whether hospitals in rural areas will receive 5.5 percent or more of the gross disproportionate share hospital funds for non-state hospitals. If hospitals in rural areas will receive at least 5.5 percent of the gross non-state hospital funds, HHSC will reimburse them using existing principles. If hospitals in rural areas will not receive at least 5.5 percent of non-state hospital funds, HHSC will reimburse them at 5.5 percent of non-state hospital funds, using existing principles. Reimbursement for the remaining hospitals is determined as follows:

(A) HHSC or its designee determines the average monthly number of weighted Medicaid inpatient days and weighted low-income days of each qualifying hospital.

(B) A qualifying hospital receives a monthly disproportionate share payment based on the following formula:

Figure: 1 TAC §355.8065(f)(4)(B)

(C) All MSA population data are from the most recent decennial census. The specific weights for certain hospital districts and children's hospitals are as follows:

(i) Children's hospitals are weighted at 1.25.

(ii) MSAs with populations greater than or equal to 121,000 and less than 300,000 are weighted at 2.5.

(iii) MSAs with populations greater than or equal to 300,000 and less than 1,000,000 are weighted at 2.75.

(iv) MSAs with populations greater than or equal to 1,000,000 and less than 3,000,000 are weighted at 3.0.

(v) MSAs with populations greater than or equal to 3,000,000 are weighted at 3.5.

(vi) HHSC may change the weights as needed in the DSH program to address changes in program size.

(D) HHSC or its designee determines the hospital specific limit for each disproportionate share hospital. This limit is the sum of a hospital's Medicaid shortfall, as defined in subsection (b)(16) of this section, and its cost of services to uninsured patients, as defined in subsection (b)(5) of this section, multiplied by the appropriate inflation update factor, as provided for in subparagraph (E) of this subsection. If HHSC or its designee determines that a hospital's Medicaid payments exceed its Medicaid costs, HHSC will reduce the hospital's cost of uninsured patients in the year the DSH payment is made by the amount of the overage.

(i) The Medicaid shortfall includes total Medicaid charges related to adjudicated claims and any Medicaid payment made for the corresponding inpatient and outpatient services delivered to Texas Medicaid clients, as determined from the hospital's fiscal year claims data, regardless of whether the claim was paid. These denied claims include, but are not limited to, patients whose spell of illness claims were exhausted, or payments were denied due to late filing. See subsection (b)(16) of this section for definition of "Medicaid shortfall."

(ii) The total Medicaid charges related to adjudicated claims for each hospital are converted to cost, utilizing a calculated cost-to-charge ratio (inpatient and outpatient). HHSC or its designee determines that ratio by using the hospital's CMS Form 2552, Hospital and Hospital Health Care Complex Cost Report, that was submitted for the fiscal year ending in the previous calendar year. HHSC or its designee uses the latest available Medicaid cost report in the absence of the Medicaid cost report submitted in the fiscal year ending in the previous calendar year. To determine the cost-to-charge ratio (inpatient and outpatient) for each hospital, HHSC or its designee uses the total cost from the CMS Form 2552, Worksheet B, Part I, Column 25, and total charges from the CMS Form 2552, Worksheet C, Part I, Column 8. The ratio is the total cost divided by the total gross patient charges. The cost-to-charge ratio is an all-payer ratio. HHSC removes from the calculation of the cost-to-charge ratio non-hospital services including, but not limited to, ambulance, rural health clinics, primary home care, home health agencies, hospice, and skilled nursing facilities.

(iii) HHSC or its designee determines the cost of services to patients who have no health insurance or source of third party payments for services provided during the fiscal year for each hospital. Hospitals are surveyed each year to determine charges that can be attributed to patients without insurance or other third party resources. Hospitals must not include non-reimbursable cost centers listed on the CMS Form 2552, Schedule B, Part I, Column 25, Lines 96 through 100. The charges from reporting hospitals are multiplied by each hospital's cost-to-charge ratio (inpatient and outpatient) to determine the cost. Hospitals that report on their annual DSH application charges for patients without health insurance or other source of third party payments, and payments made by or on behalf of those patients, must include adjustments to charges and payments received during the hospital's fiscal year and for five months after the end of the hospital's fiscal year.

(iv) After HHSC or its designee determines each disproportionate share hospital's cost of services to patients who have no health insurance or source of third party payments for services provided during the year, HHSC or its designee subtracts from each hospital's cost of services the amount of payments made by or on behalf of those patients who have no health insurance or source of third party payments for services provided during the year.

(E) HHSC or its designee shall trend each hospital's hospital specific limit using the inflation rates described in subsection (b)(12) of this section. HHSC or its designee shall calculate the number of months from the mid-point of the hospital's cost reporting period to the mid-point of the federal fiscal year DSH program. HHSC or its designee shall then multiply the portion of the hospital's cost report year occurring in the federal fiscal year by the inflation update factor used for each federal fiscal year in the calculation of hospital reimbursement rates for each federal fiscal year. The product of these calculations shall be multiplied by each hospital's hospital specific limit to obtain each hospital's adjusted hospital specific limit.

(F) HHSC or its designee compares the projected payment for each disproportionate share hospital, as determined by subsections (d) and (e) of this section, with its adjusted hospital specific limit, as determined by subparagraphs (D) and (E) of this paragraph. If the hospital's projected payment is greater than its adjusted hospital specific limit, HHSC or its designee reduces the hospital's payment to its adjusted hospital specific limit.

(G) If there are DSH funds left in the available fund for the remaining hospitals, because some hospitals have had their DSH payments reduced to their adjusted hospital specific limits, HHSC or its designee distributes the excess funds according to the provisions in this section. For hospitals whose projected DSH payments are less than their adjusted hospital specific limits, HHSC or its designee does the following:

(i) calculate the difference between its adjusted hospital specific limit and its projected disproportionate share hospital payment;

(ii) add all of the differences from clause (i) of this subparagraph;

(iii) calculate a ratio for each hospital by dividing the difference from clause (i) of this subparagraph by the sum for clause (ii) of this subparagraph; and

(iv) multiply the ratio from clause (iii) of this subparagraph by the remaining available fund.

(H) Only those hospitals that are below their adjusted hospital specific limits are eligible to participate in this distribution. The DSH funds remaining in the available fund are distributed to the hospitals that have not already reached their adjusted hospital specific limits. Each hospital's total disproportionate share payment (including the redistribution of excess funds) cannot exceed its adjusted hospital specific limit.

(g) Review of HHSC determination of eligibility and estimated payment amount. HHSC notifies a hospital of its tentative eligibility or ineligibility and estimated payment amount at the begin-

ning of the federal fiscal year. A hospital that does not qualify or that contends the amount of payment is incorrect may request a review by the state in accordance with paragraph (1) of this subsection. Tentative eligibility determinations and estimated payment amounts for all hospitals may change depending on the outcome of the review.

(1) Except as specified in paragraph (4) of this subsection, a request for review must be submitted in writing to HHSC within 15 calendar days of the date of the notification of tentative eligibility or ineligibility. The request must contain specific documentation supporting its contention that HHSC made factual or calculation errors that, if corrected, would result in the hospital's qualifying for payments or receiving a higher payment amount. A hospital must submit additional documentation within 30 calendar days of the date of notification of tentative eligibility or ineligibility. The written request for review and all supporting documentation must be sent to the Director of Hospital Reimbursement, Rate Analysis Department of HHSC.

(2) The review is:

(A) limited to allegations of factual or calculation errors made by HHSC.

(B) supported by documentation submitted by the hospital or used by HHSC in making its original determination.

(C) solely a paper review and is not an adversarial hearing.

(3) HHSC makes a determination and notifies the hospital of the results of a review at the time of the first monthly payment. Any adjustments made as a result of a review will not exceed the limits of available DSH funds.

(4) No additional review is conducted after first monthly payments are made unless, at the time of the first monthly payments, HHSC gives a hospital its first notice that the hospital is ineligible for DSH funding. In that case, the hospital may then request a review in accordance with paragraph (1) of this subsection.

(5) A request for review may not be based on a hospital's claim that the data submitted to HHSC by the hospital or a fiscal intermediary is incorrect or incomplete. On or about April 1 of each year, HHSC sends each participating hospital a report of adjudicated data received from fiscal intermediaries reflecting the hospital's Medicaid days, Medicaid charges, and Medicaid payments during the relevant time period. A hospital may communicate directly with the fiscal intermediary to correct any data in that report that the hospital believes is inaccurate. The fiscal intermediary must submit a corrected report to HHSC by July 1 of each year for the corrected report to be considered.

(6) At the request of a hospital, HHSC will conduct administrative reviews in cases where a hospital and a fiscal intermediary cannot resolve differences in adjudicated data. HHSC will make the final determination in these cases.

(h) Disproportionate share funds held in reserve.

(1) Hospitals participating in the disproportionate share program are required to comply at all times with the conditions of participation specified in subsection (c) of this section. If HHSC or its designee has reason to believe that a hospital is not complying with the conditions of participation, HHSC or its designee notifies the hospital of possible noncompliance. Upon receipt of the notice of possible noncompliance, the hospital has 30 days to demonstrate its compliance with conditions of participation. If the hospital fails to demonstrate its compliance within 30 days, HHSC or its designee has the authority to hold that hospital's disproportionate share payments in reserve until the:

(A) hospital can demonstrate its compliance with the conditions of participation;

(B) decision to hold payments in reserve is reviewed and the decision results in favor of the hospital; or

(C) date the last monthly payment in the relevant federal fiscal year occurs; whichever occurs first.

(2) If a hospital's disproportionate share payments are being held in reserve on the date of the last monthly payment in the federal fiscal year, the amount of the payments is divided proportionately among the hospitals receiving a last monthly payment and is not restored to the hospital. If the hospital demonstrates its compliance with the conditions of participation or if the hospital receives a favorable review decision, the funds are restored to the hospital.

(3) Hospitals that have had disproportionate share payments held in reserve may request a review by HHSC or its designee.

(A) The hospital's written request for a review must:

(i) be made to HHSC or its designee;

(ii) be received by HHSC or its designee within 10 days after the hospital's disproportionate share payments are held in reserve; and

(iii) contain specific documentation supporting its contention that it is in compliance with the conditions of participation.

(B) The review is:

(i) limited to allegations of compliance with conditions of participation;

(ii) limited to a review of documentation submitted by the hospital or used by HHSC or its designee in making its original determination; and

(iii) not conducted as an adversary hearing.

(C) HHSC or its designee conducts the review as quickly as possible and notifies hospitals requesting the review of the results. Once the last monthly payment for the relevant state fiscal year is made, no additional review or appeal is available to hospitals.

(4) If a hospital that is already receiving Medicaid disproportionate share funds closes, loses its license, loses its Medicare or Medicaid eligibility, that hospital's disproportionate share funds are reallocated among the remaining disproportionate share hospitals. If the hospital reopens, as the same hospital type, regains similar licensure or Medicare and Medicaid eligibility during the same fiscal year, that hospital receives monthly disproportionate share payments for the remaining months in the federal fiscal year, as determined by the appropriate reimbursement formula and from available funds.

(i) Voluntary withdrawal from the DSH program. If HHSC obtains a federal waiver under Section 1115 of the Social Security Act to implement the Medicaid reform provisions in Chapter 531 of the Texas Government Code, Subchapter N, Texas Health Opportunity Pool Trust Fund:

(1) HHSC will recoup all DSH payments made during the same federal fiscal year to a hospital that voluntarily terminates its participation in the DSH program.

(2) HHSC will not redistribute to other hospitals under this division the amount of any recovered and non-reimbursed projected DSH funds.

(3) A hospital that voluntarily terminates from the DSH program will be ineligible to receive payments under this section for

the next three consecutive federal fiscal years after the hospital's termination.

(4) If a hospital receives DSH funding in one federal fiscal year and does not apply for DSH funding in the following federal fiscal year, even though it would have qualified in that year, the amount of that hospital's DSH funding in the previous year will not be redistributed to other hospitals under this division.

(5) If a hospital does not apply for DSH funding in the federal fiscal year following a federal fiscal year in which it received DSH funding, even though it would have qualified for DSH funding in that year, the hospital will be ineligible to receive payments under this section for the next three consecutive federal fiscal years after the year in which it did not apply.

(j) Recovery of DSH funds. If a hospital receives an overpayment of DSH funds, including an overpayment that results from HHSC error or audit, HHSC will recoup such overpayment. Notwithstanding subsection (i) of this section, these funds will be redistributed to DSH providers that are eligible for additional payments subject to their hospital specific limits.

(k) All DSH payments are subject to the availability of appropriated state and federal funds.

(l) If a hospital is located in a county that is declared a federal natural disaster area, it may request that the state use the hospital's data, excluding data used to calculate the one percent Medicaid minimum utilization rate and the adjusted hospital specific limit, from the most recent year prior to the natural disaster for qualification and reimbursement purposes. This request must be submitted in writing to the state with the hospital's annual DSH application. The state reserves the right to approve or deny the written exception request and will notify the hospital of its decision prior to the beginning of the DSH program year. Hospitals may request an administrative review of the state's decision in this subsection. The review will be conducted under the provisions of subsection (g) of this section.

(m) Audit process. HHSC or its designee will audit periodically DSH providers. HHSC will determine the number of hospitals that will be audited on site and that will undergo desk reviews. HHSC will use statistically valid methods to determine the sample size of information for auditing or desk review.

(n) Failure to provide supporting documentation. HHSC or its designee will exclude data from calculations under this section if a hospital fails to maintain and provide adequate documentation to support that data.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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1 TAC §355.8067

The Health and Human Services Commission (HHSC) adopts an amendment to §355.8067, concerning disproportionate share hospital reimbursement methodology for state-owned teaching hospitals, with changes to the proposed text as published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5127). The text of the rule will be republished. The rule changes clarify current practices as well as make changes to the processes used to determine, review, and audit DSH payments. The rule will become effective on September 1, 2008.

One of the purposes of the rule is to more equitably distribute federal DSH funds among Texas hospitals. Since there is a set amount of aggregate DSH money available to Texas hospitals, if one hospital receives more DSH money, other hospitals receive less. HHSC proposed to standardize a number of DSH program elements among hospitals participating in the DSH program to create consistent requirements for all hospitals.

The rule also incorporates assurances given by HHSC to the Centers for Medicare and Medicaid Services (CMS). After an audit by the federal Health and Human Services Office of Inspector General, HHSC agreed to add DSH rule language to codify its administrative practices relating to: calculating cost-to-charge ratios, handling Medicaid profits in calculating a hospital's Medicaid shortfall, and calculating uninsured costs.

Finally, the rule includes changes in subsection (j) that relate to Medicaid reform initiatives at Chapter 531 of the Texas Government Code, Subchapter N, Texas Health Opportunity Pool Trust Fund. HHSC submitted a Medicaid reform waiver request to CMS on April 16, 2008, with a comprehensive plan to transform health care in Texas by providing more people with insurance, reducing reliance on expensive emergency room visits for basic care, and making it easier for the working poor to buy into employer-sponsored health coverage. Under the conditions specified in this amendment, if a state-owned teaching hospital withdraws from the DSH program, HHSC will use its DSH funds to help finance the reform.

Comments

HHSC received written comments during the 30-day comment period from the Travis County Healthcare District (TCHD) and the Texas Association of Public and Nonprofit Hospitals (TAPNH). A summary of the comments and HHSC's responses follows.

Comment: Both TCHD and TAPNH supported the plan to redistribute DSH funds following recoupment after an overpayment to a DSH provider.

Response: HHSC appreciates the support of this rule change and believes that the new rule language will be beneficial to HHSC and the provider community. The rule language was not changed in response to this comment.

Comment: Both TCHD and TAPNH opposed the plan in subsection (j) to withdraw funds from the DSH program when a DSH provider voluntarily withdraws from the DSH program. TCHD and TAPNH seek instead to have these DSH funds redistributed to other DSH providers. TAPNH believes that the plan to make a hospital that voluntarily withdraws from the DSH program ineligible for DSH funding for three years is excessive, punitive and without purpose.

Response: The proposed change to subsection (j) is contingent on HHSC's successfully obtaining federal approval of its Medicaid reform waiver. The proposed amendment supports HHSC's Medicaid reform efforts to transform health care in Texas by pro-

viding more people with insurance, reducing reliance on expensive emergency room visits for basic care, and making it easier for the working poor to buy into employer-sponsored health coverage. Should the waiver be approved, hospitals that remain in the DSH program will receive the same amount in DSH funding that they would have received had the exiting hospital remained in the DSH program. HHSC believes that the three-year ineligibility period protects the hospitals remaining in the program by stabilizing the DSH allocation for the remaining DSH hospitals for a period of three years. The rule language was not changed in response to these comments.

Comment: TAPNH opposed using the Centers for Medicare and Medicaid Services (CMS) Prospective Payment System (PPS) Market Basket Index exclusively for DSH inflationary rates. TAPNH asked that HHSC continue to use the greater of the PPS Market Basket Index or the Texas-specific medical care component of the Consumer Price Index. Also, TAPNH requested that HHSC clarify that the PPS Market Basket Index would not reflect any decreases to that figure required by Congress.

Response: HHSC has employed the greater of the CMS PPS Market Basket Index and the Texas-specific medical component of the Consumer Price Index in the past for hospital reimbursement. However, applying the greater of two indexes may have skewed the rates higher or lower over time. HHSC decided to use the CMS PPS Market Basket Index because CMS uses this index as the trend factor for inflationary cost. HHSC will use the CMS PPS Market Basket Index as published by CMS for the inpatient cost-of-living increase calculations. The rule language was not changed in response to the comment.

Comment: TAPNH suggested HHSC clarify in §355.8067(f) what time period a "hospital's year" refers to.

Response: As a result of this comment, HHSC changed the language in subsection (f) to refer to a "hospital's cost reporting period" instead of a "hospital's year."

Comment: TAPNH strongly supports significant liquidated damages for fiscal intermediaries that submit late or inaccurate data to the state.

Response: HHSC will consider this comment when it develops provisions for liquidated damages for fiscal intermediaries. The rule language was not changed as a result of this comment.

Comment: TAPNH recommends HHSC share the methods used to determine sample size with the audited hospitals for their review of the sampling methodology.

Response: HHSC will consider this comment when it develops methods to determine audit sample sizes. The rule language was not changed as a result of this comment.

Legal Authority

The amendment is adopted 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.

§355.8067. Disproportionate Share Hospital Reimbursement Methodology for State-Owned Teaching Hospitals.

(a) A state-owned teaching hospital is eligible for disproportionate share hospital (DSH) reimbursement. A state-owned teaching hospital is a hospital owned and operated by a state university or other agency of the state. Each year, HHSC will mail a DSH application packet to all active Medicaid hospitals. The application packet may request self-reported data HHSC deems necessary to supplement the AHA/THA/DSHS annual hospital survey and the fiscal intermediary data. A state-owned teaching hospital may apply for DSH funds annually by completing the application packet by the deadline specified by HHSC in the packet's cover letter. A hospital that fails to submit a complete application by the deadline specified by HHSC will not be eligible to receive DSH funds that year.

(b) Conditions of participation. Before the beginning of each federal fiscal year, which begins October 1, HHSC will survey Medicaid hospitals to determine which hospitals meet the state's conditions of participation.

(1) A hospital eligible for DSH reimbursement must allow HHSC or its designee to have access to its hospital records and accounting systems during regular business hours.

(2) Each hospital participating in the DSH program must have a Medicaid inpatient utilization rate of at least one percent.

(3) To qualify for disproportionate share payments, each hospital must have at least two physicians (M.D. or D.O.), with staff privileges at the hospital, who have agreed to provide non-emergency obstetrical services to Medicaid clients. The two-physician requirement does not apply to hospitals whose inpatients are predominantly under 18 years old or that did not offer non-emergency obstetrical services to the general population as of December 22, 1987.

(c) For purposes of this section, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) Total Medicaid inpatient days--The total number of Title XIX inpatient days based on the latest available state fiscal year adjudicated claims data for patients eligible for Title XIX benefits. The term excludes days for patients who are covered for services that are fully or partially reimbursable by Medicare. The term includes Medicaid-eligible days of care adjudicated by managed care organizations. Total Medicaid inpatient days include days that were denied payment for reasons other than eligibility. The term excludes days attributable to Medicaid patients between the ages of 21 and 65 who live in an institution for mental diseases. The term includes days attributable to individuals eligible for Medicaid in other states. Total Medicaid inpatient days includes days with adjudicated dates between September 1 and August 31 (state fiscal year).

(2) Total inpatient census days--The total number of a hospital's inpatient census days during its fiscal year ending in the previous calendar year.

(3) Cost of services to uninsured patients--The inpatient and outpatient charges to patients who have no health insurance or other source of third party payment for services provided during the year, multiplied by the hospital's ratio of costs to charges (inpatient and outpatient), less the amount of payments made by or on behalf of those patients. Uninsured patients are those patients who have no health insurance or other source of third party payments for services provided during the year. Uninsured patients include those patients who do not possess health insurance that would apply to the service for which the individual sought treatment.

(4) Hospital specific limit--The sum of the following two measurements: Medicaid shortfall and costs of services to uninsured patients.

(5) Medicaid shortfall--The cost of services (inpatient and outpatient) furnished to Medicaid patients, less the amount paid under the non-disproportionate share hospital payment methodology.

(6) Cost-to-charge ratio (inpatient and outpatient)--Total adjudicated charges for each hospital from all payers that are converted to cost by dividing the total cost by the total gross inpatient charges. The cost-to-charge ratio is an all-payer ratio that covers all applicable hospital costs and charges relating to patient care. This ratio does not distinguish between payer types such as Medicare, Medicaid or private pay.

(7) Adjusted hospital specific limit--A hospital specific limit trended forward to account for the inflation update factor since the base year.

(8) Inflation update factor--HHSC or its designee applies a cost of living index to a hospital's unreimbursed Medicaid costs and its cost of treating uninsured patients, based on the Centers for Medicare and Medicaid Services (CMS) Prospective Payment System Hospital Market Basket Index.

(9) Medicaid inpatient utilization rate--The fraction expressed as a percentage, the numerator of which is the hospital's number of inpatient days attributable to patients who (for these days) were eligible for medical assistance under a state plan, and the denominator of which is the total number of the hospital's inpatient days in that period. The term "inpatient day" includes each day in which an individual (including a newborn) is an inpatient in the hospital, whether or not the individual is in a specialized ward and whether or not the individual remains in the hospital for lack of suitable placement elsewhere.

(10) Payments received from uninsured patients--Those payments received from or on behalf of uninsured patients as defined in paragraph (3) of this subsection.

(11) Charity charges--The total amount of hospital charges for inpatient and outpatient services attributed to charity care in a cost reporting period.

(12) Available fund--The total amount of funds that may be reimbursed to the state-owned teaching hospitals.

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

(14) Adjudicated--A hospital claim that is approved or denied for payment by HHSC or its designee, or another payer in the case of non-HHSC programs.

(d) HHSC reimburses state-owned teaching hospitals on a monthly basis from the available fund for state-owned teaching hospitals. Monthly payments equal one-twelfth of annual payments unless it is necessary to adjust the amount because payments are not made for a full 12-month period, to comply with the annual state disproportionate share hospital allotment, or to comply with other state or federal disproportionate share hospital program requirements. Prior to the start of the next federal fiscal year, HHSC determines the size of the fund to reimburse state-owned teaching hospitals for the next federal fiscal year. The available fund to reimburse the state-owned teaching hospitals equals the total of their disproportionate share hospital payments, as follows: a state-owned teaching hospital that meets the requirements for disproportionate share status receives annually up to 100 percent of its adjusted hospital specific limit.

(e) HHSC determines the hospital specific limit for each disproportionate share hospital. This limit is the sum of a hospital's Medicaid shortfall, as defined in subsection (c)(5) of this section, and its cost of services to uninsured patients as defined in subsection (c)(3) of this section, multiplied by the appropriate inflation update factor, as provided for in subsection (f) of this section.

(1) The Medicaid shortfall includes total Medicaid charges related to adjudicated claims and any Medicaid payments made for the corresponding inpatient and outpatient services delivered to Texas Medicaid clients, as determined from the hospital's fiscal year claims data, regardless of whether the claim was paid. These denied claims include, but are not limited to, patients whose spell of illness claims were exhausted, or payments were denied due to late filing. Refer to subsection (c)(5) of this section.

(A) The total Medicaid charges related to adjudicated claims for each hospital are converted to cost, utilizing a calculated cost-to-charge ratio (inpatient and outpatient). HHSC determines that ratio by using the hospital's CMS 2552-92, Hospital and Hospital Health Care Complex Cost Report, that was submitted for the fiscal year ending in the previous calendar year. HHSC or its designee uses the latest available Medicare cost report in the absence of the Medicare cost report submitted in the fiscal year ending in the previous calendar year. To determine the cost-to-charge ratio (inpatient and outpatient) for each hospital, HHSC uses the total cost from the CMS 2552-92, Worksheet B, Part 1, Column 25, and total charges from the CMS 2552-92, Worksheet C, Part 1, Column 8. The ratio is the total cost divided by the total gross patient charges. The ratio of costs to charges is an all-payer ratio, which does not distinguish between payer types. HHSC removes from the calculation of the cost-to-charge ratio non-hospital services including, but not limited to, ambulance, rural health clinics, primary home care, home health agencies, hospice, and skilled nursing facilities.

(B) HHSC determines the cost of services to patients who have no health insurance or source of third party payments for services provided during the year for each hospital. Hospitals are surveyed each year to determine charges that can be attributed to patients without insurance or other third party resources. Hospitals must not include non-reimbursable cost centers listed on the CMS Form 2552, Schedule B, Part I, Column 25, Lines 96 through 100. The charges are multiplied by each hospital's cost-to-charge ratio (inpatient and outpatient) to determine the cost. Hospitals that report annually charges for patients without health insurance or other source of third party payments, and payments made by or on behalf of those patients, must include charge and payment adjustments made during the hospital's fiscal year and for five months after the end of the hospital's fiscal year.

(2) After HHSC determines each disproportionate share hospital's cost of services to patients who have no health insurance or source of third party payments for services provided during the year, HHSC subtracts from each hospital's cost of services the amount of payments made by or on behalf of those patients.

(3) If HHSC determines that a hospital's Medicaid payments exceed its Medicaid costs in the hospital's fiscal year, HHSC will reduce the hospital's cost of uninsured patients in the year the DSH payment is made by the amount of the overage.

(f) HHSC trends each hospital's hospital specific limit using the inflation update factor, as defined in subsection (c)(8) of this section, in calculating the adjusted hospital specific limit. HHSC calculates the number of months from the mid-point of the hospital's cost reporting period to the mid-point of the federal DSH program fiscal year. HHSC then multiplies the portion of the hospital's cost reporting period occurring in the DSH program fiscal year by the inflation update factor defined in subsection (c)(8) of this section to obtain each hospital's adjusted hospital specific limit.

(g) If a hospital is located in a county that is declared a federal natural disaster area, it may request that the state use the hospital's data, excluding data used to calculate the one percent Medicaid minimum utilization rate and the adjusted hospital specific limit in compli-

ance with sections 1923(d)(3) and 1923(g) of the Social Security Act, from the most recent year prior to the natural disaster for qualification and reimbursement purposes. This request must be submitted in writing to the state with the hospital's annual DSH application. The state reserves the right to approve or deny the written exception request and will notify the hospital of its decision prior to the beginning of the DSH program year. Hospitals may request a review of the state's decision in this subsection.

(h) All DSH payments are subject to the availability of appropriated state and federal funds.

(i) Review of HHSC determination of eligibility and estimated payment amount. HHSC notifies a hospital of its tentative eligibility or ineligibility and estimated payment amount at the beginning of the federal fiscal year. A hospital that does not qualify or that contends the amount of payment is incorrect may request a review by the state in accordance with paragraph (1) of this subsection. Tentative eligibility determinations and estimated payment amounts for all hospitals may change depending on the outcome of the review.

(1) Except as specified in paragraph (4) of this subsection, a request for review must be submitted in writing to HHSC within 15 calendar days of the date of the notification of tentative eligibility or ineligibility. The request must contain specific documentation supporting its contention that HHSC made factual or calculation errors which, if corrected, would result in the hospital's qualifying for payments or receiving a higher payment amount. A hospital must submit additional documentation within 30 calendar days of the date of notification of tentative eligibility or ineligibility. The written request for review and all supporting documentation must be sent to the Director of Hospital Reimbursement, Rate Analysis Department of HHSC.

(2) The review is:

(A) limited to allegations of factual or calculation errors made by HHSC.

(B) supported by documentation submitted by the hospital or used by HHSC in making its original determination.

(C) solely a paper review and is not an adversarial hearing.

(3) HHSC makes a determination and notifies the hospital of the results of a review at the time of the first monthly payment. Any adjustments made as a result of a review will not exceed the limits of available DSH funds.

(4) No additional review is conducted after first monthly payments are made unless, at the time of the first monthly payments, HHSC gives a hospital its first notice that the hospital is ineligible for DSH funding. In that case, the hospital may then request a review in accordance with paragraph (1) of this subsection.

(5) A request for review may not be based on a hospital's claim that the data submitted to HHSC by the hospital or a fiscal intermediary is incorrect or incomplete. On or about April 1 of each year, HHSC sends each participating hospital a report of adjudicated data received from fiscal intermediaries reflecting the hospital's Medicaid days, Medicaid charges, and Medicaid payments during the relevant time period. A hospital may communicate directly with the fiscal intermediary to correct any data in that report that the hospital believes is inaccurate. The fiscal intermediary must submit a corrected report to HHSC by July 1 of each year for the corrected report to be considered.

(6) At the request of a hospital, HHSC will conduct administrative reviews in cases where a hospital and a fiscal intermediary cannot resolve differences in adjudicated data. HHSC will make the final determination in these cases.

(j) Voluntary withdrawal from the DSH program. If HHSC successfully obtains a federal waiver under Section 1115 of the Social Security Act to implement the Medicaid reform provisions in Chapter 531 of the Texas Government Code, Subchapter N, Texas Health Opportunity Pool Trust Fund:

(1) HHSC will recoup all DSH payments made during the same federal fiscal year to a hospital that voluntarily terminates its participation in the DSH program.

(2) HHSC will not redistribute to other hospitals under this division the amount of any recovered and non-reimbursed projected DSH funds.

(3) A hospital that voluntarily terminates from the DSH program will be ineligible to receive payments under this section for the next three consecutive federal fiscal years after the hospital's termination.

(4) If a hospital receives DSH funding in one federal fiscal year and does not apply for DSH funding in the following federal fiscal year, even though it would have qualified in that year, the amount of that hospital's DSH funding in the previous year will not be redistributed to other hospitals under this section.

(5) If a hospital does not apply for DSH funding in the federal fiscal year following a federal fiscal year in which it received DSH funding, even though it would have qualified for DSH funding in that year, the hospital will be ineligible to receive payments under this section for the next three consecutive federal fiscal years after the year in which it did not apply.

(k) Recovery of DSH funds. If a hospital receives an overpayment of DSH funds, including an overpayment that results from HHSC error or audit, HHSC will recoup such overpayment. Notwithstanding subsection (j) of this section, these funds will be redistributed to DSH providers that are eligible for additional payments subject to their hospital specific limits.

(l) Audit process. HHSC will periodically audit and desk review data submitted by DSH providers. HHSC will determine the number of hospitals that will be audited on site and that will undergo desk reviews. HHSC will use statistically valid methods to determine the sample size of information for auditing or desk review.

(m) Failure to provide supporting documentation. HHSC will exclude data from calculations under this section if a hospital fails to maintain and provide adequate documentation to support that data.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2008.

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

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TITLE 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 36. EXOTIC LIVESTOCK AND FOWL

4 TAC §36.1

The Texas Animal Health Commission (Commission) adopts amendments to §36.1 concerning Definitions without changes to the proposed text as published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4429) and will not be republished.

The purpose of the amendments to §36.1 is to add a definition for livestock to include llamas, alpacas, and exotic livestock and so this proposal is to bring Exotic Livestock and Fowl Chapter into conformity with the changes in the Texas Agriculture Code.

House Bill (HB) 3300 from the 80th Texas Legislative Session amended the definition for livestock as utilized in the Texas Agriculture Code by adding llamas, alpacas, and exotic livestock and thus standardizes the classification of llamas and alpacas in all counties without having any impact on their agricultural valuation for tax purposes.

Llamas and alpacas are raised as domestic livestock. According to the bill analysis for this legislation failure to include them within the current definition of livestock in the Texas Agricultural Code has caused some llama and alpaca owners to have difficulty in obtaining farm/ranch liability insurance and not all Texas counties have an allowance (animal unit) determination for agricultural valuations for llamas and alpacas.

The Commission is adding the definition of livestock to Chapter 36 but it does not alter the classification for meeting Commission testing requirements.

No comments were received regarding adoption of the rule.

STATUTORY AUTHORITY

The amendment is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The Commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That authority is found in §161.061.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2008.

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Gene Snelson
General Counsel
Texas Animal Health Commission
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For further information, please call: (512) 719-0714

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CHAPTER 51. ENTRY REQUIREMENTS

4 TAC §51.3, §51.8

The Texas Animal Health Commission (commission) adopts amendments to §51.3 concerning Exceptions and §51.8 concerning Cattle without changes to the proposed text as published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4430) and will not be republished.

The purpose of these amendments to Chapter 51 is to provide an individual animal identification requirement for certain animals entering Texas from out of state.

The Commission is amending entry requirements in §51.8, regarding dairy steers, to require that they be identified prior to movement into Texas. We get a large number of dairy steers sent to feedlots in Texas for feeding. The identification requirements are focused on reducing the risk of exposure to tuberculosis for entry into Texas. The commission has recently required that all dairy cattle in Texas be officially identified. These requirements were put in place in order to protect the Texas dairy cattle industry from the risk of exposure to Tuberculosis. This risk and concern is further demonstrated by the fact that several other states have recently identified tuberculosis in dairy herds. In order to protect our dairy industry from the risk of Tuberculosis and to ensure that all classes of dairy breed cattle are identified before entry into Texas, the Commission proposes a specific requirement that dairy breed steers being exported from other states into Texas be officially individually identified. The Commission is also differentiating between beef breed and dairy breed cattle that enter Texas under exceptions in §51.3 to ensure that dairy breed cattle are not authorized to enter under the exemptions.

Also the Commission is clarifying language in the rules in §51.3 and §51.8 to be consistent with terms utilized by USDA in its program standards and rules. USDA no longer recognizes designated pens or quarantined feedlots but has a national standard for approved feedyards. Therefore the Commission is proposing to make modifications to reflect that change. Additionally, USDA is currently utilizing different terms to describe areas within a state that have a different tuberculosis classification from the tuberculosis classification of the state as a whole. These areas within a state that have a different status are called a "zone" and no longer classified as an "area". The rules reflect this change.

No comments were received regarding adoption of the rules.

STATUTORY AUTHORITY

The amendments are adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. That authority is found in §161.061.

As a control measure, the commission, by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce.

The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That authority is found in §161.054. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048.

Section 161.005 provides that the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire commission.

Section 161.061 provides that if the commission determines that a disease listed in §161.041 of this code or an agency of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state where livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. Section 161.101 provides that the commission may require a veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal to report the existence of specific diseases among livestock, exotic livestock, bison, domestic fowl, or exotic fowl.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 55. SWINE

The Texas Animal Health Commission (Commission) adopts the repeal and replacement of §55.9, concerning Feral Swine. The repeal of §55.9 is adopted without changes to the proposal as published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4434) and will not be republished. New §55.9 is adopted with changes to the proposed text as published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4434). The text of the rule will be republished.

The purpose of the repeal and replacement to §55.9 is to adopt new requirements for handling and moving feral swine.

The rules will become effective on October 1, 2008.

House Bill (HB) 2543 from the 80th Texas Legislative Session continues the Texas Animal Health Commission and it contains the Sunset Commission's recommendations regarding feral swine. HB 2543 clarifies the Commission's existing authority to regulate the movement of animals to include movement of feral swine for disease-control purposes. It provides the Commission the authority to adopt rules relating to the movement of feral swine, including disease-testing requirements prior to movement from one location to another. The bill also grants the Commission specific statutory authority to require the registration of feral swine holding facilities for disease-control purposes. Also, the bill gives the Commission clear authority to take enforcement action against individuals who violate statutory provisions or Commission rules or orders related to feral swine. The bill does not authorize the Commission to interfere with any other agency's authority, such as Texas Parks and Wildlife Department's authority to regulate the hunting and trapping of feral swine.

In developing new rules for feral swine holding facilities a stakeholder group comprised of the various organizations and people involved in the swine industry was convened to discuss issues for implementing the requirements from HB 2543. The group served in the development of these feral swine rules. The group was composed of representatives of Texas Pork Producers, Texas Farm Bureau, Texas Wildlife Association, Texas Veterinary Medical Association, Texas Department of Agriculture, Texas Parks & Wildlife, Texas Tech University, USDA/APHIS, feral swine slaughter plants, a hunter, and holding facility operator. Also the group contained individual participants who represented various segments involved with feral swine. The group was chaired by TAHC Commissioner Chuck Real.

This feral swine stakeholder group met on September 21, 2007, and discussed the issues confronting these requirements. From that group a set of issues was created for discussion points in the development of rules. The chairman of the group, TAHC Commissioner Chuck Real, then created a smaller working group, comprised of domestic and feral swine participants to discuss those issues and provide feedback to the rules drafted in response to those discussions. Then TAHC staff used the current requirements in §55.9 as a reference point and then discussed different standards as well as the various issue affecting feral swine trapping and slaughter. The smaller work group met on November 1, 2007 and discussed a number of issues in order to provide guidance to agency staff in the drafting of the rules. A draft set of rules of the rules was developed and circulated for discussion and suggestions for improvement. The resulting final draft of the rules was considered by the Commission. The rules provide for the following requirements and standards in subsections (a) - (h):

Subsection (a) provides the definitions for terms used in this section.

Subsection (b) provides that the requirements apply to anyone who traps feral swine and moves them alive from the premises or location where they were trapped or otherwise captured. The subsection then indicates that movement is only authorized in accordance with the destinations provided in the rule.

Subsection (c) provides that a Holding Facility can not be approved until after an inspection by Commission personnel determines that the facility meets the specified criteria: Authorization for an approved facility shall be on a form prescribed by the Commission and include specified information. Records are to be generated and maintained by owners and/or operators of approved holding facilities. The Commission may suspend the authorization for an approved holding facility if the owner or operator fails to generate, maintain or provide records on feral swine received/released, fails to maintain swine-proof fences to pre-

vent egress or ingress of feral swine, or violates any of the provisions of this chapter or the provisions of Chapter 161 of the Agriculture Code.

Subsection (d) provides that if feral swine are trapped and moved for release to a hunting preserve the hunting preserve shall meet the stated requirements contained in the rules: Only male feral swine can be released to a hunting preserve. This is to allow facilities to harvest trophy boars (male) for release. The rules do not authorize gilts and sows (females) for release because of the higher risk for disease transmission as well as the problems of authorizing breeding gilts and sows that can create a greater nuisance problem. To qualify for release the boars must be individually identified with a Commission approved form of identification. The Commission realizes that attaching identification to a feral swine, which is to be released for hunting, is not a popular requirement. As a practical matter some type of identification is necessary to indicate what animals have been released and during movement what animals are being moved to a premises. Currently the Commission is evaluating various types of identification to determine acceptable methods for this type of animal.

Also, records must be created and maintained by an authorized hunting preserve. Furthermore, there is a "Hunting Lease License" that is issued by the Texas Parks and Wildlife Department (TPWD). There was a lot of discussion on defining the hunting preserve with any terminology used by TPWD. TPWD has statutory authority, in Chapter 43 of the Parks and Wildlife Code to require the registration as a hunting lease if they have a guest for pay or other consideration to engage in hunting. This requirement includes lease arrangements for hunting feral swine. Based on that requirement the rules are drafted to require that in order to be recognized as a valid hunting preserve for release of feral swine they must have a current permit and be in good standing with TPWD.

Also, the premises shall be enclosed by a swine-proof fence and the fence shall be maintained continually to prevent the egress of feral swine under; over, or through the fence. In Chapter 143 of the Texas Agriculture Code it is indicated that a sufficient fence must keep swine from getting through the fence and that standard was what was used for the rule. Finally, feral swine shall not be fed any garbage or waste as defined in Chapter 165 of the Texas Agriculture Code.

The authorization for a hunting preserve may be suspended or rescinded if the owner and/or the operator fails to generate, maintain or provide records on feral swine as provided in subsection (c)(3) of this chapter, sufficient fences are not maintained, or violates any of the provisions of this chapter or the provisions of Chapter 161 of the Agriculture Code. Applications for an Approved Hunting Preserve shall be completed on a form prescribed by the Commission.

Subsection (e) provides that feral swine which are tested for change in status to domestic swine and/or are positive for brucellosis and/or pseudorabies shall be handled in accordance with the requirements for Brucellosis, as contained in Chapter 35, Subchapter B and for pseudorabies as contained in Chapter 55 of this Title.

Subsection (f) provides that formerly free-roaming swine could be qualified for reclassification as domestic swine upon completion of the stated test protocols.

Subsection (g) provides for inspection authority. Under these requirements our legal authority is restated to clearly indicate that a person employed by the Commission may enter public or private property for the exercise of an authority or performance of a duty under this chapter. Also a Commission representative shall perform periodic inspections of authorized facilities and locations, and records related thereto, to ensure compliance with the requirements of the act or this chapter.

Subsection (h) provides for administrative, civil or criminal penalties for any violations of these rules. In addition, the agency may revoke or deny renewal of a permit and/or assess administrative penalties against any person for a violation of these rules. In Chapter 161 there are specific statutory provisions that make certain types of violations to be criminal with associated penalties. In §161.150, which is entitled "Failure to Register Feral Swine Holding Facilities; Holding of Feral Swine", provides that "[a] person commits an offense if the person recklessly: (1) maintains a feral swine holding facility that is not registered under §161.0412; or (2) as the owner or person in charge of a holding facility that is not registered under §161.0412, holds or permits another to hold a feral swine in the holding facility. Furthermore, it also provides that for "(e)ach feral swine held or permitted to be held in violation of Subsection (a)(2) constitutes a separate offense." In that chapter there is also another specific statutory section that creates a criminal penalty for violation of these requirements. In §161.1375, which is entitled "Movement of Feral Swine", it provides that "(a) person commits an offense if the person recklessly: (1) moves feral swine in a manner that is not in compliance with rules adopted by the commission under §161.0412 or §161.054; or (2) as the owner or person in charge of a holding facility in which a feral swine is held, permits another to remove feral swine from the holding facility in a manner that is not in compliance with those rules."

Response to Comments

The Commission received forty-two (42) written comments regarding the repeal and replacement to §55.9, for feral swine. The comments were quite varied in the issues raised, the tone of the comment, and the different positions and attitudes expressed about the proposed amendments. There were a number of commenters who felt these rules would negatively affect them. Another group of commenters felt the rules should be stronger in dealing with live feral swine and prohibit movement. Then there were those commenters who appreciate the effort to develop a manageable regulation for dealing with movement of feral swine for disease control. The Commission appreciates receiving the comments, and particularly appreciates those who raised very good questions relative to the impact of regulations on their operations. The Commission is providing a response to all the comments received.

The Commission received comments from the Texas Pork Producers, Texas and Southwestern Cattle Raisers Association, Texas Farm Bureau, and the Texas Sheep and Goat Raisers Association. These associations expressed support for the rules and the agency's attempt to address disease concerns and reduce that risk from feral swine. The remaining comments were wide ranging in the issues raised and the perspectives on the effectiveness or appropriateness of the regulations.

In responding to the comments, it is important to note the history of the feral swine holding facility program in Texas. This program was created in 1992 in response to concerns from the United States Department of Agriculture (USDA) regarding the potential risk for exposure of domestic swine to Brucellosis and pseudorabies from infected feral swine. The basic tenet of the program was focused on preventing feral swine that were trapped and moved from spreading disease to domestic swine or other

livestock. The program included registration of feral swine holding facilities and controls on movements of captured feral swine. The movement of live feral swine was limited to specific destinations, i.e. slaughter, approved livestock markets, feral swine holding facilities and game preserves. Under the 1992 requirements, there was not a definition of a game preserve nor did that regulation include facility standards. However, the regulation did include testing requirements for Brucellosis and pseudorabies (negative test within thirty days) prior to releasing feral swine to a game preserve or to any other location.

During the last Texas Legislative Session, the Sunset Advisory Commission recommended that specific authority be added to our statutory authority to more effectively regulate the program and provide criminal penalties necessary to effectively sanction violators of the requirements. Under this new statutory authority, which became effective September 1, 2007, these new proposed rules were developed with input from the stakeholder group.

These rules are an expansion of the 1992 rules, with modifications made to realistically address identified problems in a more effective manner. The most significant modification was regarded the standards for a game preserve and what will be needed to legally release feral swine to such a premises. However, not one commenter mentioned that they had tested feral swine prior to release under the current regulations.

The 1992 rules authorized the release of feral swine to a game preserve, but there were no game preserve fencing requirements, and no definition for a game preserve. Since the implementation of the 1992 rules, the landscape regarding feral swine has changed drastically. In 1992 feral swine were limited to more specific regions of the state. A number of commenters noted that there had been no feral swine in their area until recently. A number of commenters specifically blamed the transportation and release of feral swine for hunting as the primary reason for the spread of feral swine to other parts of the state. Several commenters wanted the agency to outright prohibit any movement of live feral swine. There is a firmly established population of feral swine throughout a large part of this state, and the trapping and release of feral swine for hunting purposes have played a significant role in the distribution of feral swine. As these animals spread throughout the state, there are more contacts between feral swine and domestic swine. This creates greater need to ensure that those trapped, transported and released feral swine are not able to range onto land owned by others.

Disease Risk:

Disease risk from feral swine is a serious concern for the Commission and for anyone who raises livestock in this state. Their impact on the landscape is equally devastating to farmers and property owners. Some of the commenters seem to minimize that risk and the degree to which feral swine can be a problem in Texas. One commenter stated that "[t]here are millions of hogs in this state and they have moved as far northward as Michigan. What very little disease that exists in the wild will stay in the wild regardless of your rules and regulations."

The Commission strongly disagrees that there is little disease and that it will stay in the wild. Disease transmission from feral swine to domestic swine and other livestock is a real concern, not only for swine owners, but also for cattle producers. Feral swine are a serious disease risk and they must be treated as such.

The Texas Cooperative Extension - Wildlife Services issued a report on Feral Swine in Texas which stated that "(f)eral hogs are susceptible to a variety of infectious and parasitic diseases. The more hog populations increase and expand, the greater the chances that they may transmit disease to other wildlife, to livestock and to humans. External parasites that infest feral hogs include fleas, hog lice and ticks. Internal parasites include roundworms, liver flukes, kidneyworms, lungworms, stomach worms and whipworms. Hog diseases that could have severe repercussions for agribusiness include swine brucellosis, pseudorabies, leptospirosis, tuberculosis, tularemia, trichinosis, plague and anthrax. Exotic or foreign diseases of concern include foot and mouth disease, African swine fever, hog cholera and swine vesicular disease."

The Commission does have serious concerns about the risk of disease exposure posed by feral swine. Surveys of feral swine for disease indicate that from 2003 to 2008 approximately 20% of feral swine tested were positive to tests for pseudorabies and approximately 10% were positive to tests for swine brucellosis. Additionally, since January 2006, 26 cattle in 19 herds have been found to be infected with swine brucellosis.

The uncontrolled movement of feral swine from one location to another for release exacerbates the disease risk. Based on that concern, the stakeholder group focused on developing regulatory standards for releasing feral swine to a hunting preserve.

Hunting Preserve:

First of all, the Commission reiterates that the proposed regulations do not apply to the simple act of hunting or trapping free-ranging feral swine. The regulations would be implicated ONLY when the feral swine are moved alive from one location to another, or are relocated to a hunting preserve.

A number of commenters were against the proposed rules because of perceived negative impacts on premises or ranches where feral swine are hunted. There is a perception that the rule will put feral swine hunting ranches out of business. This is based on a general misperception that all ranches where feral swine are hunted will come under the requirements for game preserves. That is incorrect.

One commenter noted he does not bring feral swine onto to his hunting preserve and the only feral swine that leave his premises are dead. If this is the case, his operation would not fall under these proposed regulations. The rule applies only to a ranch or hunting preserve that receives live feral swine from another location. Free-ranging feral swine already on the property--or those that enter the property on their own, where they are shot, trapped, or killed--do not fall under these requirements.

A number of commenters asked the Commission to prohibit the movement of live feral swine. One commenter stated that "I do not agree with hauling in wild hogs and turning them out." Another stated that "I would like to suggest that no "wild hogs" be allowed to be transported live and sold to hunting preserves." Another commenter stated that "(a)llowing feral swine to be placed in a 'hunting' preserve reveals questionable judgment by the TAHC. There is no perceivable justification for a government agency to sanction or endorse this repugnant conduct" The Commission notes that this activity is on-going and would not cease simply based on regulatory prohibition. The Commission believes that reasonable restrictions will minimize the disease risk.

While the Commission concurs that the movement of feral swine can be a problem for adjacent landowners, the goal is to make trapping and transport occur in a manageable, legal, method that reduces the risk to adjacent landowners. Regarding hunting preserves, the issue that drew some of the greatest indignation was "sufficient fences."

Sufficient Fences:

In regards to game proof fences or hog proof fences, a number of comments were received about the sufficiency and the five-foot standard in the definition. A number of commenters noted that there is no such thing as a hog proof fence.

One commenter stated that, "There is no 5-foot fencing. We used 1047 high tinsel wire, which is recommended for hog fencing. We put a string of barbed wire on the bottom (four-point predator wire.). Every fifth T-Post, we put up a 2 3/8 inch piece of iron pipe. Does this sound like a second rate fence?"

A commenter stated that "[t]he definition of a "swine-proof fence" is nothing but a social construct." Another commenter stated that "[t]he fencing industry, as confirmed with Tractor Supply, only offers 330-foot rolls of 4-foot tall 'sheep and goat' wire with 4 inch x 4 inch holes, which is commonly used as hog wire and commonly called "Hog Wire". This hog wire is a lot stronger than taller horse fence which may be available, however, horse fence is a much smaller gage and not strong enough to hold hogs. Actual Hog Panels are only 3 feet tall. 3 foot tall Hog Panels are commonly used for holding hogs, so the 4 foot tall "hog wire" fence is even better. Hog Wire is what is being used across the State. There is not a 5 foot hog wire fence, as specified in this rule, manufactured or available."

Clearly based on the destructive ability of feral swine, different ranches or facilities might provide different types of fences to keep feral swine from breaching the area. Several commenters stated that, if they were paying to have trapped swine released on their property, they wanted those animals to stay on their property.

In proposing these rules, the Commission knew that it would be an impossible regulatory task to define specific fence requirements. Ingenious Texas ranchers can ensure that their fences are sufficient, but they may not meet the five-foot standard. The five-foot standard was taken from state statute.

The Texas Agriculture Code, Chapter 143, Fences; Range Restrictions, provides in §143.001 that a sufficient fence around cleared land in cultivation is at least five feet high and will prevent hogs from passing through. That is the standard we initially identified in these rules, but the bottom line is, the Commission does not want to dictate the type of fence. However, the Commission does want to be sure that any location authorized for releasing feral swine has fences sufficient to prevent feral swine from escaping. The Commission's goal is to establish a realistic standard for the hunting preserve owner or operator and therefore removes the five foot standard contained in the proposed definition for sufficient fences.

During the initial application for an authorized hunting preserve, TAHC field inspectors will make a general determination as to the sufficiency of the fence. A simple barbed wire fence would not be sufficient. The fence must keep feral swine from escaping and contain the entire area where the feral swine are to be released. There can be no gaps or holes in the fence perimeter. Applicants who cannot show that their locations will prevent feral swine from escaping will not have their facilities approved. In receiving authorization the hunting preserve owner will be responsible for warranting the sufficiency of the fence and will be responsible for maintaining the fence. If the fence is destroyed in certain areas the preserve owner or operator will be responsible for immediately making repairs. If feral swine have been allowed to escape the preserve owner or operator will be subject to the various compliance tools available to the Commission to remedy this problem.

The Commission understands that fences will require some work to ensure they can meet the standard. However, the Commission also believes that there are a variety of ways a facility can achieve that goal. One way is to establish a smaller area (not the entire property) as a hunting preserve for feral swine. As such, one commenter noted that it would be hard to create a fence for a large piece of property. Another commenter noted that he had a large ranch, but within the ranch, he fenced 200 acres for hunting feral swine.

It was noted that some facilities have swine-proof fences that allow feral swine to enter property but prevent them from escaping. This is an effective tool for keeping feral swine from tearing at a fence and allows feral swine from outside the preserve to enter the property and be subject to hunting. This is an effective way to bring free-ranging feral swine in, without transporting live feral swine from another location.

One issue in the comments was the ability of hunting to reduce the feral swine population in this state. One commenter stated that "(t)he fenced hog hunting ranches in Texas handle and harvest only a miniscule number of the state's total population of feral swine." Another comment stated that "I don't believe that putting regulations on trapping and hunting hogs is going to benefit anyone, from the farmers, hunters and trappers. At this time hunters, trapper and farmers have a good thing going as far as hogs are concerned." A number of other comments all felt that hunting was the most effective tool for reducing the numbers of feral swine.

In response, the Commission disagrees that hunting, in and of itself, effectively controls the feral swine population. Texas is home to the largest feral hog population in the U.S., and the population is increasing exponentially. These animals are prolific breeders, and hunting, as currently employed, is not a sufficient tool for reducing the population. Effectively reducing the population of feral swine is a far larger task requiring focused efforts by both the private and public sector.

Managing or trying to maintain a limited population of feral swine on property is very difficult. Feral swine are incredibly dynamic in their ability to proliferate. The Texas Cooperative Extension - Wildlife Services, in their report on *"Feral Swine in Texas"* states that "[f]eral hogs are the most prolific large, wild mammal in North America. With adequate nutrition, a feral hog population can double in 4 months. Breeding occurs throughout the year when conditions are favorable, and seasonally when food supply and nutrient quality vary. Females begin breeding at about 8 to 10 months old, or as young as 6 months if food is abundant. Under favorable conditions, sows can produce two litters every 12 to 15 months, with an average of four to eight piglets per litter and a sex ratio of 1:1." This certainly supports the need to prohibit the release of sows.

In discussing this issue with the stakeholder group, it was decided that the greatest disease risk was from the females, sows. They pose not only a disease risk for Brucellosis and pseudorabies but also are the primary source for the propagation prob-

lems from breeding feral swine. Under the 1992 rules, any feral swine can be released to a hunting preserve with a negative Brucellosis and pseudorabies test, within thirty days prior to release. It is not easy to get a veterinarian to perform these tests, and compliance with this requirement was not being fully achieved. Some commenters felt that prohibiting the release of sows is discriminatory, but the Commission disagrees. Reducing the propagation rates and the availability of free-ranging sows can be an effective way to address this disease risk.

Several commenters said that we should require the animals to be castrated prior to release or in some way chemically treated to reduce propagation. To the Commission's knowledge, chemical sterilants are not available for use in swine and according to task force members neutering would be difficult to accomplish on large swine. The Commission notes that the Texas Department of Agriculture (TDA) was appropriated $1 million for a two-year grant program to fund a long-term statewide feral hog abatement strategy. This was recently awarded to the Texas Cooperative Extension's Wildlife and Fisheries Unit, and Wildlife Services for assessing strategies to achieve this goal.

Members of the stakeholder group felt that by allowing trophy boars to be bought and released, it would create less disease risk and create a legal outlet for an activity that has been taking place all over this state. As part of the authorized release of "only boars and barrows," the proposal would require "identification" of these animals prior to release on a hunting preserve.

Identification:

The Commission received a number of comments regarding identification for the boars and barrows released on hunting preserves. Most commenters felt it was not appropriate. Several noted that hunters did not want to shot animals with tags in their ears, with one commenter comparing this to a canned hunt.

There are several reasons for requiring identification prior to release. First and foremost, this is for feral swine that have been trapped, moved elsewhere and released. This is the type of activity for which the spread of diseases to unaffected animals becomes a real problem. If an animal is being moved for release, then identification will allow the TAHC to epidemiologically determine if the source of disease originated in the area or may have been transported there by the release of feral swine.

Secondly, if a hunting preserve owner states in the application for a hunting preserve that fences are sufficient and releases animals on a premises, then the animals should not be allowed on the neighbor's property.

The identification will help to ensure that the animal importer can be held accountable for tagged swine found outside his or her hunting preserve. Lastly, this also provides a standard for evaluating if someone is moving animals illegally for release. Identification of the boars is the only means for holding people accountable for these actions. The movement and release of feral swine creates increased disease risk and also potentially exposes neighbors to the negative impacts of feral swine unless conducted in accordance with regulations designed to reduce or remove that risk.

The rule is structured so that official identification is in a form recognized by the Commission. The Commission traditionally recognizes the various forms of official identification used in livestock programs. The Commission also realizes there may be some non-traditional forms of identification more appropriate for feral swine.

Several commenters were not happy with the identification requirements, but there were no comments regarding alternative options to identification or forms of identification. Another commenter stated that attaching identification to a feral swine released for hunting is not a popular requirement. The Commission believes strongly that this requirement should not be relaxed. Identification is a key component in the credibility of this program.

TPWD:

Commenters expressed concern with the requirement that a hunting preserve be enrolled with Texas Parks and Wildlife Department (TPWD) and have a current and valid hunting lease permit. TPWD has existing statutory authority, in Chapter 43, Parks and Wildlife Code, to require the registration of a hunting lease if owners or managers have a guest for pay or provide other consideration in order to engage in hunting. This requirement includes lease arrangements for hunting feral swine.

A number of commenters seemed to find that requirement to be abhorrent, and others complained about fees. The hunting preserve is not a TAHC requirement but is a statutory TPWD requirement, and it is incumbent on the Commission to ensure compliance with those requirements.

Also some commenters challenged the requirement for a general Texas hunting license from TPWD. One person stated that a license is not needed. The Texas Parks and Wildlife Code, Chapter 42, §42.002, in subsection (c), states that "a resident landowner or the landowner's agent or lessee may take feral hogs causing depredation on the resident landowner's land without having acquired a hunting license." However, if the hunter is sport hunting, a hunting license is required. If a hunter is paying to hunt feral hogs, a hunting license is required.

A Question of Fees:

A number of commenters complained of fees. The proposed rule does not impose any TAHC fees associated with having a feral swine holding facility, or having a site designated as a hunting preserve. There is a permit fee under TPWD's existing hunting lease program and those fees are established by statute in Chapter 43 of the Parks and Wildlife Code. These fees are not associated in any way with the Commission.

Slaughter Plants:

A number of the commenters felt the slaughter plants have an unfair advantage. One commenter stated "this is an attempt to protect slaughter houses then it should be done without placing undue burdens on ranches or hunters' ranches will not be able to sell the hunts, thus resulting in tremendous damage to property."

The Commission is not quite sure what advantage slaughter plants have over a game preserve. Slaughter plants buy feral swine for slaughter and sell the meat. This is an effective outlet for removing and handling feral swine that have been trapped alive. All of the Commission's permitted feral swine holding facilities are selling to slaughter plants in Texas.

Another comment stated that "(t)hese rules are suggesting trappers can only sell conveniently to slaughter plant operators who are shipping the product over seas. Who are they paying off?" The Commission is not sure why this commenter feels that slaughter plants, and their business of buying this abundant animal, becomes an issue of someone being paid off. Slaughter plants do not operate under the Commission's authority. The processing and inspection of these animals comes under the

regulatory oversight of the Department of State Health Services or USDA FSIS.

Changing Classification:

The Commission received a couple comments on the standards for changing feral swine to "domestic" swine. He stated, "I don't think this is a good idea and should be scrapped from the new rules. There are too many bad food scares now. This would only invite one down the road." Another commenter stated that there is no indication of any requirements for "swine-proof fences" for free-ranging swine that become "domestic swine." Without any attempt to mandate fencing, the commenter wrote, escapes are even more likely. This is a difficult process to achieve and the Commission believes that those that chose to pursue this option will take all the necessary efforts to keep those swine under their control.

A commenter stated that the "TAHC has done away with the market for sows under 100 pounds. Game ranches can no longer buy them as a meat hog for the MILLIONS of hunters who love eating a nice young sow, and buying stations are not paying squat for a sow under 100 pounds. So what has tahc really accomplished by these new regs? Tahc has made it HARDER to put a dent in the hog population." The intent of the regulations is to reduce disease risk. In part this is accomplished by prohibiting the movement for release of female feral swine, which will reduce the potential for spread of disease and reduce the propagation of feral swine. The regulations do not prevent the harvest of female swine on the hundreds of millions of acres that they occupy throughout Texas.

There was also a collateral point raised: if someone can not release the smaller animals, and they are not sought out by the slaughter plants, there is no longer a market for them. Trappers can further create a problem by releasing these smaller animals. In discussions with the stakeholder groups, some of the slaughter plant representatives stated that even though they would not buy the smaller animals for slaughter, they would haul them to their facility for proper handling.

Garbage Feeding:

The Commission received a couple comments regarding the restriction to feeding garbage to feral swine. One commenter asked "Feral swine shall not be fed any garbage? What is garbage? What is not garbage?"

This relates to the regulations for feeding garbage to swine, also in §55.3. Current Commission rules prohibit the feeding of "restricted waste" to any swine. There also is a registration requirement for domestic swine which feed on "unrestricted garbage." The Commission amends the proposal to clarify those feeding restrictions. "Restricted waste--includes the animal refuse matter and the putrescible animal waste resulting from handling, preparing, cooking, or consuming food containing all or part of an animal carcass, the animal waste material by-products or commingled animal and vegetable waste material by-products of a restaurant, kitchen, cookery, or slaughterhouse, and refuse accumulations of animal matter, commingled animal and vegetable matter, liquid or otherwise. Unrestricted waste--includes the vegetable, fruit, dairy, or baked goods refuse matter and vegetable waste and refuse accumulations resulting from handling, preparing, cooking, or consuming food containing only vegetable matter, liquid or otherwise."

Humane Issues:

There were a number of humane concerns raised by commenters. One commenter noted that *"(a)llowing holding in a trailer for up to 7 days seems excessive and could come under fire by animal rights groups. Treatment standards need to be written for holding facilities that include adequate food, clean water and shelter from sun and cold."* Another commenter felt strongly that seven days in a crate is too long, particularly given there are no rules regarding food, water, and sanitation. It was also noted in the comment that there are no size requirements for the crates or limits on the number of hogs that can be held in one crate. The commenter suggested the crate size should be specific and allow room for movement.

The requirement allowing feral swine to overstay on a trapper's premises for seven days was created in response to stakeholder discussions that feral swine trappers haul trapped swine to their premises prior to movement to a feral swine holding facility. For reasons related to effective transportation costs, a trapper may hold feral swine in a pen on his premises until there are enough to transport.

Based on the current cost of gasoline and driving distances to an authorized holding facility, these are realistic factors that will affect how quickly the feral swine get into authorized movement channels. The statutory authority under which these rules are proposed is focused on registering holding facilities and not the trappers.

There are more trappers than holding facilities. Persons trapping full time should pursue having an authorized holding facility. However, there will be trappers who will, on a temporary basis hold feral swine while assembling a sufficient load for transport.

The stakeholder group grappled with how we handle this reality with an objective regulatory standard. The Commission does not have any express statutory authority over humane issues, but through the Texas Penal Code and Texas Health and Safety Code, there are statutory standards for the humane treatment of animals. These would be applicable to anyone holding feral swine in confinement.

Other Questions:

There were a number of very specific comments to which the Commission is providing response.

One commenter felt there should be a provision for a bond or any associated preventative measures for those people or entities, who for whatever reason; decide to end the keeping of feral swine in any holding facility or the like.

The Commission appreciates the comment but statutory authority for this program does not authorize us to put in place any type bond requirements.

The commenter also stated that, regardless of the marking method used on hunting preserves, there is no mention of individually identifying feral hogs at holding facilities.

Identification is not needed for feral swine in a holding facility and designated for slaughter because these animals have a "dead end" destination. There was some concern about animals escaping from a holding facility. Escape from current holding facilities has not been an issue. Physical requirements for holding facilities under the proposal are the same as under the current rules. The holding facilities are inspected by Commission personnel to ensure they can hold the animals.

The commenter said he could find no mention of how marked escapees should be handled if they are captured or harvested.

How will trappers and hunters know what to do with these animals?

If a hunter or land owner captures or kills a tagged hog and can not identify the owner of the animal, they should call the Commission for follow up.

The proposed regulations state that hunting preserves and holding facilities are required to keep and maintain records that are to be provided to "an authorized agent of the Commission upon request." A commenter wrote that these records should be supplied, by mandate, to the Commission (and made available to researchers and the public) no less than annually so that numbers and sex ratio can be used as an index of the free-ranging feral pig population. Using such data, it may show that these new regulations are doing nothing to control the population and need to be revised.

These rules are not for the primary purpose of regulating the population growth of feral swine, but rather are focused on disease reduction. This recordkeeping requirement is intended to ensure compliance and provide records that can be used to trace an animal if necessary.

As for obtaining and maintaining records for research purposes, available records are subject to the Texas Public Information Act. However, it should be noted we do not collect and copy this information.

One commenter stated that "(h)og/dog interaction should NOT be part of the hunting of feral hogs."

As stated previously, the Commission has no regulatory authority over hunting.

Why are they not testing at slaughter plant?

The Commission does not regulate the slaughter plants. This is accomplished through other state and federal agencies.

Most folks are meat hunting, not trophy hunting. More sows are mounted with long tusks than boars.

Based on the high propagation rates of feral swine, the exclusion of sows will not effectively reduce a hunter's ability to hunt and harvest feral swine for meat.

The record keeping is absurd and impossible and worse than exotic game.

The record keeping is necessary and important in order to ensure compliance with the requirements. Without record-keeping, the program would not have enforceable standards for ensuring compliance with the requirements. Other animal industries maintain records without impeding business.

When did TAHC start making hunting regulations and authorizing hunting preserves instead of TPWD?

This is not a hunting regulation nor is the TAHC treading on the TPWD's jurisdiction. This rule is focused only on those facilities that release trapped swine.

Who is the slaughter plant operator that is padding whose pockets?

This is a rhetorical allegation, without support from the commenter.

Another comment was rhetorical and stated "Who wants to shoot and ear tag?"

This is another rhetorical allegation from the commenter.

There should be an exception to the trap-transport-deliver rule which would allow unregulated transport of at least boars and barrows from owned/lease property and delivery to another property owned/leased by the same owner, especially if the purpose is for commercial hunting at the destination property. This would result in no net increase in hog numbers and it would probably result in more hogs being eliminated by hunting.

This does not offer a reduced risk method of feral swine movement and would make the rest of the rule impractical to enforce. Furthermore, it would make an artificial distinction for letting some persons move feral swine with no requirements, while others are subject to the restrictions.

I see nothing in the rules about the sale of feral hogs to individuals for slaughter. If I trap a sounder of 20-pound pigs and sell them individually for the BBQ pit--is that legal? What if it takes longer than seven days to sell them all?

The rules become applicable when feral swine are trapped and moved to another location. The commenter noted that the rule provides for holding seven days prior to movement to an authorized destination. However under the proposed rules, the destination of live feral swine is limited to approved holding facilities, slaughter plants or game preserves.

I trap on leased property. My leases are verbal and extend only to trapping hogs and/or hunting hogs. Some properties are without livestock, others are leased by someone else for grazing. So I don't really have "control" of the property. The last hog I trapped was too small for the official buying station and I hauled him straight into town, sold him to an individual for his personal consumption, but I can not swear to what actually became of the pig, as I did not witness its slaughter. I transferred the live pig to the buyer's trailer, was paid and left. Legal or not?

As noted previously, once feral swine are trapped, then transported, the proposed rules would apply. Releasing the animal alive without knowing it was slaughtered would technically violate these requirements. However there is some confusion about the pig you have identified as going to a buyer's trailer, which we would assume is an authorized holding facility. And selling any live feral swine to an authorized buying station is in accordance with these requirements and legal.

Why are there no avenues for the disposition of small hogs less than 60 lbs? I live a great distance from any hunting ranch, therefore, I have no option for small hogs of either sex. The official buying stations will not take anything under 60 lbs. Given the high fuel prices and the ridiculous increase in the price of corn, I feel certain that many small hogs that are trapped will simply be released from the trap to become a larger, smarter problem.

The Commission realizes that there is a gap in our regulatory authority to handle along with what some slaughter plants will purchase.

Will the identification requirements apply when wild hogs are trapped and transported directly to a slaughter facility?

No. Identification requirements do not apply if they are being transported directly to slaughter.

Section 161.0412 includes confining for slaughter and hunting. How is 'confine' defined? Would the traps be considered 'holding facilities' subject to inspection, or does this rule solely apply to holding and transport of animals intended for live release?

The rules do not apply to the traps per se, as they are for capturing the animals, but not necessarily for confinement. When

the animal is trapped and moved off the property alive, the rules become applicable.

Will feral swine intended for slaughter be required to be tested for pseudorabies and brucellosis?

No, they are not tested at slaughter as this is a dead-end destination for those animals.

All premises that lease hunts are required to have a premises license from TPWD. I understand and support extending these requirements to preserves that house released live swine for trophy hunting. The wording of the proposed amendment is unclear if regulations will extend to private lands that are already home to feral animals where owners do not bring in and release swine for hunting. Is this the intent?

No the rules do not apply to a hunting preserve where the feral swine were not released onto the property but are free ranging. As we have noted earlier in the response these rules do not apply to that situation.

Who will issue authorizing permits, perform periodic inspections of facilities and monitor premises fencing (Commission staff or third-party)?

These are done by Commission staff.

What portion of the TAHC budget is allotted to this?

We have no special funds for this program, nor does this program generate funds through fees.

Will the holding facilities be scrutinized to a standard for humane treatment?

We do not have regulatory authority over humane or cruelty issues. These are handled through local law enforcement.

Will the requirements for tagging for transport apply to persons that trap wild hogs on their land and transport them to a slaughter facility?

No the identification requirements do not apply if they are being transported directly to slaughter.

Section 161.0412 includes confining for slaughter and hunting. How is 'confine' defined? Would the traps be considered 'holding facilities' subject to inspection, or does this rule solely apply to holding and transport of animals intended for live release?

The rules do not apply to the traps per se as they are for the purpose of capturing the animals but not necessarily for confinement. It is when the animal is trapped and moved alive off the property that the rules become applicable.

The Commission received a comment regarding the definition of "temporary" as contained within the definition for "Approved Holding Facility." The commenter states that "(t)emporary has no common meaning and should be defined." They request that a short definitive limit should be placed on how long these hogs may remain in "holding."

The purpose of the facilities is to hold trapped feral swine from one or more locations prior to moving them to an approved destination, most often to a slaughter plant.

These movements happen in a fairly routine pattern, but are dependent upon the pick-up patterns from the slaughter plants and the number of feral swine needed to comprise a load. Because the animals are destined for slaughter as free-ranging swine, confinement is fairly minimal. The use of the term "temporary" is to denote that these facilities are not authorized to maintain the feral swine permanently. Creating a timeframe for departure is difficult. This is dependent on transportation schedules and is affected by the time of year and location in the state. Historically, this has not been a problem but, as this program is implemented, this is an issue that can be re-evaluated through future rulemaking.

The commenter noted that the definitions for feral swine and domestic swine are contradictory because the requirements in subsection (e) regarding the change of classification of feral swine are contradictory. They note that reclassification does not fit either definition?

The commenter also noted that in reference to subsection (b)(6) that "Authorized location is not defined, nor is it found in our other rules."

In regards to this comment, the intent of that terminology is to reflect the fact that under subsection (b), only certain destinations are authorized. This was intended to reference that requirement. As a point of clarity the Commission clearly denotes that movement from that location must be in accordance with subsection (b).

There also were several comments related to the responsibility for a holding facility or a hunting preserve. The proposed regulations made them applicable to either the owner or operator. The commenter felt that the owner should be responsible. There also is no requirement for an operator to notify the owner if the facility is violating the regulations. The commenter went on to say that the owner should sign the application. The regulation adds a manager, which may be different from an operator or owner. The likelihood of confusion and lack of communication increases with three people. Owners should sign these records.

In the Commission's experience, it is not always easy or practical to have the owner directly involved in all operations, as many owners are absentee landowners who have entrusted the property to the care of an operator or manager. This is the person who manages the day to day operations and is the person the Commission deals with, relative to these proposed rules.

The intent of the requirement is to ensure that the person we deal with can be held accountable. For documented violations, our goal is to establish regulatory compliance. The focus is on the person who signed the application. We want to make them responsible, whether they are the operator or owner. If we can not remedy a problem because an owner is not involved or is unaware, we will bring the problem to their attention and make them accountable.

A commenter asked "(w)hat happens in the case of injured and dying hogs? Rules should be established where they are euthanized quickly by a veterinarian and not allowed to suffer."

The animal owner or caretaker is responsible for the well-being of the animals, in accordance with any applicable animal care or cruelty standards in state statute. Requiring them to be quickly euthanized by a veterinarian is beyond the Commission's regulatory authority. The issue also is subjective and depends on facts, and the availability of a large-animal veterinarian.

How can the proper disposal of dead animals be assured? Owners or employees may not know the laws and rules that apply, or they may not follow them.

The regulatory requirements for disposal of non-diseased animals is not vested in this agency, but is handled through the Texas Commission for Environmental Quality (TCEQ). If, during

their facility inspection, Commission personnel see improper disposal, they will notify TCEQ, so the situation can be remedied. If deaths are related to disease events, the Commission will enforce existing regulations to assure proper disposal of carcasses of diseased animals.

A commenter suggested that reports be submitted regularly, rather than on request only.

The Commission believes that requiring submission of the records would place a burden on the facility owner/operator and the agency. The records are intended to ensure that the responsible party is keeping track of the feral swine entering and leaving the facility. This is an appropriate regulatory tool for ensuring accountability. Records are most effectively reviewed on site, where they can be correlated to the current inventory of swine.

Throughout the various livestock and fowl industries, dealers of agricultural animals are required to maintain records. This is a very important tool when the Commission must trace animals that have had exposure to disease. This responsibility is placed on the appropriate individuals, and the Commission does not require them to submit their records. Otherwise, this would become an overwhelming paperwork task for the agency to manage.

There was also a comment that, in the event of a violation, the owner's authorization (not the operator's) should be suspended or revoked. For the greatest regulatory latitude to remedy violations of these requirements, the owner, operator or both should be subject to having authorization revoked.

A commenter stated that a definitive number of inspections should be conducted year, and that they should be unannounced

The Commission utilized the "periodic" standard for several reasons. First, depending on the time of year, there may not be any on-going feral swine trapping or movement that would require consistent inspections. Also, feral swine holding facilities will be inspected more frequently than hunting preserves, because of the type of activity. Inspections also are based on the other job duties of our field inspectors.

A commenter requested that inspections include a veterinarian, or other specialist or experts.

The Commission has field veterinarians who can conduct disease investigations, should such be needed. However the Commission does not believe it necessary to specifically include inspection by veterinarians or other specialists or experts. The Commission's livestock inspectors are well trained to conduct the type of inspections required by the proposed regulations. Similar processes are utilized for other Commission programs.

4 TAC §55.9

STATUTORY AUTHORITY

The repeal is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The Commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041 (b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061.

As a control measure, the Commission by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in §161.054. An agent of the Commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048.

Section 161.061 provides that if the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state where livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. In §161.041(f) it provides that "(i)n complying with this section, the commission may not infringe on or supersede the authority of any other agency of this state, including the authority of the Parks and Wildlife Department relating to wildlife." If a conflict of authority occurs, the Commission shall assume responsibility for disease control efforts, but work collaboratively with the other agency to enable each agency to effectively carry out its responsibilities.

Section 161.0412, entitled Regulation and Registration of Feral Swine Holding Facilities, provides that "(t)he Commission may, for disease control purposes, require the registration of feral swine holding facilities." Furthermore that Section also provides that in order "(t)o prevent the spread of disease, the Commission may require a person to register with the commission if the person confines feral swine in a holding facility for slaughter, sale, exhibition, hunting, or any other purpose specified by commission rule." Rules adopted under this section shall include registration requirements, provisions for the issuance, revocation, and renewal of a registration, disease testing, inspections, recordkeeping, construction standards, location limitations, and provisions relating to the treatment of swine in and movement of swine to or from a feral swine holding facility.

Section 161.054, entitled Regulation of Movement of Animals, provides that "(a)s a control measure, the Commission by rule may regulate the movement of animals, including feral swine. The Commission may restrict the intrastate movement of animals, including feral swine, even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved." Also, that Section provides that "(t)he commission by rule may prohibit or regulate the movement of animals, including feral swine, into a quarantined herd, premise, or area." In §161.054(e) the Commission may regulate the movement of feral swine, by rule, and require disease testing before movement of a feral swine from one location to another, as well as establish the conditions under which feral swine may be

transported. Subsection (f) of that section also states that "(t)he commission's authority to regulate the movement of feral swine may not interfere with the authority of the Parks and Wildlife Department to regulate the hunting or trapping of feral swine."

Section 161.150, entitled "Failure to Register Feral Swine Holding Facilities; Holding of Feral Swine", provides that: "(a) person commits an offense if the person recklessly: (1) maintains a feral swine holding facility that is not registered under §161.0412; or (2) as the owner or person in charge of a holding facility that is not registered under §161.0412, holds or permits another to hold a feral swine in the holding facility. Furthermore, "[e]ach feral swine held or permitted to be held in violation of subsection (a)(2) constitutes a separate offense."

Section 161.1375, entitled "Movement of Feral Swine", provides that "(a) A person commits an offense if the person recklessly: (1) moves feral swine in a manner that is not in compliance with rules adopted by the commission under §161.0412 or §161.054; or (2) as the owner or person in charge of a holding facility in which a feral swine is held, permits another to remove feral swine from the holding facility in a manner that is not in compliance with those rules."

Chapter 165 of the Texas Agriculture Code entitled "Control of Diseases of Swine" has several sections which also provide statutory authority for this section. Section 165.021, entitled "Cooperation with United States Department of Agriculture", provides that the commission may cooperate with USDA in the eradication of swine diseases. Also §165.022 provides that the Commission may adopt rules for the manner and method of eradicating swine diseases. Under §165.023 the commission is authorized to adopt rules governing the use of biologics. Also the Texas Agriculture Code, Chapter 143, entitled Fences; Range Restrictions, provides in §143.001 that a sufficient fence around cleared land in cultivation that is at least five feet high and will prevent hogs from passing through.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2008.

TRD-200804055
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: October 1, 2008
Proposal publication date: June 6, 2008
For further information, please call: (512) 719-0714

♦ ♦ ♦

4 TAC §55.9

STATUTORY AUTHORITY

The new rule is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The Commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061.

As a control measure, the Commission by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in §161.054. An agent of the Commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048.

Section 161.061 provides that if the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state where livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. In §161.041(f) it provides that "(i)n complying with this section, the commission may not infringe on or supersede the authority of any other agency of this state, including the authority of the Parks and Wildlife Department relating to wildlife." If a conflict of authority occurs, the Commission shall assume responsibility for disease control efforts, but work collaboratively with the other agency to enable each agency to effectively carry out its responsibilities.

Section 161.0412, entitled Regulation and Registration of Feral Swine Holding Facilities, provides that "(t)he Commission may, for disease control purposes, require the registration of feral swine holding facilities." Furthermore that Section also provides that in order "(t)o prevent the spread of disease, the Commission may require a person to register with the commission if the person confines feral swine in a holding facility for slaughter, sale, exhibition, hunting, or any other purpose specified by commission rule." Rules adopted under this section shall include registration requirements, provisions for the issuance, revocation, and renewal of a registration, disease testing, inspections, recordkeeping, construction standards, location limitations, and provisions relating to the treatment of swine in and movement of swine to or from a feral swine holding facility.

Section 161.054, entitled Regulation of Movement of Animals, provides that "(a)s a control measure, the Commission by rule may regulate the movement of animals, including feral swine. The Commission may restrict the intrastate movement of animals, including feral swine, even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved." Also, that Section provides that "(t)he commission by rule may prohibit or regulate the movement of animals, including feral swine, into a quarantined herd, premise, or area." In §161.054(e) the Commission may regulate the movement of feral swine, by rule, and require disease testing before movement of a feral swine from one location to another, as well

as establish the conditions under which feral swine may be transported. Subsection (f) of that section also states that "(t)he commission's authority to regulate the movement of feral swine may not interfere with the authority of the Parks and Wildlife Department to regulate the hunting or trapping of feral swine."

Section 161.150, entitled "Failure to Register Feral Swine Holding Facilities; Holding of Feral Swine", provides that: "(a) person commits an offense if the person recklessly: (1) maintains a feral swine holding facility that is not registered under §161.0412; or (2) as the owner or person in charge of a holding facility that is not registered under §161.0412, holds or permits another to hold a feral swine in the holding facility. Furthermore, "[e]ach feral swine held or permitted to be held in violation of subsection (a)(2) constitutes a separate offense."

Section 161.1375, entitled "Movement of Feral Swine", provides that "(a) A person commits an offense if the person recklessly: (1) moves feral swine in a manner that is not in compliance with rules adopted by the commission under §161.0412 or §161.054; or (2) as the owner or person in charge of a holding facility in which a feral swine is held, permits another to remove feral swine from the holding facility in a manner that is not in compliance with those rules."

Chapter 165 of the Texas Agriculture Code entitled "Control of Diseases of Swine" has several sections which also provide statutory authority for this section. Section 165.021, entitled "Cooperation with United States Department of Agriculture", provides that the commission may cooperate with USDA in the eradication of swine diseases. Also §165.022 provides that the Commission may adopt rules for the manner and method of eradicating swine diseases. Under §165.023 the commission is authorized to adopt rules governing the use of biologics. Also the Texas Agriculture Code, Chapter 143, entitled Fences; Range Restrictions, provides in §143.001 that a sufficient fence around cleared land in cultivation that is at least five feet high and will prevent hogs from passing through.

§55.9. Feral Swine.

(a) Definitions

(1) "Approved holding facility"--A pen or pens approved by the commission to temporarily hold feral swine pending movement to a recognized slaughter facility or an authorized hunting preserve.

(2) "Authorization"--is the written and signed documents required of this chapter to show compliance with the requirements of the chapter.

(3) "Authorized Hunting Preserve" means land where feral swine are authorized to be released for the purpose of hunting.

(4) "Domestic Swine"--Swine *(Sus scrofa)* other than feral swine.

(5) "Feral swine"--Swine that have lived all (wild) or any part (feral) of their lives free-roaming.

(6) "Free-Roaming"--means not confined by man to pens, houses or other facilities designed to hold swine and prevent their escape.

(7) "Recognized slaughter facility"--a slaughter facility operated under the state or federal meat inspection laws and regulations.

(8) "Swine-Proof Fence"--means a fence constructed to sufficient construction standards; with materials of hog-proof net, woven or welded wire and wood, metal or other approved posts and, be maintained to prevent egress of feral swine over, through or under the fence.

(b) Required Authorization for Movement of Feral Swine: These requirements apply to anyone who traps feral swine and moves them from the premises or location where they were trapped or otherwise captured and moved alive. Movement is only authorized in accordance with the requirements provided in paragraphs (1) - (6) of this subsection.

(1) The feral swine are moved directly from the premises where they were trapped to recognized slaughter facility;

(2) The feral swine are moved directly from the premises where they were trapped to an approved holding facility;

(3) The feral swine are moved directly from the premises where they were trapped to an authorized hunting preserve;

(4) The feral swine are moved from an approved holding facility to a recognized slaughter facility;

(5) The feral swine are moved from an approved holding facility to an authorized hunting preserve; or

(6) Feral swine that have been trapped and are being held for transportation to an authorized location, as provided by through this subsection, may be held in an escape-proof cage on the vehicle or trailer that transported them from their original premise, or held within the transport trailer itself for up to seven (7) days.

(c) Approved Holding Facility:

(1) Written approval for a feral swine holding facility may be given after an initial inspection by commission personnel determines that the facility meets the following criteria:

(A) The facility is double fenced with swine-proof fence to prevent any feral swine from escaping and continually maintained by the owner and/or operator to prevent escape of the feral swine. The two fences shall be at least four feet apart with no animals allowed in the space between the fences. Variance from this construction standard may be requested by the owner or the operator and may be approved by the agency Executive Director upon the recommendation of the Area Director, where facility is located, if a different construction standard supports that there is no risk of feral swine escaping;

(B) The facility shall not be located within two hundred yards of any domestic swine pens;

(C) Only feral swine may be placed in the facility;

(D) Records shall be maintained by the registrant as provided in paragraph (3) of this subsection and the facility must provide them when requested or inspected;

(E) Feral swine shall not be intentionally commingled with domestic or exotic swine;

(F) Feral swine shall not be fed any garbage or waste as it is defined in Chapter 165 of the Texas Agriculture Code;

(G) Dead animals shall be removed from the registered location premises promptly and disposed of in accordance with any applicable requirement or applicable ordinances or at the direction of Commission personnel; and

(H) Feral swine shall only be moved from the facility directly to an approved slaughter facility or to an authorized hunting preserve.

(2) Application for Approved Holding Facility: Authorization for an approved holding facility shall be on a form prescribed by the Commission and include at least the following information:

(A) Name, address and telephone number of applicant;

(B) Facility name, physical location, county, directions to facility and telephone number;

(C) Diagram of the surrounding areas and the pens;

(D) Pictures of the pens;

(E) Signature of the owner/manager;

(F) The authorization is valid for two years from the date of issuance and shall expire on the two year anniversary date of the date of issuance unless re-authorized; and

(G) Re-authorization of the approved holding facility shall be completed within 30 to 60 days prior to the expiration date.

(3) Record Keeping:

(A) Records to be generated and maintained by owners and/or operators of approved holding facilities and authorized hunting preserves shall include the following:

(i) The number of swine placed in and removed from the facility and/or preserve;

(ii) The approximate weight, size, color, sex and any applied identification for each feral swine;

(iii) Dates they were placed and/or removed from the facility;

(iv) The physical location where they were trapped;

(v) The physical location that they were moved to, including any unique identification number; and

(B) The records shall be provided to an authorized agent of the commission upon request. Records shall be kept and maintained for not less than five years from the date the record was generated.

(4) Suspension/Revocation: The agency may suspend the authorization for an approved holding facility if the owner or operator fails to generate, maintain or provide records on feral swine as provided in paragraph (3) of this subsection, fails to maintain swine-proof fences to prevent egress or ingress of feral swine, or violates any of the provisions of this chapter or the provisions of Chapter 161 of the Agriculture Code. The suspension will remain in effect until the deficiencies that were the cause of the suspension are corrected and any penalties assessed as result of the suspension are satisfied and a written suspension release is provided by the agency. The authorization for a holding facility may be revoked for blatant or repetitive violation(s) of the feral swine law or rules or for repeated failure to meet the requirements contained in this chapter.

(d) Authorized Hunting Preserve:

(1) If feral swine are to be trapped and moved for release to a hunting preserve, the hunting preserve shall meet the following requirements:

(A) Only male feral swine (i.e. boars and/or barrows) may be trapped, moved and released to a hunting preserve;

(B) Any swine released must be individually identified with a commission approved form of identification prior to release;

(C) Records shall be generated and maintained as provided in subsection (c)(3) of this section;

(D) Shall have a "Hunting Lease License" with the Texas Parks and Wildlife Department and the license must be current and in good standing with that agency, as provided for in Chapter 43 of the Texas Parks and Wildlife Code;

(E) Shall be enclosed by a swine-proof fence and the fence shall be maintained continually to prevent the egress of feral swine under, over or through the fence;

(F) Feral swine shall not be fed any garbage as "garbage" or waste as defined in Chapter 165 of the Texas Agriculture Code; and

(G) The authorization for a hunting preserve may be suspended or rescinded if owner and/or the operator fails to generate, maintain or provide records on feral swine as provided in subsection (c)(3) of this section, sufficient fences are not maintained, or violates any of the provisions of this chapter or the provisions of Chapter 161 of the Agriculture Code. The suspension will remain in effect until the deficiencies that were the cause of the suspension were corrected and any penalties assessed as result of the suspension are satisfied. The preserve will be notified in writing when the suspension has been lifted. The authorization for a hunting preserve may be rescinded for blatant or repetitive violation(s) of the feral swine law or rules or for repeated failure to meet the requirements contained in this chapter.

(2) Application for Authorized Hunting Preserve:

(A) Applications shall be completed on a form prescribed by the Commission, providing at least the following information:

(i) Name, address and telephone number of applicant;

(ii) Physical location and county, directions to facility and telephone number;

(iii) A current copy of the Hunting Lease License issued by Texas Parks and Wildlife Department; and

(iv) Signature of the owner/manager that states that facility fences meet the requirements for swine-proof fences as contained in subsection (a) of this section.

(B) The authorization is valid for two years from the date of issuance. The authorization shall expire on the two year anniversary date of the date of issuance unless re-authorized. Re-authorization of the hunting preserve shall be completed within 30 to 60 days prior to the expiration date.

(C) The facility is inspected periodically by agency personnel and continually meets the requirements of this chapter.

(e) Change in Classification of Feral Swine: Free-roaming swine may be qualified for reclassification as domestic swine upon completion of the following test protocol:

(1) Three consecutive tests for brucellosis and pseudorabies, with negative results, shall be conducted on all swine in the herd unit in order to qualify for reclassification. The first test must be at least 30 days after any reactors have been removed and slaughtered and the second test must be 60 to 90 days after the first test. A third test is required 60 to 90 days following the second negative results; and

(2) In addition to the requirements in paragraph (1) of this subsection, any sexually intact female swine must also undergo a brucellosis and pseudorabies test, with negative results, a not less than 30 days after their initial farrowing.

(f) Testing: Feral swine which are positive for brucellosis and/or pseudorabies shall be handled in accordance with the require-

ments for brucellosis, as contained in Chapter 35, Subchapter B of this title (relating to Eradication of Brucellosis in Swine) and for pseudorabies as contained in Chapter 55 of this title (relating to Swine).

(g) Inspection Authority:

(1) A person employed by the commission may enter public or private property for the exercise of an authority or performance of a duty under this chapter.

(2) A commission representative shall perform periodic inspections of authorized facilities and locations, and records related thereto, to ensure compliance with the requirements of the act or this chapter.

(h) Violations and Penalties: In addition to any other violations that may arise under the act or this chapter:

(1) It is a violation for any person to falsify an application.

(2) Any violation of these rules is subject to the appropriate administrative, civil or criminal penalties. In addition, the agency may revoke or deny renewal of a permit and/or assess administrative penalties against any person for a violation of these rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2008.

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Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: October 1, 2008
Proposal publication date: June 6, 2008
For further information, please call: (512) 719-0714

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TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 9. RULES OF PROCEDURE FOR CONTESTED CASE HEARINGS, APPEALS, AND RULEMAKINGS

SUBCHAPTER A. GENERAL

7 TAC §9.1

The Finance Commission of Texas (commission) adopts amendments to 7 TAC §9.1, concerning Definitions and Interpretation; Severability. The amendments are adopted without changes to the proposal published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5167).

The purpose of the amendments to §9.1 is to make technical corrections. Technical revisions have been made to §9.1 to reflect the name change of the "savings and loan department" to the "department of savings and mortgage lending," as found in Texas Finance Code, §13.0015.

The commission received no written comments on the proposal.

The amendments are adopted pursuant to Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The amendments are also adopted under specific rulemaking authority contained in the substantive statutes administered by the finance agencies under the jurisdiction of the commission, including Finance Code, §§11.302, 11.306, 66.002, 96.002, 156.102, 181.003, 201.003.

The statutory provisions affected by the adopted amendments are contained in Finance Code, Chapters 11, 13, 61, 66, 91, 96, 156, 201.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804220
Leslie L. Pettijohn
Executive Director
Finance Commission of Texas
Effective date: August 28, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 936-7621

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SUBCHAPTER B. CONTESTED CASE HEARINGS

7 TAC §§9.16, 9.26, 9.29

The Finance Commission of Texas (commission) adopts amendments to 7 TAC §9.16, concerning Pleadings, §9.26, concerning Applicability of Texas Rules of Evidence, and §9.29, concerning Stipulations. The amendments are adopted without changes to the proposal published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5168).

In general, the purpose of the adopted amendments is to codify existing practice and to provide better clarity for litigants in the contested case hearings process. The individual purposes of each section are contained in the following paragraphs.

The purpose of the amendments to §9.16 is to codify the existing practice regarding requirements for pleading and proving affirmative defenses when an application has been denied based on the applicant's criminal history.

The purpose of the amendments to §9.26 is to clarify the former rule to remove any ambiguity in §9.26(b). The adopted amendments reflect that letters of recommendation submitted to a finance agency during the investigation stage will be considered by the agency but will not be admitted into evidence absent the satisfaction of an exception to the hearsay rule or admission without objection.

The purpose of the amendments to §9.29 is to codify the existing practice of allowing oral stipulations on the record at a hearing.

The commission received no written comments on the proposal.

The amendments are adopted pursuant to Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The amendments are also adopted under specific rulemaking authority contained in the substantive statutes administered by the finance agencies under the jurisdiction of the commission, including Finance

Code, §§11.301, 11.302, 11.304, 11.306, 14.157, 31.003, 66.002, 96.002, 151.102, 154.051, 156.102, 181.003, 201.003, 342.551, 351.003 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351.007 (Property Tax Lenders, Acts 2007, 80th Leg., ch. 1220), 348.513, 371.006, 394.214, and 396.051, Health and Safety Code, §711.012(a) and §712.008, and Tax Code, §32.06.

The statutory provisions affected by the adopted amendments are contained in Finance Code, Chapters 11, 12, 13, 14, 31, 35, 61, 66, 91, 96, 121, 151, 154, 156, 181, 185, 201, 301, 341, 342, 348, 351 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351 (Property Tax Lenders, known as the "Property Tax Lender License Act," Acts 2007, 80th Leg., ch. 1220), 371, 394, 396, Health and Safety Code, Chapters 711 and 712, and Tax Code, §32.06 and §32.065.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2008.

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Leslie L. Pettijohn
Executive Director
Finance Commission of Texas
Effective date: August 28, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 936-7621

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7 TAC §§9.18, 9.23, 9.25

The Finance Commission of Texas (commission) adopts the repeal of 7 TAC §9.18, concerning Issuance, Service, and Return of Subpoenas, §9.23, concerning Summary Judgment, and §9.25, concerning The Hearing. The commission has determined that, due to the types of amendments necessary for these rules, the best process to implement changes is the repeal of the former rules and adoption of new rules in the same location on these issues. Therefore, these rules are being repealed and new rules are adopted elsewhere in this issue of the *Texas Register.* The repeal is adopted without changes to the proposal published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5169).

The commission received no written comments on the proposal.

The repeal is adopted pursuant to Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The repeal is also adopted under specific rulemaking authority contained in the substantive statutes administered by the finance agencies under the jurisdiction of the commission, including Finance Code, §§11.301, 11.302, 11.304, 11.306, 14.157, 31.003, 66.002, 96.002, 151.102, 154.051, 156.102, 181.003, 201.003, 342.551, 351.003 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351.007 (Property Tax Lenders, Acts 2007, 80th Leg., ch. 1220), 348.513, 371.006, 394.214, and 396.051, Health and Safety Code, §711.012(a) and §712.008, and Tax Code, §32.06.

The statutory provisions affected by the adopted repeal are contained in Finance Code, Chapters 11, 12, 13, 14, 31, 35, 61, 66, 91, 96, 121, 151, 154, 156, 181, 185, 201, 301, 341, 342, 348, 351 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351 (Property Tax Lenders, known as the "Property Tax Lender License Act," Acts 2007, 80th Leg., ch. 1220), 371, 394, 396, Health and Safety Code, Chapters 711 and 712, and Tax Code, §32.06 and §32.065.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Leslie L. Pettijohn
Executive Director
Finance Commission of Texas
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Proposal publication date: July 4, 2008
For further information, please call: (512) 936-7621

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7 TAC §§9.18, 9.23, 9.25

The Finance Commission of Texas (commission) adopts new 7 TAC §9.18, concerning Issuance of Subpoenas, §9.23, concerning Summary Judgment, and §9.25, concerning The Hearing. The rules are adopted without changes to the proposal published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5170).

In general, the purpose of the new rules is to codify existing practice and to provide better clarity for litigants in the contested case hearings process. The individual purposes of each section are contained in the following paragraphs.

The purpose of new §9.18 is to conform the issuance of subpoenas to the Administrative Procedure Act (APA). The former rule governing subpoenas tracked the Texas Rules of Civil Procedure, and there is a conflict between those rules and the APA. The APA should govern these proceedings in the event of a conflict between the two sets of rules. Thus, adopted new §9.18 tracks the procedures for issuance of subpoenas provided by the APA.

The purpose of new §9.23 is to provide that certain motions for summary judgment give sufficient notice to opposing parties to allow a valid summary judgment to be issued and to codify existing practice. Subsection (b)(3) of §9.23 and accompanying subparagraphs place the burden of issuing a notice that contains submission deadlines for the opposing party to file affidavits, other written material, and cross-claims or counterclaims, on the moving party. The notice must also contain the time, date, and place where the administrative law judge will hear oral argument on the motion. These notice requirements will ensure that summary judgment hearings are set more promptly. The notice requirements will also help ensure that pro se litigants fully understand what the law requires them to do to avoid an unintentional waiver of their rights. Section 9.23(b)(5) allows the administrative law judge to schedule a motion for summary judgment on the same date as a hearing on the merits of the case.

The purpose of new §9.25 is to reorganize the information in former §9.25 and to add new material that reflects existing practice. The new material places the burden of proof on the agency when the agency denies a renewal of an existing license. The new information places the burden on the applicant to prove the applicant satisfies the requirements for the license under Chapter 53 of the Occupations Code (relating to collateral consequences of

a criminal conviction) or to prove any mitigating circumstances surrounding any conviction or deferred adjudication. This new material codifies the administrative law judge's decisions related to these issues.

The commission received no written comments on the proposal.

The new rules are adopted pursuant to Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The new rules are also adopted under specific rulemaking authority contained in the substantive statutes administered by the finance agencies under the jurisdiction of the commission, including Finance Code, §§11.301, 11.302, 11.304, 11.306, 14.157, 31.003, 66.002, 96.002, 151.102, 154.051, 156.102, 181.003, 201.003, 342.551, 351.003 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351.007 (Property Tax Lenders, Acts 2007, 80th Leg., ch. 1220), 348.513, 371.006, 394.214, and 396.051, Health and Safety Code, §711.012(a) and §712.008, and Tax Code, §32.06.

The statutory provisions affected by the adopted new rules are contained in Finance Code, Chapters 11, 12, 13, 14, 31, 35, 61, 66, 91, 96, 121, 151, 154, 156, 181, 185, 201, 301, 341, 342, 348, 351 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351 (Property Tax Lenders, known as the "Property Tax Lender License Act," Acts 2007, 80th Leg., ch. 1220), 371, 394, 396, Health and Safety Code, Chapters 711 and 712, and Tax Code, §32.06 and §32.065.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804222
Leslie L. Pettijohn
Executive Director
Finance Commission of Texas
Effective date: August 28, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 936-7621

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 2. GENERAL POLICIES AND PROCEDURES

SUBCHAPTER A. PRINCIPLES AND PROCEDURES OF THE COMMISSION

13 TAC §2.53

The Texas State Library and Archives Commission adopts without changes amendments to 13 TAC §2.53 regarding service complaints, as posted in the June 27, 2008, issue of the *Texas Register* (33 TexReg 4949). The amendment specifies the actions the agency will take when it receives a complaint. It also deletes reference to a program and rule that have been repealed.

No comments were received during the comment period.

The amendment is adopted under Government Code §441.018 which directs the commission to "maintain a system to promptly and efficiently act on complaints filed" and to "maintain information about parties to the complaint, the subject matter of the complaint, a summary of the results of the review or investigation of the complaint, and its disposition."

The amended section affects Government Code §441.018.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2008.

TRD-200804094
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Effective date: August 25, 2008
Proposal publication date: June 27, 2008
For further information, please call: (512) 463-5459

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13 TAC §2.58

The Texas State Library and Archives Commission adopts without changes new 13 TAC §2.58 regarding use of technology, as posted in the June 27, 2008, issue of the *Texas Register* (33 TexReg 4949). It specifies the agency's policy regarding use appropriate technological solutions to improve the commission's ability to perform its functions.

No comments were received during the comment period.

The rule is adopted under Government Code §441.019 which directs the commission to "implement a policy requiring the commission to use appropriate technological solutions to improve the commission's ability to perform its functions" and to "ensure that the public is able to interact with the commission on the Internet."

The new rule affects Government Code §441.019.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200804095
Edward Seidenberg
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Effective date: August 25, 2008
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For further information, please call: (512) 463-5459

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PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 16. HISTORIC SITES

13 TAC §16.3

The Texas Historical Commission adopts new §16.3 relating to Addition of Historic Sites to Texas Historical Commission Historic Sites Program) of Title 13, Part 2, Chapter 16 of the Texas Administrative Code, without changes to the text of the proposed rule published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4769). The purpose of this section is to describe the circumstances under which the Texas Historical Commission may acquire new historic sites that will be administered by the Commission. The Commission will not accept properties into the Historic Site program strictly for preservation of the resource. Acquisition is based on a comprehensive evaluation of the property's ability to best serve the citizens of Texas as an interpreted site within the resources available to the Commission. The Texas Historical Commission (Commission) operates a system of state historic sites as mandated by the Texas Legislature in House Bill 12 (Act of May 29, 2007, Chapter 1159, §11 and §12, Regular Session, 80th Legislature). The text of the adopted rule will not be republished.

This rule is adopted to comply with a legislative mandate that the Commission adopt rules to establish "criteria for determining the eligibility of real property donated to the commission for inclusion in the historic sites system." Texas Government Code §442.0053(a). The Commission believes that the criteria adopted are consistent with this law.

The new section will function by providing standards and procedures that the Commission may use in objectively evaluating any land that is proposed as a new historic site or an addition to an existing historic site. This should assist in preventing ad hoc or arbitrary decisions concerning land acquisition.

No comments were received on the proposed rule.

The new section is adopted under the Texas Government Code §442.005, which provides the Commission with authority to promulgate rules that will reasonably effect the purposes of this chapter, and Texas Government Code §442.075, which provides that the Commission may accept the transfer of additional historic sites.

No other statutes, articles, or codes are affected by these amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2008.

TRD-200804084
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Effective date: August 25, 2008
Proposal publication date: June 20, 2008
For further information, please call: (512) 463-6323

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 5. RULES APPLYING TO PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND/OR SELECTED PUBLIC COLLEGES OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §5.6

The Texas Higher Education Coordinating Board adopts an amendment to §5.6 concerning the Common Admission Application without changes to the proposed text as published in the May 23, 2008, issue of the *Texas Register* (33 TexReg 4071). Specifically, the amendment to §5.6(f) deletes the statement that the Coordinating Board may, by contract, implement a reduced rate for participating community colleges. With the passage of Senate Bill 502, 79th Texas Legislature, all public institutions of higher education that admit freshman-level or undergraduate transfer students are legislatively mandated to accept the common admission application. Therefore, no community college must contract to use the form. Community colleges are required to accept the form and all participating institutions share in the cost of the system.

No comments were received regarding the amendment.

The amendment is adopted under the Texas Education Code, §51.762, which provides the Coordinating Board with the authority to adopt rules for the common admission application.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2008.

TRD-200804061
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: August 25, 2008
Proposal publication date: May 23, 2008
For further information, please call: (512) 427-6114

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CHAPTER 6. HEALTH EDUCATION, TRAINING, AND RESEARCH FUNDS

SUBCHAPTER C. TOBACCO LAWSUIT SETTLEMENT FUNDS

19 TAC §6.73, §6.74

The Texas Higher Education Coordinating Board adopts amendments to §6.73 and §6.74, concerning the administration of the Nursing, Allied Health and Other Health-Related Education Grant Program and the Minority Health Research and Education Grant Program, without changes to the proposed text as published in the May 9, 2008, issue of the *Texas Register* (33 TexReg 3705). Specifically, changes will substitute the "Board" for "Commissioner" as the responsible body for making funding decisions. Other changes extend the range of minimum and maximum awards and the award length for both grant programs. Other changes eliminate the word "peer" from "peer reviewer" and expand the definition of appropriate reviewers to evaluate applications for both grant programs. Other changes allow the Board to adjust award criteria and weights to individual grant

competitions and eliminate similar language that only applied to competitive grants in nursing education. Other changes allow oral presentations by highly-ranked applications to be considered in award decisions under the Minority Health Research and Education Grant Program as they are for the Nursing, Allied Health and Other Health-Related Education Grant Program. Finally, changes extend the effective dates of §6.73(h) consistent with Texas Education Code, §63.202(f) and (g).

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §63.202(c) and §63.302(d) which provide the Coordinating Board with the authority to establish rules for the grant programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200804062
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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Proposal publication date: May 9, 2008
For further information, please call: (512) 427-6114

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CHAPTER 7. DEGREE GRANTING COLLEGES AND UNIVERSITIES OTHER THAN TEXAS PUBLIC INSTITUTIONS
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §§7.5, 7.8, 7.9

The Texas Higher Education Coordinating Board adopts amendments to §§7.5, 7.8, and 7.9 concerning Degree Granting Colleges and Universities Other Than Texas Public Institutions, without changes to the proposed text as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4774). Specifically, the amendments allow Board staff to make substantive changes, based on comments received in April, to Chapter 7 rules. The amendments clarify the meanings of governance and distinction of roles, add a requirement to institutional evaluation, increase the amount of the surety bond required for an alternative certificate of authority, add information relating to associate of occupational science degrees, and add a data reporting requirement.

The following comments were received regarding the amendments:

Comment: The Holland and Knight Law Firm suggested a change to §7.5(22) (relating to Standards for Operation of Institutions) - Student Rights and Responsibilities. "The institution shall establish and adhere to a clear and fair policy regarding due process in disciplinary matters; outline the established grievance process of the institution, which shall indicate that students should follow this process and may contact the Board and/or Attorney General to file a complaint about the institution if all other avenues have been exhausted, and publish these policies in a handbook, which shall include other rights and responsibilities of the students. This handbook shall be supplied in print or electronically to each student upon enrollment in the institution." They also recommended deleting the language underlined in the above paragraph and replacing the language with the following: "The institution shall establish and adhere to a clear and fair policy regarding due process in disciplinary matters; outline the established grievance process of the institution, and publish these policies in a handbook, which shall include other rights and responsibilities of the students. This handbook shall be supplied in print or electronically to each student upon enrollment in the institution."

Response: The comment by the Holland and Knight Law Firm referred to sections of Chapter 7 rules that had been adopted in April, rather than the sections available for comment. Staff determined that the suggested change had been submitted by others and was addressed at the April 2008 Board meeting therefore no other changes were made as a result of this comment.

Comment: The Holland and Knight Law Firm suggested changes to §7.3(2) and (3) (relating to Definitions), stating that it would be appropriate to broaden the definitions and make them more generic. The recommended change to §7.3(2) would read: Accreditation/Peer Review Process. A peer review process conducted by a credible national education organization that results in public recognition of an academic institution for the purposes of (1) assessing and recognizing the quality and integrity of the institution and (2) protecting the public. The recommended change to §7.3(3) would read: Accreditation/Peer Review Organization. A national education organization that conducts voluntary accreditation or other quality assessment activities through voluntary peer review and makes decisions regarding the status of institutions.

Response: The comment by the Holland and Knight Law Firm referred to sections of Chapter 7 rules that had been adopted in April, rather than the sections available for comment. Staff determined that the suggested changes had been submitted by others and were addressed at the April 2008 Board meeting therefore no other changes were made as a result of this comment.

Comment: DeVry University suggested the following change to §7.3(17) (relating to Definitions) of the adopted rules to cover other program levels by deleting the term "associate."

Response: The comment referred to a section of Chapter 7 rules that were adopted in April, rather than the sections available for comment therefore no other changes were made as a result of this comment. Staff will consider the change in October.

The amendments are adopted under the Texas Education Code, Chapter 61, Subchapter G, and Texas Education Code Chapter 132, which provides the Coordinating Board with the authority to regulate the awarding or offering of degrees, credit toward degrees, and the use of certain terms.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2008.

TRD-200804063
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: August 25, 2008
Proposal publication date: June 20, 2008
For further information, please call: (512) 427-6114

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19 TAC §7.15, §7.16

The Texas Higher Education Coordinating Board adopts the repeal of §7.15, concerning Use of Fictitious, Fraudulent, or Substandard Degrees, and §7.16, concerning Administrative Penalties and Injunctions, without changes to the proposal as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4776).

Specifically, this repeal will allow Board staff to add a new §7.15 concerning Data Reporting, and to renumber the sections concerning the Use of Fictitious, Fraudulent, or Substandard Degrees and Prohibitions, Administrative Penalties and Injunctions.

No comments were received regarding the repeal of these sections.

The repeal is adopted under the Texas Education Code, Chapter 61, Subchapter G, and Texas Education Code Chapter 132, which provides the Coordinating Board with the authority to regulate the awarding or offering of degrees, credit toward degrees, and the use of certain terms.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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19 TAC §§7.15 - 7.17

The Texas Higher Education Coordinating Board adopts new §§7.15 - 7.17, concerning Degree Granting Colleges and Universities Other than Texas Public Institutions, without changes to the proposed text as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4776).

Specifically, these new sections will allow Board staff to add a new §7.15 concerning Data Reporting, and to renumber the sections concerning the Use of Fictitious, Fraudulent, or Substandard Degrees and Prohibitions, Administrative Penalties and Injunctions.

No comments were received regarding the new sections.

The new sections are adopted under the Texas Education Code, Chapter 61, Subchapter G, and Texas Education Code Chapter 132, which provides the Coordinating Board with the authority to regulate the awarding or offering of degrees, credit toward degrees, and the use of certain terms.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
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For further information, please call: (512) 427-6114

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CHAPTER 21. STUDENT SERVICES
SUBCHAPTER B. DETERMINATION OF RESIDENT STATUS AND WAIVER PROGRAMS FOR CERTAIN NONRESIDENT PERSONS

19 TAC §§21.22, 21.24, 21.25

The Texas Higher Education Coordinating Board adopts amendments to §§21.22, 21.24, and 21.25, concerning Determination of Resident Status and Waiver Programs for Certain Nonresident Persons, without changes to the proposed text as published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4446).

Specifically, the amendment to §21.22(6) adheres to standard procedure by defining the acronym "USCIS" the first time it occurs in the rules. The amendment to §21.22(11) corrects the spelling of an institution by changing it from "San Houston State University" to "Sam Houston State University." Section 21.24(b)(3) states that an eligible nonimmigrant that holds one of the types of visas listed in Chart I and incorporated into this subchapter for all purposes may establish a domicile. The visa type "NAFTA" is proposed for inclusion in the chart to match the existing "Immigration Classifications and Visa Categories" on the website of the United States Citizenship and Immigration Services (USCIS). The eligibility status of visa type "TD" had heretofore not been listed. The amendment makes it clear that a nonimmigrant with this visa type is not eligible to domicile in the United States. Section 21.25(c) states that if a person who establishes resident status under §21.24(a)(1) of this title is not a Citizen of the United States or a Permanent Resident, the person shall, in addition to the other requirements of this section, provide the institution with a signed affidavit, stating that the person will apply to become a Permanent Resident as soon as the person becomes eligible to apply. The affidavit shall be required only when the person applies for resident status and shall be in the form provided in Chart II and incorporated into this subchapter for all purposes. The amendment adds a line to the affidavit (Chart II) on which a person will indicate his or her date of birth. This addition to the affidavit has been requested by institutions in order to ensure the proper matching of documents in the event several students have the same name.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §54.075, which provides the Coordinating Board with the authority to adopt rules to carry out the purposes of Texas Education Code, §§54.0501 - 54.075.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200804066

Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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Proposal publication date: June 6, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER F. MATCHING SCHOLARSHIPS TO RETAIN STUDENTS IN TEXAS

19 TAC §§21.151, 21.152, 21.154

The Texas Higher Education Coordinating Board adopts amendments to §§21.151, 21.152, and 21.154 concerning the Matching Scholarships to Retain Students in Texas Program without changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3535).

Specifically, the amendments to §21.151 concerning Purpose update the title of this section to "Authority and Purpose" for consistency throughout the rules, and add items (a) and (b) which reference the authorizing statute and describe the program's purpose. Amendments to §22.152(2) concerning Definitions update the citation and title for Chapter 21, Subchapter B, which deals with residency. The amendment to §21.154(1) concerning Eligible Students changes "Texas resident" to "resident of Texas," which corresponds with the term defined in §22.152.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §61.087, which provides the Coordinating Board with the authority to adopt any rules necessary to implement this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200804067
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: August 25, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER M. TEXAS COLLEGE WORK-STUDY PROGRAM

19 TAC §21.402, §21.404

The Texas Higher Education Coordinating Board adopts amendments to §21.402 and §21.404 concerning the Texas College Work-Study Program without changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3535).

Specifically, the amendments to §21.402(12) concerning Definitions update the citation for Chapter 21, Subchapter B, which deals with residency. The amendment to §21.404(4) concerning Eligible Student Employees reflects state selective service registration requirements (Texas Education Code, §51.9095) for receiving state aid.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §56.073, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §§56.071 - 56.079, and §51.9095, which authorizes the Coordinating Board to adopt rules regarding student compliance with selective service registration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200804068
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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Proposal publication date: May 2, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER AA. RECIPROCAL EDUCATIONAL EXCHANGE PROGRAM

19 TAC §21.910

The Texas Higher Education Coordinating Board adopts amendments to §21.910 concerning the Reciprocal Educational Exchange Program without changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3536). Specifically, the amendments to §21.910 (Reporting Requirements) eliminate the specific reporting deadline date and clarify that prior-year program data is to be reported annually by a deadline specified by the Board.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, Section 54, Subchapter B, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §54.060(d).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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Proposal publication date: May 2, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER BB. PROGRAMS FOR ENROLLING STUDENTS FROM MEXICO

19 TAC §21.938

The Texas Higher Education Coordinating Board adopts amendments to §21.938 concerning Reporting Requirements without changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3536). Specifically, the amendments to §21.938 eliminate the reporting deadline date, require institutions to report program data on an annual basis, and simplify the data being reported.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, Section 54, Subchapter B, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §54.060(b) and (e).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200804070
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: August 25, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER NN. EXEMPTION PROGRAM FOR VETERANS AND THEIR DEPENDENTS (THE HAZLEWOOD ACT)

19 TAC §§21.2100 - 21.2106, 21.2108

The Texas Higher Education Coordinating Board adopts amendments to §§21.2100 - 21.2106 and 21.2108 in Subchapter NN of this chapter, concerning the Exemption Program for Veterans and their Dependents (The Hazlewood Act), without changes to the proposed text as published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4447). Specifically, the amendment to §21.2100(3) reflects the standard format used throughout this section by capitalizing the first word of a definition. The amendment to §21.2100(8) expands the definition of "dependent" to include a child who was claimed as a dependent in the same year as the veteran's death or service-related injury. Previously, a child was a dependent if the child was claimed in the year preceding the veteran's death or injury. The amendment makes §21.2100(8) consistent with §21.2105(b)(3). The amendment to §21.2100(15) reflects the fact that a change regarding deposit fees as mandated in Senate Bill 1233, 80th Texas Legislature, deleted the term "property." This amendment regarding deposit fees is also proposed in §§21.2101(a), 21.2101(b), 21.2102(4), 21.2103(2), 21.2106(a)(3), and 21.2108(a). The amendment to §21.2100(16) updates the citation and title for Chapter 21, Subchapter B, which deals with residency. The amendment to §21.2101(a), in addition to deleting the word "property" from "deposit fees," corrects grammar by changing "veterans" to "veteran." The amendment to §21.2101(g) deletes the now out-dated academic term relevant to when junior college districts were given authority to establish fees for extraordinary costs for certain programs. Amendments to §21.2102(4), in addition to deleting the word "property" from "deposit fees," clarify that Hazlewood benefits can be combined with federal education benefits based on their combined calculated value for the entire semester. A grammatical error is also corrected, changing "are" to "is." The amendment to §21.2104(b) provides guidance for processing late applications. The amendment to §21.2104(c) deletes the now out-dated academic term relevant to when all applicants were first required to submit an application to receive the exemption. Previously, only applicants new to the program were required to submit documentation. The amendment to §21.2105(a)(2) deletes the term "reservist's," as all veterans of the armed services may be eligible for federal veterans' education benefits. The amendment to §21.2105(b)(3) reflects the complete list of veteran service-related conditions by which a dependent may qualify for an exemption. The amendment to §21.2106(a)(4) updates the rules related to the eligibility of a veteran who has defaulted on a state and/or federal education loan to comply with statutory language. New §21.2108(c) provides guidance for reporting students who have received federal and state veterans' education benefits during the same semester.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §54.203, which provides the Coordinating Board with the authority to adopt rules to provide for the efficient and uniform application of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200804071
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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Proposal publication date: June 6, 2008
For further information, please call: (512) 427-6114

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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS

SUBCHAPTER B. PROVISIONS FOR THE TUITION EQUALIZATION GRANT PROGRAM

19 TAC §22.24

The Texas Higher Education Coordinating Board adopts amendments to §22.24 concerning Eligible Students without changes to the proposed text as published in the June 13, 2008, issue of the *Texas Register* (33 TexReg 4587). Specifically, new paragraph (3)(C) has been added to clarify the continuation requirements for first-time entering undergraduates who enter in the second regular term or semester.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §61.229 which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §§61.221 - 61.230.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2008.

TRD-200804072
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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Proposal publication date: June 13, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER E. TEXAS NEW HORIZONS SCHOLARSHIP PROGRAM

19 TAC §22.83, §22.86

The Texas Higher Education Coordinating Board adopts amendments to §22.83 and §22.86, concerning the Texas New Horizons Scholarship Program, with changes to §22.86 of the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3537). Section 22.83 is being adopted without changes. Specifically, the amendments to §22.83 concerning Eligible Students cite the eligibility requirements for continuing in the program. This data was once housed in the General Provisions section of Chapter 22, §§22.1 - 22.8, but these sections were repealed so that the provisions could be added to individual program rules in order for the program rules to act as stand-alone documents reflecting all program requirements. House Bill 713, 76th Texas Legislature, repealed Texas Education Code, §54.216, which authorized the Texas New Horizons Scholarship Program. The program is being phased out and awards for the few remaining continuation students are funded from TEXAS Grant appropriations. The amendment to §22.86 concerning Funding reflects the change in funding source for scholarship awards from an appropriation specifically for the Texas New Horizons Scholarship Program to appropriations from the TEXAS Grant Program.

The following comment was received regarding the amendments:

Comment: Coordinating Board staff suggested that the new language in §22.86 be revised for ease of reading and clarification.

Response: The Coordinating Board agreed and deleted the phrase "costs of the" and changed "covered" to "funded."

The amendments are adopted under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt rules to effectuate the programs under its administration.

§22.86. Funding.

The scholarships authorized under this section shall be funded by appropriations for the TEXAS Grant program established by the Texas Education Code, Chapter 56, Subchapter M.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2008.

TRD-200804073
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER H. PROVISIONS FOR THE LICENSE PLATE INSIGNIA SCHOLARSHIP PROGRAM

19 TAC §§22.141, 22.142, 22.146, 22.147

The Texas Higher Education Coordinating Board adopts amendments to §§22.141, 22.142, 22.146, and 22.147, concerning the Provisions for the License Plate Insignia Scholarship Program, with changes to the proposed text of §22.147 as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3538). Sections 22.141, 22.142, and 22.146 are being adopted without changes. Specifically, amendment to §22.141(a) concerning Authority and Purpose updates the citation for the authorizing statute from Texas Transportation Code, §502.270 to §504.615. The amendment to §22.146 concerning Allocations and Reallocations also updates the citation for the authorizing statute. The amendment to §22.142 updates the name of the Texas Department of Transportation, formerly the State Department of Highways and Public Transportation. The amendment to §22.147 concerning Disbursements changes the mandatory frequency for sending funds generated through the sale of license plates to the institutions from monthly to quarterly cycles.

The following comment was received regarding the amendments:

Comment: Coordinating Board staff suggested deleting the phrase "on a regular basis" in order to simplify and clarify §22.147(2).

Response: The Coordinating Board agreed and deleted the phrase "on a regular basis."

The amendments are adopted under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt any rules to effectuate the programs under its administration.

§22.147. Disbursements.

Awards are to be made to eligible students at each institution in accordance with these rules and regulations.

(1) For public senior colleges and universities. The department deposits funds from purchased license plates directly into the institution's account at the State Comptroller's Office. Therefore, public senior colleges and universities may draw from those funds as appropriate to make awards to eligible students.

(2) For other public institutions. Funds will be made available to the institution through the Board. At least once per quarter, the Board will send the institution a state warrant for the amount of License Plate Insignia Scholarship funds generated through the sale of license plates and deposited by the department in the State Comptroller's Office for that institution.

(3) For private or independent institutions. At the beginning of each fiscal year and periodically as funds are deposited in the State Comptroller's Office by the department, the Board will notify the

institution as to the amount of funds available for awarding as scholarships. On receipt of a student's application and certification by the financial aid officer of the amount of the scholarship for which the student is eligible, the Board shall forward funds to the institution for disbursement to the students.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. PROVISIONS FOR THE FIFTH-YEAR ACCOUNTING STUDENT SCHOLARSHIP PROGRAM

19 TAC §22.162, §22.164

The Texas Higher Education Coordinating Board adopts amendments to §22.162 and §22.164, concerning Provisions for the Fifth-Year Accounting Student Scholarship Program. Section 22.164 is adopted with changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3538). Section 22.162 is being adopted without changes.

Specifically, the amendment to §22.162(10) updates the title for Chapter 21, Subchapter B, which deals with residency. New §22.164(a)(8) adds the requirement that a student must be a resident of Texas in order to receive funds. New §22.164(a)(9) reflects state selective service registration requirements (Texas Education Code, §51.9095) for receiving state aid. The amendments to §22.164(b) provide language which enables the advisory committee to establish tighter selection criteria based on financial need, and remove Texas residency as one of the factors for selecting scholarship recipients since being a Texas resident is proposed in §22.164(a)(8) as a new eligibility requirement for receiving funds.

The following comment was received regarding the amendments:

Comment: Coordinating Board staff suggested improving the grammar of the new language in §22.164(b)(1) by changing "in keeping with" to "in accordance with."

Response: The Coordinating Board agreed with this change.

The amendments are adopted under the Texas Education Code, §61.755, which authorizes the Coordinating Board to establish and administer scholarships for fifth-year accounting students, and §51.9095, which authorizes the Coordinating Board to adopt rules regarding student compliance with selective service registration.

§22.164. Eligible Students.

(a) To receive funds, a student must:

(1) be enrolled on at least a half-time basis at an approved institution;

(2) maintain satisfactory academic progress in his or her program of study as defined by the institution; and

(3) have completed at least 120 credit hours of college work, including at least 15 hours of accounting;

(4) sign a written statement confirming his/her intent to take the written examination conducted by the Texas State Board of Public Accountancy for the purpose of granting a certificate of "certified public accountant";

(5) confirm he or she has not yet taken the CPA examination;

(6) maintain a cumulative grade point average, as determined by the institution, that is equal to or greater than the grade point average required by the institution for graduation;

(7) be enrolled in the additional hours of study required by Texas Occupation Code, §901.256(2)(A) (concerning Work Experience Requirements);

(8) be a resident of Texas; and

(9) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from Selective Service registration under federal law.

(b) In selecting recipients the Program Officer shall consider at a minimum the following factors relating to each applicant:

(1) financial need, which acts as an upper limit to the amount the student may receive and cannot equal less than the amount calculated in accordance with the formula provided institutions in the application instructions;

(2) scholastic ability and performance as measured by the student's cumulative college grade point average as determined by the institution in which the student is enrolled; and

(3) ethnic or racial minority status.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 427-6114

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SUBCHAPTER L. TOWARD EXCELLENCE, ACCESS, AND SUCCESS (TEXAS) GRANT PROGRAM

19 TAC §22.229

The Texas Higher Education Coordinating Board adopts an amendment to §22.229, concerning the Toward EXcellence, Access and Success (TEXAS) Grant Program, without changes to the proposed text as published in the June 13, 2008, issue of the *Texas Register* (33 TexReg 4588).

Specifically, the amendment to §22.229(b)(2) adds new subparagraph (D) to clarify the continuation requirements for first time entering undergraduates who enter in the second regular term or semester.

No comments were received regarding the amendment.

The amendment is adopted under the Texas Education Code, §56.303, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §§56.301 - 56.311.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER N. INDIVIDUAL DEVELOPMENT ACCOUNT INFORMATION PROGRAM

19 TAC §22.280

The Texas Higher Education Coordinating Board adopts an amendment to §22.280, concerning Individual Development Account Information Program, without changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3539).

Specifically, the amendment to §22.280, concerning Authority and Purpose, updates the citation for the Individual Development Account Information Program from Texas Education Code, Subchapter C, Chapter 61, §61.0816 to Texas Education Code, Chapter 61, Subchapter C, §61.0817.

No comments were received regarding the amendment.

The amendment is adopted under the Texas Education Code, §61.0817, which provides the Coordinating Board with the authority to adopt any rules necessary to administer this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER O. EXEMPTION PROGRAM FOR CHILDREN OF PROFESSIONAL NURSING PROGRAM FACULTY AND STAFF

19 TAC §22.293, §22.295

The Texas Higher Education Coordinating Board adopts amendments to §22.293 and §22.295, concerning the Exemption Program for Children of Professional Nursing Program Faculty and Staff, without changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3540). Specifically, the amendment to §22.293(7) updates the citation and title for Chapter 21, Subchapter B, which deals with residency. The amendments to §22.295 reflect state selective service registration requirements (Texas Education Code §51.9095) for receiving state aid.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §54.221, which provides the Coordinating Board with the authority to adopt rules governing the granting or denial of an exemption under this section, including rules relating to the determination of eligibility for an exemption; and §51.9095, which authorizes the Coordinating Board to adopt rules regarding student compliance with selective service registration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
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SUBCHAPTER P. EXEMPTION PROGRAM FOR CLINICAL PRECEPTORS AND THEIR CHILDREN

19 TAC §§22.303, 22.305, 22.306

The Texas Higher Education Coordinating Board adopts amendments to §§22.303, 22.305, and 22.306, concerning the Exemption Program for Clinical Preceptors and Their Children, without changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3540). Specifically, the amendment to §22.303(7) updates the citation and title for Chapter 21, Subchapter B, which deals with residency. Amendments to §22.305(4) and §22.306(4) reflect state selective service registration requirements (Texas Education, §51.9095) for receiving state aid. In addition, §22.306(2) references the specific requirements that preceptors must meet for their children to qualify for the exemption.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt rules to effectuate the programs under its administra-

tion, and §51.9095, which authorizes the Coordinating Board to adopt rules regarding student compliance with selective service registration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 427-6114

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SUBCHAPTER Q. ENGINEERING SCHOLARSHIP PROGRAM

19 TAC §22.315

The Texas Higher Education Coordinating Board adopts amendments to §22.315 concerning the Student Eligibility Requirements without changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3541). Specifically, the amendment to §22.315 reflects state selective service registration requirements (Texas Education Code, §51.9095) for receiving state aid.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt rules to effectuate the programs under its administration, and §51.9095, which authorizes the Coordinating Board to adopt rules regarding student compliance with selective service registration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER BB. COMMISSIONER'S RULES ON REPORTING REQUIREMENTS

19 TAC §61.1028

The Texas Education Agency (TEA) adopts new §61.1028, concerning reporting of bus accidents. The new section is adopted with changes from the proposed text as published in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4283). The adopted new rule implements the requirements of the Texas Education Code (TEC), §34.015, as added by House Bill (HB) 323, 80th Texas Legislature, 2007, that charges the TEA with collecting from school districts annually information on accidents involving the districts' buses and reporting this information.

Adopted new 19 TAC §61.1028, Reporting of Bus Accidents, implements the TEC, §34.015, by establishing applicable definitions and specific requirements for reporting bus accidents. The adopted new rule requires school districts and open-enrollment charter schools to report to the TEA annually the number of bus accidents. Each bus accident report must include the date of the accident; the type of bus involved; whether the bus was equipped with seat belts and, if so, what kind; the number of students and adults involved in the accident; the number and types of injuries sustained by the bus passengers; and whether injured passengers were wearing seat belts and, if so, what kind.

In response to public comment, subsection (a) has been modified to clarify several definitions, and subsection (b)(1)(C) has been modified to specify that the phrase "type of bus" refers to one of the buses defined in subsection (a).

The TEA determined that the adopted new rule will have no direct adverse economic impact to small businesses or microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began May 30, 2008, and ended June 30, 2008. Following is a summary of public comments received and corresponding agency responses regarding the proposed new 19 TAC §61.1028, Reporting of Bus Accidents.

Comment. The transportation training and safety specialist from Northside Independent School District (ISD) commented that the phrase "type of bus" in subsection (b)(1)(C) should be clarified. The commenter suggested specifying in subsection (a) what is meant by "type of bus."

Agency Response. The agency agrees. Subsection (b)(1)(C) has been modified to indicate that "type of bus" refers to one of the types of buses specified and defined in subsection (a). Also, in subsection (a), each definition based on a Texas Transportation Code definition has been modified to reference the applicable section of the Texas Transportation Code.

Comment. The transportation training and safety specialist from Northside ISD commented that bus passengers may be secured by restraint systems other than standard seat belts. The commenter suggested that a list of all the types of seat belts and restraints be provided in subsection (b)(1)(G) so that the data collected would be more accurate.

Agency Response. The agency disagrees and maintains language as published as proposed. TEC, §34.015, requires reports of bus accidents to include information on whether a bus was equipped with, and whether injured passengers were wearing, seat belts. A seat belt is necessarily either a lap belt or a three-point lap/shoulder belt, not any other type of restraint. The online survey through which school districts and open-enrollment charter schools report accidents allows respondents to specify which type of seat belt a bus was equipped with and which type injured passengers were wearing.

The new section is adopted under the Texas Education Code, §34.015, which authorizes the TEA by rule to determine the information to be reported for bus accidents. The TEC, §34.015, requires school districts to report annually to the TEA information regarding accidents involving the districts' buses and requires the TEA to publish reported information on its website.

The new section implements the Texas Education Code, §34.015.

§61.1028. Reporting of Bus Accidents.

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

(1) Accident--Any accident as described by the Texas Transportation Code, Chapter 550, Subchapter B.

(2) School bus--In accordance with the Texas Transportation Code, §541.201, a school bus is a motor vehicle that was manufactured in compliance with the Federal Motor Vehicle Safety Standards (FMVSS) for school buses in effect on the date of manufacture and that is used to transport preprimary, primary, or secondary students on a route to or from school or on a school-related activity trip other than on routes to and from school. A school bus is a bus owned, leased, contracted to, or operated by a school or school district that is regularly used to transport students to and from school or school-related activities; meets all applicable FMVSS; and is readily identified by alternately flashing lights, national school bus yellow paint, and the legend "School Bus." The term does not include a multifunction school activity bus, a school activity bus, or a motor bus.

(3) Multifunction school activity bus--In accordance with the Texas Transportation Code, §541.201, a multifunction school activity bus is a subcategory of school bus. It must meet all FMVSS for a school bus except having traffic control devices, including flashing lights and stop arm, and it may not be painted in national school bus yellow. The multifunction school activity bus cannot be used to transport students from home to school or school to home or for any purpose other than school activities.

(4) School activity bus--In accordance with the Texas Transportation Code, §541.201, a school activity bus is a bus designed to accommodate more than 15 passengers, including the operator, that is owned, operated, rented, or leased by a school district, county school, open-enrollment charter school, regional education service center, or shared services arrangement and that is used to transport public school students on a school-related activity trip, other than on routes to and from school. The term does not include a chartered bus, a bus operated by a mass transit authority, a school bus, or a multifunction school activity bus.

(5) Motor bus--The term "motor bus" does not include a vehicle that meets the definition of a school bus, a multifunction school activity bus, or a school activity bus. A motor bus is:

(A) a commercial, motor transit-type vehicle owned or leased by the school district or the school district's commercial contractor that is designed to transport 16 or more passengers including the driver on school activity trips; or

(B) a transit-type bus operated by a mass/metropolitan transit authority when the school district contracts with the authority in accordance with Texas Education Code, §34.008, to transport students to and from school.

(b) Reporting.

(1) School districts and open-enrollment charter schools shall report annually to the Texas Education Agency (TEA) the number of accidents in which their buses were involved in the past year. School districts and open-enrollment charter schools shall report the accidents in a manner prescribed by the commissioner of education. School districts and open-enrollment charter schools shall file annual accident reports to the TEA only in the period beginning July 1 and ending July 31 and shall include the following information in the report:

(A) the total number of bus accidents;

(B) the date each accident occurred;

(C) the type of bus, as specified in subsection (a) of this section, involved in each accident;

(D) whether the bus involved in each accident was equipped with seat belts and, if so, the type of seat belts;

(E) the number of students and adults involved in each accident;

(F) the number and types of injuries that were sustained by the bus passengers in each accident; and

(G) whether the injured passengers in each accident were wearing seat belts at the time of the accident and, if so, the type of seat belts.

(2) A school district or open-enrollment charter school shall report a bus accident involving a school bus, a multifunction school activity bus, a school activity bus, or a motor bus if:

(A) the bus is owned, leased, contracted, or chartered by a school district or charter school and was transporting school district or charter school personnel, students, or a combination of personnel and students; or

(B) the bus was driven by a school district or charter school employee or by an employee of the school district's or charter school's bus contractor with no passengers on board and the accident involved a collision with a pedestrian.

(3) A school district or open-enrollment charter school shall not report a bus accident involving a school bus, a multifunction school activity bus, a school activity bus, or a motor bus if:

(A) the bus was driven by a school district or charter school employee or by an employee of the school district's or charter school's bus contractor, the accident occurred when no passenger other than the school district's or charter school's driver or bus contractor's driver was on board the bus, and the accident did not involve a collision with a pedestrian; or

(B) the accident involved a bus chartered by a school district or charter school for a school activity trip and no school district or charter school personnel or students were on board the bus at the time of the accident.

(4) A school district or open-enrollment charter school shall not report an accident that occurred in a vehicle that is owned, contracted, or chartered by a school district or charter school and is not a school bus, a multifunction school activity bus, a school activity bus, or a motor bus.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200804159

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CHAPTER 102. EDUCATIONAL PROGRAMS SUBCHAPTER EE. COMMISSIONER'S RULES CONCERNING PILOT PROGRAMS

19 TAC §102.1056

The Texas Education Agency (TEA) adopts new §102.1056, concerning the Dropout Recovery Pilot Program. The new section is adopted with changes from the proposed text as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4778). The adopted new rule establishes a grant program for dropout recovery that meets the requirements of the Strategic Plan of the High School Completion and Success Initiative Council authorized in the Texas Education Code (TEC), §39.361(c).

The TEC, §39.357(b), requires the commissioner to establish rules as necessary to administer the strategic plan adopted by the High School Completion and Success Initiative Council (Council). The TEC, §39.361(c), authorizes the commissioner to establish grant programs to meet the goals of the Council's strategic plan. In addition, the TEC, §39.366, authorizes the commissioner to adopt rules as necessary to administer the High School Completion and Success Initiative.

The strategic plan was adopted by the Council on March 11, 2008. The Council's goals are to: reduce high school dropout rates, improve postsecondary success, and close gaps in achievement among student socio-economic, racial, and ethnic groups. Under these goals, the Council specified objectives and corresponding action plans. In action plan 1.3.1, the strategic plan provides for targeted intervention programs to serve students who have academic deficiencies, are at-risk of dropping out of school, or have already dropped out of school through traditional and alternative education settings. The strategic plan further specifies the inclusion of a dropout recovery program for which a variety of service providers are eligible such as school districts, open-enrollment charter schools, regional education service centers, institutions of higher education, and nonprofit organizations.

The adopted new 19 TAC §102.1056 implements the statutory provisions of the dropout recovery pilot program as follows.

Subsection (a) defines words and terms used in the section.

Subsection (b) outlines eligibility requirements for grant applicants.

Subsection (c) provides information required to be submitted in any application for funding.

Subsection (d) provides for the notification, in writing, of selected or non-selected applicants.

Subsection (e) outlines the conditions of pilot program operation.

Subsection (f) explains the grant funding mechanism to include: base funding; performance funding, including interim benchmark payments and completion payments; other funding for school districts under the Foundation School Program; and other funding for eligible institutions of higher education, nonprofit organizations, county departments of education, and education service centers under the grant.

Subsection (g) provides a list of allowable expenditures.

Subsection (h) provides a list of disallowed expenditures.

Subsection (i) provides for grantee compliance with evaluation procedures established by the commissioner.

Subsection (j) defines the subsequent funding eligibility.

Subsection (k) defines the conditions leading to revocation of the grant.

Subsection (l) outlines requirements for access to records.

Subsection (m) provides for creation of a technical advisory panel.

In response to public comment, subsection (n) was added at adoption to allow for the audit and recovery of grant funds against any state provided funds.

Approved pilot program participants will be required to adhere to all procedural, reporting, and evaluation requirements. Entities awarded funding will be required to maintain grant application documentation and program-related paperwork.

The TEA determined that the adopted new rule will have no direct adverse economic impact to small businesses or microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period began June 20, 2008, and ended July 21, 2008. In addition, a public hearing was held on June 25, 2008, in Austin, Texas, to receive public comment on the proposed new rule. A number of individuals, including school officials, members of the Texas Senate and House of Representatives, and other interested organizations, submitted comments and inquiries regarding the Dropout Recovery Pilot Program. Following is a summary of the public comments received and corresponding agency responses regarding proposed new 19 TAC Chapter 102, Educational Programs, Subchapter EE, Commissioner's Rules Concerning Pilot Programs, §102.1056, Dropout Recovery Pilot Program.

ELIGIBLE APPLICANTS

Comment. Several individuals and representatives of the Coalition of Public Schools, the Texas American Federation of Teachers, the Association of Texas Professional Educators, the Texas Freedom Network, the Texas Association of School Boards, the Texas Association of School Administrators, and the Texas State Teachers Association, commented that private schools should not be included as eligible applicants under the Dropout Recovery Pilot Program. Many commenters stated that public funds should not be awarded to private schools. Two commenters stated that the definition of eligible applicants was expanded from private schools to nonprofit organizations in response to legislative criticism received after the program was announced; however, this action did not fully alleviate the concerns centered around the state directly funding private schools and is inconsistent with other programs authorized under House Bill (HB) 2237.

Agency Response. The agency disagrees that public funds should not be awarded to private nonprofit schools under this program. Eligible applicants for the Dropout Recovery Pilot Program may include private schools; however, the program also allows for participation by a variety of other entities, such as pub-

lic school districts and open-enrollment charter schools, along with nonprofit organizations, institutions of higher education, county departments of education, education service centers, and nonprofit organizations with experience in educational programs. This definition was further clarified in the Request for Application (RFA) issued July 1, 2008. The agency has determined that there is no single proven strategy for recovering dropouts; rather, each category of eligible organization brings different strengths, expertise, and experience with a variety of strategies and programs. National research on dropout recovery programs verifies that a wide range of program options provides students who have dropped out with the best opportunity to reconnect and succeed.

Comment. The Texas Public Policy Foundation and the Americans for Prosperity Foundation expressed support for exploring new methods and solutions for dropouts. Both mentioned that students can fall through the cracks in the current public education system that offers limited alternatives.

Agency Response. The agency agrees with offering multiple strategies for recovering dropouts.

Comment. The Texas Classroom Teachers Association requested that eligible applicants be limited to only those entities with the ability to award a high school diploma or that have articulation agreements with institutions of higher education.

Agency Response. The agency disagrees with the comment that eligible applicants should be limited to those entities with the ability to award a high school diploma and the comment that eligible applicants should have articulation agreements with institutions of higher education. Students who have dropped out of school may be interested in attaining college readiness in the shortest amount of time possible without having to earn a high school diploma. If an applicant chooses to offer students a college readiness program, it must offer students the opportunity to earn a General Educational Development (GED) credential, achieve a passing score on a Texas Success Initiative (TSI) testing instrument or earn a TSI exemption based on a score on an alternative test, and either earn credit for a college course within an institution of higher education's core curriculum or earn advanced technical credit listed in the Advanced Technical Credit Statewide Articulated Crosswalk. Programs do not need to have an articulation agreement with an institution of higher education to offer a college readiness program; they need only have a partnership with an institution of higher education to allow students the opportunity to take college courses at no cost to the students in the program.

Comment. The Texas Classroom Teachers Association supported the requirement in subsection (b)(3)(A) that to be awarded a grant an applicant must have been operating as an eligible entity for at least three years prior to the time of the grant application.

Agency Response. The agency agrees.

Comment. The Association of Texas Professional Educators commented that operators of a private kindergarten or elementary school would not be well-equipped to serve the unique needs of secondary school dropouts.

Agency Response. The agency disagrees. Educational experience, whether at the secondary or elementary level, will provide eligible applicants with the background necessary to develop dropout recovery programs. Since this is a competitive grant program, all applications will be reviewed and scored, and only those applicants with the highest scores will be considered for funding. Applicants that propose to implement research-based strategies will receive priority points, and all applicants are required to demonstrate experience with at-risk students or school dropouts as a requirement of the grant application.

LEGISLATIVE INTENT

Comment. Several individuals and two members of the Texas Senate and one member of the Texas House of Representatives, as well as representatives of the Coalition of Public Schools, the Texas American Federation of Teachers, the Association of Texas Professional Educators, the Texas Association of School Administrators, the Texas Freedom Network, and the Texas State Teachers Association, commented that the award of public funds to private schools was not the intent of the Texas Legislature when it passed HB 2237. Many commenters likened this to development of a voucher program which was opposed by the Texas Legislature and clearly set forth in an amendment to HB 1, passed by record vote on March 29, 2007. The amendment states that no funds appropriated under HB 1 were intended to pay for a public education voucher program if the state funds are used to pay for tuition vouchers.

Agency Response. The agency disagrees that the Dropout Recovery Pilot Program is like a voucher program. The Dropout Recovery Pilot Program allows a variety of entities to apply for funds to serve students who have already dropped out of a Texas public school. The agency has determined that all Texas students deserve the opportunity to be successful in life after high school, and the Dropout Recovery Pilot Program offers innovative ways to serve these students, including programs at private nonprofit schools. This program is an effort to bring students back into schools and does not divert any Foundation School Program money from school districts. A voucher program provides funds to parents to pay for their child to attend a school of their choice. This program does not provide funds to parents; instead, it provides funds to eligible organizations.

Comment. Several individuals and two members of the Texas Senate and one member of the Texas House of Representatives, as well as representatives of the Coalition of Public Schools, the Texas American Federation of Teachers, the Association of Texas Professional Educators, the Texas Freedom Network, the Texas Association of School Administrators, and the Texas State Teachers Association, commented that the agency was acting beyond its authority to countermand the intent of the Texas Legislature.

Agency Response. The agency disagrees. HB 2237, 80th Texas Legislature, 2007, created a nine- member High School Completion and Success Initiative Council (Council) composed of the commissioner of education, the commissioner of higher education, and seven distinguished members appointed from lists of nominees provided by the Office of the Governor, Lieutenant Governor, and the Speaker of the Texas House of Representatives. In response to its legislative charge, the Council adopted a strategic plan, which includes groundbreaking intervention programs, like the Dropout Recovery Pilot Program, targeting students who have already dropped out of Texas public schools. Texas Education Code (TEC), §39.361(c), states that the commissioner of education shall consider the Council's recommendations for programs and based on those recommendations may award grants to school districts, open-enrollment charter schools, institutions of higher education, regional education service centers, and nonprofit organizations to meet the goals of the Council's strategic plan.

Additionally, TEC, §39.361(d)(2), expressly states that the commissioner of education may not award discretionary funds appropriated for high school completion and success except in conformance with the Council's strategic plan.

COMPLIANCE AND ACCOUNTABILITY

Comment. A representative from the Texas Freedom Network testified that the commissioner does not have the authority to approve different groups as accredited.

Agency Response. The agency agrees with this comment. The rule for this program does not claim authority for the commissioner to approve accreditation of different groups; rather, the rule states, in subsection (b)(3)(B)(ii)(III), that an applicant that is acting as the fiscal agent and that issues high school diplomas must have earned accreditation through the TEA or an accrediting entity operating as a member of the Texas Private School Accreditation Commission, or have been accredited by another accrediting entity that is approved by the commissioner of education.

Comment. Several individuals commented regarding accountability of the grantees of the Dropout Recovery Pilot Program. A representative of the East Austin Military Veterans' Coalition commented that the TEA is not monitoring this program for compliance.

Agency Response. The agency disagrees. The RFA for the Dropout Recovery Pilot Program requires each applicant to describe in the application an evaluation plan/design for monitoring the implementation of the program on an ongoing basis and for determining whether the program met its stated goals and objectives and achieved the desired results based on the established performance indicators. By submitting a grant application, the applicant agrees to comply with any reporting and evaluation requirements that may be established by the TEA, and all grantees are required to submit progress reports and expenditure reports on a regular basis. Additionally, program requirements that must be addressed by every applicant include the following: compliance with state requirements for criminal background checks for all staff, compliance with all relevant federal laws and regulations, and compliance with all TEA requirements. Technical assistance will be provided to grantees to assist grantees in the implementation of program requirements. The RFA also provides for on-site monitoring of the grantee under Part 4, Standard Application System, Schedule #6A, General Provisions and Assurance, Section G, Monitoring.

Comment. The Texas Association of School Administrators, the Texas Association of School Boards, and the Association of Texas Professional Educators, commented that private entities are not held to the same accountability standards as the public schools, nor does the commissioner have the power to sanction a private entity or recover state funding should the grantee violate grant requirements.

Agency Response. The agency agrees that private entities are not held to the same statewide accountability standards as public schools. For this reason, the rule allows only private schools accredited by an accrediting entity operating as a member of the Texas Private School Accreditation Commission (TEPSAC) or another accrediting entity approved by the commissioner of education to apply for this program. TEPSAC specifies that for a non-public school to be certified, its operations, curriculum, staffing, and instruction must be sufficiently comparable to those of public schools. In addition, to receive accreditation, the TEPSAC requires a non-public school to employ a testing program sufficiently comparable to the Texas Assessment of Knowledge and Skills (TAKS). Additionally, with the exception of the start-up funding, this program provides payments to grantees only upon demonstration of student performance.

The agency agrees that the commissioner of education does not have the authority to sanction a private entity. The rule provides the commissioner of education the authority of revocation. The commissioner of education may revoke the grant award for the Dropout Recovery Pilot Program for various factors, such as noncompliance with the rule or program assurances, failure to submit required reports, failure to participate in data collection and audits, failure to meet grant performance standards, and/or failure to provide required information for TEA evaluation of the grant.

The agency agrees that the right of recovery of state funding was not directly granted in the rule. The agency has added language in subsection (n) at adoption to explicitly allow recovery of state funds.

OTHER ISSUES

Comment. The Association of Texas Professional Educators submitted a list of ways in which the Dropout Recovery Pilot Program differs from the Collaborative Dropout Reduction Pilot Program, including the total amount of available funds, the requirement for matching funds, the commitment for continuing efforts beyond the life of the grant, and the timeframe for preparation, submission, and review of the applications.

Agency Response. The agency agrees that differences between the two programs exist. These are intended to be separate programs. The Collaborative Dropout Reduction Pilot Program targets at-risk students with intervention strategies. The Dropout Recovery Pilot Program focuses on creating innovative programs for students who have already dropped out of Texas public schools. Funding amounts and match requirements for the Collaborative Dropout Reduction Pilot Program were dictated by statutory requirements. Compressed grant application timelines for the Dropout Recovery Pilot Program resulted from the adoption in March 2008 of the High School Completion and Success Initiative Council Strategic Plan by the statutorily-created High School Completion and Success Initiative Council.

Comment. The Association of Texas Professional Educators expressed concerns that the Dropout Recovery Pilot Program provides for no collaborative efforts with other public or private entities, no requirement for applicants to have a large population of economically disadvantaged students, and extra points for research-based strategies but no requirement that services have a foundation in scientifically proven methods.

Agency Response. The agency disagrees that the Dropout Recovery Pilot Program provides for no collaborative efforts with public or private entities. The RFA gives priority points for applicants that demonstrate collaboration with local partners. The agency agrees that the rule does not require applicants to have a large population of economically disadvantaged students, but the agency has determined that programs targeting students who have already dropped out of school will necessarily serve a number of economically disadvantaged students. The agency agrees that the RFA provides priority points for research-based strategies but does not require scientifically proven methods. The agency does not require scientifically proven methods as a basis for priority points because most of the scientifically-based research focuses on dropout prevention not recovery.

Comment. A private citizen who is also a Texas certified public school teacher suggested that eligible applicants for the program be expanded to include students in a home school environment as these students who have dropped out would be able to obtain individual attention and the kind of encouragement that would help them to complete their secondary education.

Agency Response. The agency disagrees. The program conforms with the strategic plan adopted by the High School Completion and Success Initiative Council. The TEC, §39.361(d)(2), expressly states that the commissioner of education may not award discretionary funds appropriated for high school completion and success except in conformance with the Council's strategic plan. In accordance with the TEC, §39.361(c), the Council's strategic plan provides recommendations for grant awards only to school districts, open-enrollment charter schools, institutions of higher education, regional education service centers, and nonprofit organizations.

Comment. The Round Rock Independent School District (ISD) commented that the rule should include more clarity regarding the distribution of performance funding. The district stated that the additional clarity would provide districts more information and guidance to determine whether or not to apply for the Dropout Recovery Pilot Program.

Agency Response. The agency disagrees. The purpose of the rule is to outline the framework of the overall program that is proposed. Detailed information that would assist potential applicants in making their decision about whether to submit an application is more appropriately located within the RFA. Detailed information about performance funding can be found in the current RFA.

Comment. The Round Rock ISD requested adding "completion rate" as an element of the eligibility requirements.

Agency Response. The agency disagrees. Rather than limit the program to specific school districts with low completion rates, a variety of service providers, within certain areas of the state with high dropout rates, are given the opportunity to apply to serve eligible students.

Comment. The Association of Texas Professional Educators and a representative of the Texas Freedom Network commented that the student eligibility requirements are insufficient to prevent parents from withdrawing their children from public school and holding them out until they are eligible for the program in order to enroll them in private school the next school year.

Agency Response. The agency disagrees. To be eligible for this program, a student must have been absent or withdrawn from a Texas public school for 30 consecutive school days and, during that time of absence, not been enrolled in a public school, private school, or home school. Parents are unlikely to withdraw their children from school for a full six weeks, at the risk of truancy charges, in order to enroll their children in a program designed specifically to serve school dropouts operated by a private school.

Comment. The Texas Association of School Boards commented that the rule does not include a provision that would prohibit private, nonprofit grantees from denying enrollment to applicants who fail to meet their criteria even though funded with state funds.

Agency Response. The agency agrees. No grantee, including school districts and charter schools, under the Dropout Recovery Pilot Program is prohibited from denying enrollment to students who fail to meet their eligibility requirements as specified in their grant application. However, the General Provisions and Assurances included in the RFA require that the contractor abide by all federal laws, including laws and regulations related to discriminatory practices. See page 47 in Part IV: Standard Application System of the Dropout Recovery Pilot Program RFA.

Comment. The Texas Classroom Teachers Association commented that the word "or" should be deleted and replaced with "and" to clarify the expectation that all programs should be geared towards earning a high school diploma. The association further stated that the goal of the program should be limited to attainment of a high school diploma and not provide for college readiness as an outcome.

Agency Response. The agency disagrees. Although the agency agrees that a high school diploma is an important outcome, it may not be an appropriate outcome for every dropout. Many of the students who have dropped out of school may be interested in attaining a GED in order to move on to college in the shortest amount of time possible, or because they have made multiple unsuccessful attempts to earn a high school diploma. Further, many dropouts are over age and some have not met the high school credit requirements, making returning to high school to complete a diploma program unlikely. In order to serve these students effectively, college readiness is the outcome best suited to their individual needs and situation.

Comment. The Texas Classroom Teachers Association stated their concern that obtaining a GED was an outcome that triggered a payment under the Dropout Recovery Pilot Program when the education and accountability system is moving away from treating or viewing a GED as equivalent to a high school diploma. The association further questioned the need for the "Other funding" provision in subsection (f)(4), based upon the association's interpretation that GED-granting institutions would receive funding for the student's completion of a GED.

Agency Response. The agency disagrees that obtaining a GED triggers a payment under this grant program. Grantees will not receive performance payments or completion payments for students who acquire only the GED credential. To receive a completion payment, the student must have earned a GED *and* have achieved a passing score on a TSI testing instrument or earned an exemption for an alternative TSI test *and* earned college credit.

Comment. The Texas Classroom Teachers Association commented that subsections (a)(8) and (b)(2) allow an ineligible nonprofit organization to participate in a local program through a shared service arrangement without the review and scrutiny received by an eligible applicant. The association further stated that allowing for "inappropriate subcontractors hired through shared service arrangements may not be in the best interests of the students."

Agency Response. The agency disagrees that nonprofit organizations participating in the program through a shared service arrangement are not subjected to the same review and scrutiny as single entity eligible applicants. Shared service arrangements transfer the responsibility of scrutinizing program partners to the grantee that is held responsible for the actions of each member entity. Under the RFA, shared service arrangements must provide full disclosure in their application of the members of the shared service arrangement; a description of the responsibilities of the fiscal agent and each SSA member, to include the refund liability that may result from on-site monitoring or audits and the

final disposition of equipment, facilities, and materials purchased for this project from grant funds; certification that the information contained in their application is correct and complete; and that payments to members of shared service arrangements are expended in accordance with applicable laws and regulations. Additionally, the fiscal agent under the shared service arrangement accepts responsibility for the refund for any exceptions taken as a result of on-site monitoring or audits and maintains the signed agreement which must be on file with the fiscal agent for review and which gives the fiscal agent recourse to the member agencies in the event of any discrepancy(ies) that may occur. Further, shared service arrangements are a method of ensuring that local nonprofit organizations partnering to provide social services necessary to the retention and success of dropout recovery are held accountable for all applicable program requirements as well as on-site monitoring and/or audits.

Comment. The Texas Classroom Teachers Association expressed support for the definition of a dropout for the purposes of this program specified in subsection (a)(3)(B) and (C). The association also expressed support for the language in subsection (b)(3), including subparagraph (A), which requires an applicant awarded a grant to have been operating as an eligible entity for at least three years prior to the time of the grant application.

Agency Response. The agency agrees.

Comment. The Texas Classroom Teachers Association commented that the rule should specify the length of the grant in order to facilitate the planning of interested parties.

Agency Response. The agency disagrees. Information regarding the length of the Dropout Recovery Pilot Program is included in the RFA, which is the appropriate document for conveying the requirements for each grant cycle. The rule, as written, does not preclude the possibility of subsequent funding or multi-year programs in the future.

The new section is adopted under the Texas Education Code, §39.357, as added by House Bill 2237, 80th Texas Legislature, 2007, which requires the commissioner to establish rules as necessary to administer the strategic plan adopted by the High School Completion and Success Initiative Council (Council), and TEC, §39.366, which authorizes the commissioner to adopt rules as necessary to administer the High School Completion and Success Initiative. The TEC, §39.361(c), authorizes the commissioner to establish grant programs to meet the goals of the Council's strategic plan.

The new section implements the Texas Education Code, §§39.357, 39.365, 39.366, and 39.361.

§102.1056. Dropout Recovery Pilot Program.

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

(1) Advanced technical credit--Credit earned by a high school student who meets established guidelines for successful completion of an articulated content-enhanced technical course included on the list of courses in the Statewide Articulated Crosswalk established by the Advanced Technical Credit Program, a program accepted by participating colleges and universities for students interested in preparing for college and a technical career that requires postsecondary education.

(2) Dropout Recovery Pilot Program--A pilot program established and implemented by the Texas Education Agency (TEA) in accordance with the Texas Education Code (TEC), Chapter 39, Subchapter L. The pilot program is to provide eligible entities with financial grants to identify and recruit students who have dropped out of Texas public schools and provide them services designed to enable them to earn a high school diploma or demonstrate college readiness.

(3) Eligible student--For the purposes of this section, an eligible student is defined as a student who is 25 years of age or less and who:

(A) was assigned by a Texas public secondary school a leaver code in the Public Education Information Management System (PEIMS) that corresponds to the definition of a dropout for that school year in which the student withdrew;

(B) was enrolled in a Texas public secondary school and during the last regular school year in which the student was enrolled the student was not in attendance for at least 30 consecutive school days. Between this period of non-attendance and enrollment in the Dropout Recovery Pilot Program, the student may not have been enrolled in any Texas public secondary school, private school, or home school; or

(C) has a notarized affidavit from the student's parent or legal guardian stating that the student has dropped out of a Texas public secondary school, as defined in subparagraph (A) or (B) of this paragraph, and is not currently enrolled in a Texas public secondary school, private school, or home school.

(4) Institution of higher education (IHE)--An institution of higher education is any public technical institute, public junior college, public senior college or university, medical or dental unit, or other agency of higher education as defined in the TEC, §61.003.

(5) Nonprofit organization--An organization that meets the requirements of the United States Code, Title 26, Subtitle A, Chapter 1, Subchapter F, Part I, Section 501(a).

(6) P-16 Individualized graduation plan (P-16 IGP)--A document with a prekindergarten through postsecondary focus, detailing a student's plans regarding courses to be taken during high school in order to succeed in entry-level courses offered at IHEs. A P-16 IGP shall include the following:

(A) the most recent assessment scores and strategies to improve these scores if they fall below the student's appropriate grade level;

(B) the educational goals of the student;

(C) any diagnostic information, appropriate monitoring and intervention and other evaluation strategies;

(D) a description of participation of the student's parent(s) or guardian, including consideration of their educational expectations for the student; and

(E) a description of innovative methods to be used to promote the student's advancement and preparation to enter higher education prepared to succeed in entry-level courses.

(7) School district--For the purposes of this section, the definition of school district includes an open-enrollment charter school.

(8) Shared service arrangement (SSA)--A shared service arrangement is an agreement between two or more eligible applicants (school districts, nonprofit organizations that have demonstrated the ability and capacity to provide educational programs to students in any grade from kindergarten through Grade 12, education service centers, county departments of education) for provision of program services. A nonprofit organization that is not an eligible applicant may participate in the shared service arrangement, but may not serve as the fiscal agent.

(9) Texas Success Initiative (TSI)--An initiative of the Texas Higher Education Coordinating Board established under §4.51 of this title (relating to Purpose).

(b) Eligibility.

(1) The following entities, located in specific regions of the state as established annually in the grant application, are eligible to apply for and receive grant funds under the Dropout Recovery Pilot Program:

(A) school districts;

(B) IHEs;

(C) county departments of education;

(D) nonprofit organizations that have demonstrated the ability and capacity to provide educational programs to students in any grade from kindergarten through Grade 12; and

(E) education service centers established under the TEC, §8.001.

(2) Eligible applicants listed in paragraph (1) of this subsection and other nonprofit organizations may enter into an SSA in order to apply for grant funds. An SSA is limited to no more than ten entities.

(3) The applicant awarded the grant and acting as the fiscal agent for the program must comply with the following conditions of eligibility.

(A) The applicant must have been operating as one of the eligible entities listed in paragraph (1) of this subsection for at least three years prior to the time of grant application.

(B) If an applicant is operating an education program that issues high school diplomas, the applicant must either have:

(i) been granted a charter from the State Board of Education or the local district in which it resides, or a home-rule district in accordance with the TEC, §§12.011, 12.052, and 12.101; or

(ii) earned accreditation through:

(I) the TEA, in accordance with the TEC, §39.071, and §97.1053 of this title (relating to Purpose);

(II) an accrediting entity, operating as a member of the Texas Private School Accreditation Commission; or

(III) another accrediting entity approved by the commissioner of education.

(C) The applicant must be determined by the TEA to be financially stable. The TEA will make this determination using information required of the applicant serving as the fiscal agent and submitted in the grant application, including information provided in the following reports:

(i) an audit report, conducted within the last two years, including a statement of financial position, statement of activities (income), statement of cash flows, note disclosures, and the independent auditor's opinion (standard report);

(ii) if subject to the Single Audit Act of 1996, as amended, the applicant must also include reports in accordance with Government Auditing Standards, as promulgated by the United States Government Accountability Office and Office of Management and Budget Circular A-133; or

(iii) a compilation of financial statements prepared by a certified public accountant, including a report on compiled financial statements, a statement of financial position, statement of activities (income), and statement of cash flow.

(D) All nonprofit organizations, including open-enrollment charter schools but excluding school districts, must submit current proof of nonprofit status. An applicant may show current nonprofit status by any of the following means:

(i) a copy of a letter from the Internal Revenue Service recognizing that contributions to the organization are tax deductible under the Internal Revenue Code, Section 501(c)(3);

(ii) a statement from a state taxing body or the state attorney general certifying that the organization is a nonprofit organization operating within the state and that no part of its net earnings may lawfully benefit any private shareholder or individual;

(iii) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or

(iv) any item described in this subparagraph if that item applies to a state or national parent organization, together with a statement by the parent organization that it is a local nonprofit affiliate.

(c) Application.

(1) An eligible applicant must submit an application in accordance with procedures determined by the commissioner and detailed in the Request for Application (RFA). The application must include a P-16 Strategic Plan that indicates how implementation of this program will address deficiencies in the grantee's overall P-16 strategy.

(2) Each eligible applicant must meet all deadlines, requirements, and guidelines outlined in the RFA.

(d) Notification. The TEA will notify each applicant in writing of selection or non-selection for funding under the Dropout Recovery Pilot Program. In the case of an application selected for funding, notification to the applicant will include the contractual conditions the applicant agrees to accept as a condition of grant award.

(e) Conditions of pilot program operation. Each grantee operating an approved Dropout Recovery Pilot Program must operate the program in accordance with the requirements outlined in the RFA and must:

(1) conduct an assessment, in accordance with specifications detailed in subsection (f)(4)(B)(ii)-(iii) of this section, for each participating student to determine services needed and create a P-16 IGP for each student based on the assessment;

(2) employ as faculty and administrators persons with baccalaureate or advanced degrees;

(3) meet the following requirement regarding employee criminal history checks:

(A) if a grantee is a school district, the grantee must be in compliance with the TEC, §22.085(f), to remain eligible for the program; or

(B) if a grantee is not a school district, the grantee must obtain criminal history record information as defined in §153.1101(2) of this title (relating to Definitions) on each employee, and an officer of the organization with signature authority must certify that no employee of the organization or person contracted with the organization who has contact with students in the program has been convicted of:

(i) a felony offense under Title 5, Texas Penal Code;

(ii) an offense or conviction of which a defendant is required to register as a sex offender under Code of Criminal Procedure, Chapter 62; and

(iii) an offense under the laws of another state or federal law that is equivalent to an offense under clause (i) or (ii) of this subparagraph; and

(4) ensure that the grant activities funded under the Dropout Recovery Pilot program are non-sectarian.

(f) Funding. Grantees are eligible to receive the following funding.

(1) Base funding. A grantee will receive a base amount of funding, to be determined during the grant application phase, in the first year of operation of the program for the purposes of planning, establishing an appropriate infrastructure to implement the program, and implementing the program for eligible students.

(2) Performance funding. In addition to the base funding, a grantee is eligible to receive performance funding up to a total of $2,000 in the program year (which includes no more than $1,000 in interim benchmark payments and $1,000 in a completion payment) for each eligible student participating in the program based upon the student's academic performance.

(A) Interim benchmark payments. A payment of $250 for any, not to exceed four, of the following benchmarks achieved by an eligible student participating in the program who:

(i) earned the required course credits necessary to advance to the next grade level;

(ii) earned high school graduation credit for a dual credit course that was established through an articulation agreement with an IHE or a private or an independent IHE, as defined in the TEC, §61.003(15);

(iii) earned college credit for a course that is within an IHE's core curriculum, in accordance with §4.28 of this title (relating to Core Curriculum), or an equivalent course offered by a private or an independent IHE, as defined in the TEC, §61.003(15);

(iv) earned a passing score on all subject areas of the statewide student assessment program for a grade level not including the Grade 11 exit-level statewide assessments;

(v) earned a score of three or higher on a College Board advanced placement examination;

(vi) earned a score on the Preliminary SAT®/National Merit Scholarship Qualifying Test or the PLAN® that predicts evidence of readiness, as determined by College Board or ACT®, for placement in College Board advanced placement, International Baccalaureate, or dual credit courses; or

(vii) other benchmarks as approved by the commissioner.

(B) Completion payments. A payment of $1,000 for each participating student who:

(i) earns a high school diploma; or

(ii) demonstrates college readiness by:

(I) achieving a passing score on a TSI testing instrument or earning a TSI exemption based on the score received for an alternative test such as SAT® or ACT®; and

(II) obtaining a General Educational Development (GED) credential; and

(III) earning either:

(-a-) college credit for a course that is within an IHE's approved core curriculum, in accordance with §4.28 of this title, or an equivalent course offered by a private or an independent IHE, as defined in the TEC, §61.003(15); or

(-b-) advanced technical credit.

(3) Other funding for school districts. School districts operating approved Dropout Recovery Pilot Programs may receive Foundation School Program funds for eligible participating students, in accordance with the TEC, §42.003.

(4) Other funding for eligible IHEs, nonprofit organizations, county departments of education, and education service centers. Programs operated by eligible IHEs, nonprofit organizations, county departments of education, and education service centers may receive a payment in an amount not greater than $4,000 ($2,000 per semester) for each eligible student participating in the program each year.

(A) Semester payments of up to $2,000 for each eligible student will be made at the end of each semester contingent upon the eligible student achieving academic progress on the same assessment instrument administered upon initial enrollment in the program and at the end of each subsequent semester.

(B) Programs must adhere to the following in choosing an assessment instrument to assess academic progress as described in subparagraph (A) of this paragraph:

(i) the same assessment instrument must be administered to the participating student for initial testing and at the end of each semester;

(ii) the assessment instrument must be a standardized test or a performance assessment with standardized scoring protocols; and

(iii) the assessment instrument and the performance standards for measuring academic progress must be identified in the grant application and approved by the commissioner prior to grant award.

(g) Allowable expenditures. Allowable expenditures with grant funds include, but are not limited to, the following:

(1) textbooks and other instructional materials;

(2) recruiting and promotional materials;

(3) personnel costs, including salaries, benefits, stipends, and incentives;

(4) tutoring services;

(5) test fees;

(6) social services;

(7) transportation;

(8) educational software;

(9) incentive programs for students;

(10) technology;

(11) equipment costs; and

(12) costs associated with distance learning or participation in virtual schools.

(h) Disallowed expenditures. The following expenditures, including but not limited to the following, may not be made with grant funds:

(1) construction;

(2) purchase of buildings;

(3) debt service (including lease-purchase agreements);

(4) expenditures related to religious instruction;

(5) expenditures related to students who are not eligible for the program; or

(6) indirect costs.

(i) Evaluation. Each grantee operating an approved Dropout Recovery Pilot Program must comply with evaluation procedures established by the commissioner as detailed in the RFA.

(j) Subsequent funding. To receive any subsequent funding for the Dropout Recovery Pilot Program, grantees must reapply for funding on an annual basis. In order to remain eligible for any subsequent funding, the grantee must have met all applicable performance standards included in the prior year's grant agreement and submit a new application annually.

(k) Revocation.

(1) The commissioner may revoke the grant award for the Dropout Recovery Pilot Program based on the following factors:

(A) noncompliance with application assurances and/or the provisions of this section;

(B) lack of program success as evidenced by progress reports and program data;

(C) failure to participate in data collection and audits;

(D) failure to meet performance standards specified in the application; or

(E) failure to provide accurate, timely, and complete information as required by the TEA to evaluate the effectiveness of the Dropout Recovery Pilot Program.

(2) A decision by the commissioner to revoke the grant award of a Dropout Recovery Pilot Program is final and may not be appealed.

(l) Access to records. For grantees that are nongovernmental bodies, access must be granted to all records, including those of the controlling or parent entity, involving transactions and payments of program funds.

(m) Technical assistance. The commissioner may create a technical advisory panel made up of experts and practitioners from areas with experience and expertise in dropout recovery to advise the TEA regarding review criteria and implementation issues. The technical advisory panel may provide technical assistance.

(n) Recovery of funds. The commissioner may audit the use of grant funds and may recover funds against any state provided funds.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2008.

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CHAPTER 103. HEALTH AND SAFETY SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING PHYSICAL FITNESS

19 TAC §103.1003

The Texas Education Agency (TEA) adopts new §103.1003, concerning student physical activity requirements and exemptions. The new section is adopted without changes from the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3542) and will not be republished. The adopted new section implements the requirements of the Texas Education Code (TEC), §28.002, as amended by Senate Bill (SB) 530, 80th Texas Legislature, 2007, which requires that school districts and open-enrollment charter schools require physical activity in Kindergarten-Grade 8 and allow for appropriate exemptions.

Through SB 530, the 80th Texas Legislature amended the TEC, §28.002, requiring school districts to ensure that students in Kindergarten-Grade 8 participate in moderate to vigorous physical activity for at least 30 minutes daily. The TEC, §28.002(l) and (l-1), authorize the commissioner of education to provide exemptions for alternative extracurricular and other structured activities to meet the physical activity requirement.

Adopted new 19 TAC Chapter 103, Health and Safety, Subchapter AA, Commissioner's Rules Concerning Physical Fitness, §103.1003, Student Physical Activity Requirements and Exemptions, implements the TEC, §28.002(l) and (l-1), by specifying options for exemptions at the district level to meet the physical activity requirements in certain grade levels. The adopted new rule includes exemptions for health classifications, an extracurricular activity, a school-related activity, or an activity sponsored by a private league or club. The new rule also provides a definition for structured activity.

The TEA determined that the adopted new rule will have no direct adverse economic impact to small businesses or microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began May 2, 2008, and ended June 1, 2008. Following is a summary of the public comments received and corresponding agency responses regarding proposed new 19 TAC §103.1003, Student Physical Activity Requirements and Exemptions.

Comment. Two educators and one individual commented in support of the proposed rule.

Agency Response. The agency agrees.

Comment. A parent expressed concerns with language in proposed subsection (d) that defines structured activities that would be considered exempt from the physical activity requirement. The parent commented that the proposed language would require off-campus physical activity providers, such as those for private league or club activities, to teach the Texas Essential Knowledge and Skills (TEKS) for physical education in 19 TAC

Chapter 116 in their entirety. The parent also stated that the school district in the community in which he resides currently permits physical activity exemptions for students participating in private Olympic-level activities, as authorized by 19 TAC §74.11. The parent noted that since private Olympic-level activities do not necessarily address all the competencies listed in 19 TAC Chapter 116, it may be very difficult for students to continue obtaining these exemptions. The parent further stated that the requirement seems inconsistent with the intent of SB 530 and recommended changes to the rule text to address his concerns.

Agency Response. The agency disagrees and maintains language as published as proposed. The proposed language does not impede upon the district's ability to direct the teaching of the TEKS. The rule provides for a structured activity to be based on the grade appropriate movement, physical activity and health, and social development strands of the TEKS for physical education, not individual student expectations within the TEKS.

Comment. Two educators from Alief Independent School District (ISD) commented that minimum physical activity requirements should not apply to students in Grade 6 who attend an intermediate school. The educators expressed concern that intermediate schools do not have the resources available to implement the new rule, such as large gyms, tracks, weight rooms, and dressing rooms.

Agency Response. The agency disagrees and maintains language as published as proposed. The legislation and proposed rule provide flexibility for meeting the physical activity requirement throughout Grades 6, 7, and 8. In addition, intermediate schools are not solely responsible for meeting this requirement. The responsibility to ensure that students in Grades 6, 7, and 8 meet the requirement will be shared across the district.

Comment. An individual commented that there is not enough time in the school day to support the minimum physical activity requirement. The individual stated that it is extremely difficult, at best, to accomplish the necessary instructional time for core subject areas already.

Agency Response. The agency disagrees and maintains language as published as proposed. The new rule provides flexibility that will allow school districts to develop options and opportunities for students to be physically active.

Comment. An individual commented that school health initiatives will need the support of academic and administrative teams.

Agency Response. The agency agrees.

Comment. A counselor from Ector County ISD and an educator commented that the minimum physical activity requirement will limit students' opportunities to take elective courses. The counselor also commented that students should be allowed to explore other elective options in eighth grade, in particular if the students have taken eight years of physical education in Kindergarten-Grade 7. The educator also commented that students will not participate in physical activity.

Agency Response. The agency disagrees and maintains language as published as proposed. The new rule provides flexibility for meeting the physical activity requirement, while allowing school districts to maintain elective options and providing students with opportunities to be physically active.

The new section is adopted under the Texas Education Code, §28.002(l) and (l-1), which authorize the commissioner of education to adopt rules to provide exemptions for alternative extracurricular and other structured activities to meet the physical activity requirement. TEC, §28.002(l), requires that school districts and open-enrollment charter schools require physical activity in Kindergarten-Grade 8 and allow for appropriate exemptions.

The new section implements the Texas Education Code, §28.002(l) and (l-1).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804161
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: August 28, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 475-1497

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER Q. REPORTING, TREATMENT AND INVESTIGATION OF CHILD BLOOD LEAD LEVELS

25 TAC §§37.331 - 37.339

The Executive Commissioner of the Health and Human Services Commission (commission) on behalf of the Department of State Health Services (department) adopts amendments to §§37.331 - 37.336, and new §§37.337 - 37.339, concerning the reporting and control of child lead poisoning without changes to the proposed text as published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 1955) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The rules are necessary to comply with the Texas Health and Safety Code, Chapter 88, which requires the department to adopt rules concerning the reporting and control of childhood lead poisoning.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §§37.331 - 37.336 and has determined that reasons for adopting these sections continue to exist and, therefore, these rules on childhood lead poisoning are necessary. New §§37.337 - 37.339 were added because of amendments to the Texas Health and Safety Code, Chapter 88, by the 80th Texas Legislature, 2007.

SECTION-BY-SECTION SUMMARY

The amendments to §37.331 update legacy agency names and organizational structure to reflect the post-consolidation oper-

ations of the department and the Health and Human Services Commission. Amendments to §37.332 add new definitions and delete definitions no longer referenced in text. Amendments to §37.333 add text stating that confidential information provided to the department is pursuant to the Texas Health and Safety Code, Chapter 88, §88.002. Amendments to §37.334 update information required for the registry of children's blood lead test results. Section 37.335 was amended to state "any facility in which a laboratory conducts blood lead testing." Amendments to §37.336 update legacy agency names, delete reporting of blood lead level results to the local health authority, and change the preferred method of reporting to electronic transmission. New §37.337, §37.338, and §37.339 were added to define the criteria and procedures for follow up care and environmental lead investigations pursuant to the Texas Health and Safety Code, §§88.007, 88.008, and 88.009.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The adopted rules are authorized by the Health and Safety Code, §88.003, which requires rules on reporting childhood blood lead levels of concern; and §88.007 which allows rules on follow up care for children with elevated blood lead levels; and Government Code, §531.0055, and the Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804153
Lisa Hernandez
General Counsel
Department of State Health Services
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Proposal publication date: March 7, 2008
For further information, please call: (512) 458-7111 x6972

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TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER E. HEALTH FACILITY FEES

28 TAC §134.402

The Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to 28 TAC §134.402 concerning Ambulatory Surgical Center Fee Guideline. The section is adopted with changes to the proposed text as published in the June 13, 2008, issue of the *Texas Register* (33 TexReg 4614) and error corrections published in the June 27, 2008, issue of the *Texas Register* (33 TexReg 5047).

These amendments are necessary to comply with the requirements of Labor Code §413.011 and §413.012. The rule was originally adopted in 2004 to comply with statutory mandates enacted in 2001 by House Bill (HB) 2600, 77th Legislature, Regular Session. HB 2600 amended Labor Code §413.011 to add new requirements for workers' compensation reimbursement policies and guidelines. Prior to adoption of the 2004 fee guideline, the Texas workers' compensation system did not have a fee schedule for health care provided in ambulatory surgical centers (ASCs). Therefore, those services were reimbursed on a case-by-case basis determination of what was fair and reasonable under what was then §134.1 of this title (relating to Use of the Fee Guidelines, repealed effective May 2, 2006).

Section 134.402 was amended in 2005 to address certain impacts of the new rule on participants in the Texas workers' compensation system. In 2007 the Centers for Medicare and Medicaid Services (CMS) significantly revised the Medicare ASC reimbursement methodology. In order to maintain the stability of the ASC reimbursement, the Commissioner of Workers' Compensation (Commissioner) amended §134.402 and retained the current ASC guidelines while researching and preparing to implement the new Medicare ASC reimbursement methodology. The amendments continued the use of reimbursement structures and amounts of the Medicare ASC 2007 rates for ASC facility services provided on January 1, 2008 through August 31, 2008. This continuation has afforded additional time for the Commissioner to determine and establish the appropriate ASC reimbursement methodology. The amendments to the rule are needed to align with revised Medicare reimbursement methodologies, develop the most suitable reimbursement structure, and utilize appropriate conversion factors or other payment adjustment factors geared to the Texas workers' compensation system.

Labor Code §413.011 establishes the statutory framework for Division fee guidelines for medical services. The statute requires the Commissioner to adopt health care reimbursement policies and guidelines that reflect reimbursement structures found in other health care delivery systems with minimal modifications as necessary to meet occupational injury requirements. In addition, Labor Code §413.011(a) requires the Commissioner to adopt the most current reimbursement methodologies, models, and values or weights used by the CMS to achieve standardization, including applicable payment policies relating to coding, billing, and reporting, and may modify documentation requirements as necessary to meet the requirements of Labor Code §413.053 (relating to Standards of Reporting and Billing).

Under Labor Code §413.011(b), the Commissioner is required to develop conversion factors or other payment adjustment factors

in determining appropriate fees when developing these guidelines, taking into account economic indicators in health care by not adopting conversion factors or other payment adjustment factors based solely on those factors as developed by the CMS. The subsection further states that it does not directly itself adopt the Medicare fee schedule into Texas law.

Labor Code §413.011(d) requires that guidelines for medical services be fair and reasonable and designed to ensure the quality of medical care and to achieve effective medical cost control. The guidelines may not provide for payment of a fee in excess of the fee charged for similar treatment of an injured individual of an equivalent standard of living and paid by that individual or by someone acting on that individual's behalf. Notwithstanding §413.016 or any other provision of Title 5 of the Labor Code, §413.011(d-1) provides that an insurance carrier may pay fees to a health care provider that are inconsistent with the fee guidelines adopted by the Division if the insurance carrier or a network under Chapter 1305, Insurance Code, arranging for out-of-network services under Insurance Code §1305.006: (1) has a contract with the health care provider, that includes a specific fee schedule; and (2) complies with the notice requirements established under §413.011(d-2).

Additionally, Labor Code §413.012 requires the Commissioner to review and revise the medical policies and fee guidelines every two years to reflect fair and reasonable fees. Labor Code §413.0511(b)(1) also requires consultation with the Medical Advisor in developing, reviewing, and maintaining guidelines. Section 413.041 of the Labor Code requires health care practitioners and health care providers to submit to the Division financial disclosure information including ASC ownership interests.

These provisions are considered as the rule is amended. This section does not apply to political subdivisions with contractual relationships under Labor Code §504.053(b)(2).

MEDICARE

CMS regulates the Medicare and Medicaid programs. CMS has established a Medicare prospective payment system (PPS) for hospital/facility-based services, which include inpatient and outpatient hospital care, ambulatory surgical services, and other facility-based services such as, but not limited to, rehabilitation, psychiatric, and long term care units. Medicare requires a deductible and co-pay from the patient until the patient reaches a certain level of expenditures. When setting reimbursement amounts, Medicare considers and includes this deductible and co-pay for facility services. CMS has directed extensive research in determining facility reimbursements in the Medicare system. Reimbursements are based on a facility's expected cost to provide a service rather than charged amounts, thus reimbursements differ by facility type. CMS establishes a predetermined amount of reimbursement which bundles or packages services. CMS updates reimbursements periodically based on a variety of factors, including weights (e.g., intensity), clinical issues, costs, inflation, and federal budget constraints. Reimbursement is based on national average costs with adjustments for geographic and facility specific factors. In addition, billed claims are subject to clinical coding edits Medicare has developed.

In setting the payment rates in the Outpatient Payment Prospective System (OPPS), CMS covers hospitals' operating and capital costs for services they furnish. Within the OPPS Ambulatory Payment Classifications (APCs) were adopted by CMS in August 2000. There are more than 800 APCs based on clinically similar items and services requiring similar amounts of resources. An outpatient visit may include multiple APCs, each APC having a predetermined rate. CMS determines the payment rate for each service by multiplying the APC relative weight for the service by a conversion factor. The relative weight for an APC measures the resource requirements of the service and is based on the median cost of the services in that APC. There are numerous other factors that comprise a reimbursement for a hospital outpatient setting.

On August 2, 2007, CMS published a final rule establishing a revised Medicare payment system for ASCs that applies to services provided on or after January 1, 2008 and expanded access to procedures in the ASC setting by allowing ASC payment to approximately 790 additional procedures in calendar year (CY) 2008. This compares to the nine specific reimbursement categories or ASC groups that were the previous Medicare ASC reimbursement system and are the current Texas workers' compensation ASC reimbursement groups. Also, on November 27, 2007, CMS published a final rule containing CY 2008 payment rates for ASCs based in part on the rates Medicare pays hospital outpatient departments (HOPDs). CMS changed the ASC payment system beginning January 1, 2008 because the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 also called Medicare Modernization Act (MMA) (Pub. L. 108-173, 117 Stat. 2066) required CMS to revise the ASC payment system no later than January 1, 2008.

THE GOVERNMENT ACCOUNTABILITY OFFICE REPORT

CMS based the revised ASC payment system on the OPPS after the Government Accountability Office (GAO) studied ASC costs and found that the relativity of costs among ASC procedures was comparable to their relativity of costs in HOPDs. According to the statutorily mandated GAO report entitled, "Medicare: Payment for Ambulatory Surgical Centers Should Be Based on the Hospital Outpatient Payment System" (GAO-07-86) released in November 2006, ASCs experience greater efficiencies in providing surgical services than HOPDs, resulting in surgical procedures being less costly when performed in an ASC facility setting. The GAO determined that the APC groups in the OPPS accurately reflect the relative costs of the procedures performed in ASCs. The GAO's analysis of the cost ratios showed that the ASC-to-APC cost ratios were more tightly distributed around their median cost ratio than were the OPPS-to-APC ratios. The report's analysis demonstrated that the APC groups reflect the relative costs of procedures performed by ASCs as they do for procedures performed in HOPDs and, therefore, that the APC groups could be used as the basis for an ASC payment. The GAO report concluded that, as a group, the costs of procedures performed in ASCs have a relatively consistent relationship with the costs of the APC groups to which they are assigned under the OPPS. The GAO's analysis also found that the procedures in the ASC setting have lower costs than those same procedures in HOPDs. The GAO reported that the median cost ratio among all ASC procedures was 0.39, whereas the median cost ratio among all OPPS procedures was 1.04. When the ASC median cost ratio is weighted according to Medicare ASC utilization, the ASC median cost increases to 0.84. This weighted ratio may be more indicative of the relationship between ASC and HOPD costs than a direct one-to-one comparison of APCs.

Based on its findings from the study, the GAO recommended that CMS implement a payment system for procedures performed in ASCs based on the OPPS, taking into account the lower relative costs of procedures performed in ASCs compared to HOPDs

in determining ASC payment rates. CMS followed the GAO's recommendations.

CMS CY 2008 REVISED ASC PAYMENT SYSTEM

Under the OPPS-based revised ASC payment system, CMS pays for hospital outpatient services on a rate-per-service basis that varies according to APC group to which the service is assigned. CMS uses the Healthcare Common Procedure Coding System (HCPCS) Level I and Level II codes and descriptors to identify and group the services within each APC group. The OPPS includes payment for most hospital outpatient services except those identified in the CMS CY 2008 OPPS/ASC final rule published on November 27, 2007 that updated the OPPS for CY 2008 and provided the CY 2008 ASC conversion factor and payment rates. Medicare now uses the same APCs for ASCs as are used for HOPDs. Because ASCs provide only surgical services and hospitals provide many other types of outpatient procedures, such as emergency room services, HOPDs will utilize more APCs than ASCs.

In accordance with the MMA, the revised Medicare ASC payment system must be "budget neutral" which means that in CY 2008 Medicare expenditures under the revised Medicare ASC payment system must approximate the expenditures that would have occurred in the absence of the revised Medicare ASC payment system. In the CY 2008 OPPS/ASC final rule, CMS estimates that ASCs should be paid about 65 percent of the OPPS payment rates for the same surgical procedures in a HOPD.

The standard Medicare ASC payment for most ASC covered surgical procedures is calculated by multiplying the ASC conversion factor ($41.401 for CY 2008) by the ASC relative payment weight set (based on the OPPS relative payment weight) for each separately payable procedure.

The complete lists of ASC covered surgical procedures and ASC covered ancillary services, the applicable payment indicators, payment rates for each covered surgical procedure and ancillary service before adjustment for regional wage variations, the wage adjusted payment rates, and wage indices are available on the CMS web site at *http://www.cms.hhs.gov/ascpayment/.*

CMS is providing a four-year transition to the fully implemented revised ASC rates. Payments during the four-year transition to the fully implemented revised ASC payment rates will be based on a blend of the CY 2007 ASC payment rates and the revised ASC payment rates at 75/25 in CY 2008, 50/50 in CY 2009, and 25/75 in CY 2010 with payment at 100 percent of the revised ASC payment rates in 2011. Payment for covered surgical procedures added for ASC payment in CY 2008 or later and payment for covered ancillary services that are not paid separately under the existing ASC payment system will not be subject to a transition. For additional explanation, see *http://www.cms.hhs.gov/ascpayment/.*

IMPLANTABLE DEVICES

Prior to implementation of the revised Medicare ASC payment system, ASCs received separate payment for implantable devices. Under the revised system, CMS uses a modified payment methodology to establish the ASC payment rates for procedures that are designated as "device intensive." Device intensive procedures are specified ASC covered surgical procedures that, under the OPPS, are assigned to certain device dependent APCs. Device dependent APCs are groups of procedures that require the insertion or implantation of expensive devices. Payment for the high cost devices is packaged into the procedure payments under the OPPS. For the device dependent APCs, CMS develops estimates of the "device offset percentage," the proportion of the procedures" costs that are attributable to the cost of the device. CMS identifies the covered surgical procedures for which the device offset percentage of the APC under the OPPS is greater than 50 percent of the APCs median cost and designates those surgical procedures as device intensive. CMS pays the same amount for the device-related portion of the procedure under the revised ASC payment system as under the OPPS for HOPDs. However, in the Medicare system payment for the service portion of the ASC rate will be adjusted by the ASC conversion factor.

For example: If the OPPS payment for a device intensive procedure is $7,000 and the device offset percentage is 75 percent, the device portion is $5,250 ($7,000 x 0.75 = $5,250). The remaining $1,750 ($7,000 - $5,250 = $1,750) is the service portion of the procedure, the non-device cost that the facility incurs when the device is implanted. Under the revised ASC payment system, CMS will pay the same amount for the device portion of the procedure ($5,250) as under the OPPS, but will adjust the service portion to approximately 65 percent of $1,750, or $1,137 ($1,750 x 0.65 = $1,137). This is consistent with other OPPS surgical procedures when ASCs are reimbursed for performance of these procedures. Thus, the Medicare ASC rate will be calculated by adjusting the OPPS service portion by the Medicare ASC conversion factor and that will be added to the full device portion of the OPPS rate to establish the full Medicare ASC payment rate for the procedure. Using the example, the resulting ASC reimbursement would be $6,387 ($5,250 + $1,137 = $6,387).

Because payment for procedures is based on the OPPS, which packages payment for implantable devices in the payment for the surgical procedures to implant them, in the Medicare system ASCs will no longer bill separately under the Durable Medical Equipment, Prosthetics/Orthotics, and Supplies (DMEPOS) fee schedule for any implantable devices.

Procedure payments, into which payment for devices is packaged, including those for device intensive procedures, are subject to the adjustment for geographic differences in wage. Because the labor-related share is 50 percent under the revised ASC payment system, the local wage index adjustment is applied to 50 percent of the national payment rate for the procedure involving the device. Payment rates for each covered surgical procedure before adjustment for regional wage variations, the wage adjusted payment rates, and wage indices are available on the CMS web site at *http://www.cms.hhs.gov/ascpayment/.*

Pass-through status under the OPPS is granted to new implantable devices that meet explicit OPPS criteria, including demonstrated substantial clinical improvement for patients. Under the OPPS, devices with pass-through status are paid separately for two to three years at hospital charges adjusted to cost. CMS provides separate payment to ASCs at contractor-priced rates for devices that are included in device categories with pass-through status under the OPPS when the devices are an integral part of a covered surgical procedure. Payment for these devices is not subject to the wage adjustment, while payment for procedures used to implant pass-through devices is subject to the wage adjustment.

In the Medicare system, ASCs will bill separately for devices that have pass-through status under the OPPS when provided integral to covered surgical procedures and will be paid separately under the revised ASC payment system. CMS has instructed

ASCs in the Medicare system to use the appropriate Level II HCPCS codes to report the devices.

DIVISION DATA

In maintaining a medical billing database, the Division requires insurance carriers to submit billing and reimbursement information to the Division on a regular basis. The Division implemented a new reporting format in late 2006 to facilitate collection of medical billing and reimbursement data from insurance carriers in conjunction with new electronic billing reporting requirements. The new electronic reporting format is the International Association of Industrial Accident Boards and Commission's 837 format. Insurance carriers submitted CY 2005 and 2006 charged and paid data in this new format, and the Division has based the primary components of its analysis on CY 2006 information. In developing an analysis of the data for the amendment of §134.402 of this title, CY 2006 data was determined to be the most complete set of mature claims data available. The Division reviewed the CY 2006 claims data to have an improved understanding of the types of ASC facility services provided to injured employees and to understand the billing and reimbursement calculations associated with those services. The Division was also able to review charge and payment activity for specific types of services.

Although an important component of the Texas workers' compensation system, ASC facility services account for a proportionally smaller portion of the medical benefits paid in the Texas workers' compensation system than hospital or doctor services. For example, based on a Deloitte Consulting, LLP (Deloitte) analysis of division data payments to ASCs for CY 2006 services totaled approximately $21.4 million. Based on this observation, the Division estimated ASC reimbursement at less than three percent of total medical payments. Data used in the recent adoption of §134.403 of this title (relating to Hospital Facility Fee Guideline--Outpatient) and §134.404 of this title (relating to Hospital Facility Fee Guideline--Inpatient) (hospital fee guidelines) estimated payments to hospitals for CY 2006 services totaled approximately $205 million, which represents approximately 21 percent of total medical payments. These hospital payments were split relatively evenly between inpatient services ($93 million) and outpatient services ($111 million). A similar Division review of reimbursement data for CY 2006 doctor services estimated payments at approximately $625 million, or nearly 65 percent of total medical payments.

In CY 2006, 338 ASCs had approximately 13,700 Texas workers' compensation admissions, whereas 177 ASCs had ten or fewer admissions. Forty-one ASCs had more than 100 admissions each, representing 64 percent of ASC charges and 62 percent of ASC reimbursements. Seventy-six ASCs had almost 80 percent of the admissions. This concentration is also evident in the services provided in the ASC facility setting. Ninety-five percent of all Texas workers' compensation ASC services were grouped to only 40 APCs. Further, the five most utilized APCs accounted for approximately 70 percent of the Texas workers' compensation system ASC encounters.

DELOITTE CONSULTING, LLP

In March 2008, the Division entered into a professional services agreement with Deloitte, a subsidiary of Deloitte Touche Tohmatsu. Deloitte is one of the leading providers of complex consulting services, with a long history of service to most of the state governments across the country. Deloitte provides technology integration services, supporting the implementation of new legislation, designing operations to support refined business processes, and developing tools to support management decisions, and is often an advisor to some of the largest government agencies in the United States. Deloitte is experienced in deploying ASC and APC fee schedule reimbursement methodologies and is experienced in the workers' compensation area. Deloitte has access to industry and national normative databases that allows it to develop comparative analyses and assess differentials with the Division's internal data.

Specifically, the agreement sought Deloitte's expertise to perform actuarial services that indexed the Texas workers' compensation ASC facility reimbursement to Medicare's 2008 ASC facility reimbursement. Additionally, Deloitte was to index other health care systems' ASC reimbursement with Medicare reimbursement for ASC services.

Texas Workers' Compensation ASC Reimbursement Comparison to Medicare

The Division provided Deloitte detailed ASC utilization, charge, and payment data for CY 2005 and 2006 from the Division medical billing data base. The data set included over 29,000 bills attributable to more than 20,000 injured employees. Deloitte found the data set to be credibly populated and appropriate for use in the analysis. Data for the two calendar years were reviewed at a high level and determined to be consistent. The final analysis focused on the services provided during CY 2006.

As a preliminary review, Deloitte grouped and repriced the CY 2006 according to the CY 2006 Medicare and the §134.402 reimbursement methodologies. Analysis indicated that overall claims were paid at a rate of 213.6 percent of the Medicare ASC rate. This figure is consistent with the Division's previously stated reimbursement rate of 213.3 percent of Medicare and indicated a high level of data confidence for the majority of 2006 claims.

Almost 98 percent of the Texas workers' compensation claims are for ASC services that are not classified by Medicare as device intensive. Deloitte grouped and repriced these claims according to the new Medicare ASC reimbursement methodology. The resulting analysis estimates that CY 2006 ASC services provided and reimbursed in the Texas workers' compensation system were paid at approximately 189 percent of CY 2008 Medicare ASC reimbursement. This ratio establishes a reference point for the Division in establishing appropriate ASC reimbursement.

The remaining two percent of Texas workers' compensation claims involved services that Medicare identifies as device intensive. Device intensive procedures are identified as procedures including an implantable device where the device costs are on average more than 50 percent of the total Medicare procedure reimbursement. Deloitte estimated that these claims were reimbursed at approximately 112 percent of the CY 2008 Medicare ASC rate. Deloitte noted that the low figure for reimbursement of device intensive procedures may be related to the high proportion of these claims' overall costs associated with the implantable device rather than the procedure.

Comparison of Commercial and Medicare ASC Payment Rates

Deloitte also provided detailed information regarding reimbursement of ASC services by commercial payors outside the Texas workers' compensation system. The source of the commercial data for this analysis was the 2006 Medstat Market Scan Databases (Medstat). Medstat captures person-specific clinical utilization, expenditures and enrollment across patient types from large employers, health plans, government and public

organizations, Blue Cross Blue Shield plans, and third party administrators. Medstat links paid claims and encounter data to detailed patient information across sites and types of providers and over time. This data represents a broad spectrum of insured employees and their dependents. Texas Medstat data for CY 2006 includes claim information for over one million members.

Deloitte analyzed the Medstat data in a similar fashion to the Texas workers' compensation data set. ASC services were identified and the data set processed to eliminate non-groupable claims, claims with negative allowed amounts, and claims where the patient age was less than 18. After applying Medicare grouping and pricing methodologies, Deloitte estimated the average commercial reimbursement for ASC services to be approximately 236 percent of Medicare reimbursement. Deloitte estimated the average ASC reimbursement for Preferred Provider Organizations (PPO) to be 265 percent of Medicare reimbursement, and Health Maintenance Organizations (HMO) to be 148 percent of Medicare reimbursement. Various other payor types such as traditional indemnity, high deductible, basic medical and major medical coverage payment rates were estimated at approximately 217 percent of Medicare ASC reimbursement.

SETTING PAYMENT ADJUSTMENT FACTORS

In adopting amended payment adjustment factors (PAFs) for use in §134.402 of this title, the Division conducted extensive research to understand ASC facility reimbursement in the current Texas workers' compensation system, including: reimbursement rates, the reimbursement rates as compared to Medicare reimbursement, and the reimbursement rates as compared to non-workers' compensation reimbursement for ASC facility services, all of which are requirements of the Labor Code at §413.011.

The Division also considered economic indicators for hospitals that are particularly relevant to the analysis process. Medicare margins and market basket information reflect the general increasing costs of care over time.

Deloitte reviewed Texas workers' compensation facility utilization and reimbursement. The reports prepared by Deloitte did not recommend a PAF, however, Deloitte did estimate that for CY 2006 ASC facility services were paid in the Texas workers' compensation system on average 189 percent of CY 2008 Medicare ASC facility services. In reviewing the estimated reimbursement rate, the Division considered the rate and the failure of CMS to adjust its reimbursement method for ASCs for an extended period of time. Although the Division adjusted for this situation when adopting the rate included in the initial §134.402, neither the previous §134.402 of this title nor the Medicare methodology actively considered medical inflation on an annual basis. CMS will utilize the Consumer Price Index for all Urban Consumers (CPI-U) (U.S. city average) to adjust its ASC reimbursement rates in CY 2010 and going forward. The CPI-U has increased approximately 15 percent since the adoption of the current rule in May of 2004. If the Texas workers' compensation rate of 189 percent of 2008 Medicare reimbursement had been adjusted to reflect the change in the CPI-U since the original adoption of the rule in 2004, the equivalent rate would currently be approximately 217 percent of the 2008 Medicare ASC rate.

The Division, however, considered additional factors in setting the PAFs. The ratio of Medicare reimbursement to reimbursement made by other payors is an important comparison. Using commercially available data, Deloitte estimated commercial payor reimbursement for ASC services at approximately 236 percent of Medicare. The disparity between Texas workers' compensation system and commercial market is particularly evident in the five most frequently used APCs for musculoskeletal surgeries. These five APCs account for nearly 30 percent of all Texas workers' compensation system ASC encounters. Commercial reimbursement for the same APCs is approximately 290 percent of Medicare, compared to 172 percent of Medicare in the Texas workers' compensation system. Although Texas workers' compensation system payments exceed the Medicare payment, the existing payments have not been competitive with the commercial market.

In adopting a revised PAF, the Division noted and considered the recommendations made by system participants. Those recommendations ranged from approximately 110 percent to 262 percent of the Medicare ASC facility services rate.

The Division also recognized the importance of surgically implanted devices to Texas injured employees. In establishing hospital facility reimbursement rates (see §134.403 and §134.404 of this title), the Division established methodologies to allow separate reimbursement of implantables to insulate facilities from potential losses directly related to the high costs of surgically implanted devices. This concept is replicated in the adopted amended ASC reimbursement methodologies to assure that costs of implantable devices are not a barrier to injured employee's access to services in an ASC facility setting.

The Division is adopting minimal modifications to Medicare's reimbursement methodology to reflect use of separate reimbursement for surgically implanted devices in non-device intensive procedures to ensure injured employees have access to care, including surgery where surgically implanted devices are medically necessary. The modification establishes two PAFs for the adopted amended rule, which are 235 percent and 153 percent of Medicare ASC reimbursement rate. The lower PAF maintains the offset ratio the Division used in establishing the lower PAF adopted in the hospital outpatient facility reimbursement methodology (see §134.403 of this title).

Additionally, the Division is adopting a specific reimbursement methodology for device intensive procedures that utilizes the higher PAF and allows separate reimbursement for the surgically implanted device either at the Medicare estimated cost, or the actual cost of the item plus an administrative fee. These device intensive procedures are specifically identified by Medicare and have device costs that are at least 50 percent of the Medicare APC reimbursement. In certain APCs, the device portion of the APC may be as high as approximately 88 percent of the Medicare APC rate. This methodology impacts a small number of APCs that warrant special consideration due to the disproportionate allocation of the device payment relative to other APCs.

The adopted amendments not only comply with the requirements of Labor Code §413.011, they also provide the Texas workers' compensation system with a rate that:

*is within the commercial market range;

*is less than the current preferred provider organization rate, but more than the current health maintenance organization rate;

*accounts for inflation based on the CPI-U since the initial adoption of §134.402 of this title;

*provides an increase over current reimbursement, improving the availability of ASC services to injured employees; and

*maintains injured employee access to surgical implanted devices through separate reimbursement when appropriate for those devices.

The adopted amendments additionally comport with the Commissioner's authority under the Labor Code to audit and investigate both health care providers and insurance carriers as might be used in auditing implantable devices. Considering the value of implantable devices in returning the injured employee to work, the Commissioner may pursue audits to monitor, review, and study the utilization, billing, and reimbursement of implantable devices.

Upon consideration of all these factors and statutory requirements, the Division determines that adopted amended rates of 235 and 153 percent of the Medicare ASC reimbursement are the appropriate PAFs to be utilized in the Texas workers' compensation system along with the other identified adopted amendments for reimbursement of ASC facility services.

In response to comments from interested parties, and in consultation with the Medical Advisor, the Commissioner has adopted this section with a change to the proposal as published.

Language in subsection (g)(1)(B) of this section that required a facility or surgical implant provider, when requesting separate reimbursement for a surgically implanted device, to attach a copy of the invoice that supports actual cost to the facility or surgical implant provider is deleted in its entirety. This change from proposal is made as a result of public comment and to clarify the requirements that providers are required to provide documentation of the cost of the implantable through §133.210 of this title (relating to Medical Documentation). Section 133.210(c)(4) of this title establishes that a provider should include with its bill any supporting documentation for procedures which do not have an established Division maximum allowable reimbursement (MAR) and the exact description of the health care provided. Since surgically implanted devices do not have an established MAR, §133.210(c)(4) of this title applies. Stating the proposed subparagraph (B) in the rule is duplicative of the requirements of §133.210 of this title. Additionally, the deleted language created a perceived conflict or inconsistency with the implantable billing requirements in §134.403 and §134.404 of this title. It is the Division's intent to maintain consistency in all facility settings for the billing and reimbursement processes concerning separate reimbursement of surgically implanted devices.

Adopted amended §134.402(a) describes the applicability of the section. Adopted amended §134.402(a)(1) states that the section applies to facility services provided on or after September 1, 2008 by an ASC, other than professional medical services. Adopted amended §134.402(a)(2) notes that the section does not apply to professional medical services billed by a health care provider not employed by the ASC, except for a surgical implant provider as described in the section; and, that it is not applicable to services provided through a workers' compensation health care network certified pursuant to Insurance Code Chapter 1305, except as provided in Insurance Code Chapter 1305.

Adopted amended §134.402(b) provides definitions for words and terms that are used in the section. Adopted new §134.402(b)(1) defines the term "Ambulatory Surgical Center" to mean a health care facility appropriately licensed by the Texas Department of State Health Services. Adopted new §134.402(b)(2) defines the term "ASC device portion" to mean the portion of the ASC payment rate that represents the cost of the implantable device, and says that it is calculated by applying the CMS OPPS device offset percentage to the OPPS payment rate. Adopted new §134.402(b)(3) defines the term "ASC service portion" to mean the Medicare ASC payment rate less the device portion. Adopted new §134.402(b)(4) defines the term "Device intensive procedure" to mean an ASC covered surgical procedure that has been designated by CMS as device intensive in TABLE 56 - ASC COVERED SURGICAL PROCEDURES DESIGNATED AS DEVICE INTENSIVE FOR CY 2008, as published in the November 27, 2007 publication of the *Federal Register*, or its successor. Adopted amended §134.402(b)(5) defines the term "Implantable" to mean an object or device that is surgically implanted, embedded, inserted, or otherwise applied, and related equipment necessary to operate, program, and recharge the implantable. Adopted new §134.402(b)(6) defines the term "Medicare payment policy" to mean reimbursement methodologies, models, and values or weights including its coding, billing, and reporting payment policies as set forth in the CMS payment policies specific to Medicare. Adopted new §134.402(b)(7) defines the term "Surgical implant provider" to mean a person that arranges for the provision of implantable devices to a health care facility and that seeks reimbursement for the implantable devices provided directly from an insurance carrier.

Adopted amended §134.402(c) clarifies that a surgical implant provider is subject to Chapter 133 and is considered a health care provider for purposes of the section and the sections in Chapter 133 of this title.

Adopted amended §134.402(d) requires that for coding, billing, and reporting of facility services covered in the section, Texas workers' compensation system participants shall apply Medicare payment policies in effect on the date a service is provided with any additions or exceptions specified in this section. Adopted amended §134.402(d)(1) provides for the inclusion of specific provisions contained in the Labor Code or Division rules, including Chapter 134, as taking precedence over any conflicting provision adopted or utilized by the CMS in administering the Medicare program. Adopted amended §134.402(d)(2) provides for the inclusion of Independent Review Organization decisions regarding medical necessity made in accordance with Labor Code §413.031 and §133.308 of this title (relating to MDR by Independent Review Organizations), which are made on a case-by-case basis, as taking precedence in that case only, over any Division rules and Medicare payment policies. Adopted new §134.402(d)(3) provides for the stated inclusion that whenever a component of the Medicare program is revised and effective, use of the revised component shall be required for compliance with Division rules, decisions, and orders for services rendered on and after the effective date, or after the effective date or the adoption date of the revised Medicare component, whichever is later.

Adopted amended §134.402(e) establishes that regardless of billed amount, reimbursement methods shall be determined in the following order. The first method is in adopted §134.402(e)(1), which states that reimbursement is the amount for the service that is included in a specific fee schedule in a contract that complies with the requirements of Labor Code §413.011. The second method is provided in adopted §134.402(e)(2), which states that if no contracted fee schedule exists that complies with Labor Code §413.011, the MAR amount is as described under subsection (f) of the section, including reimbursements for implantables. The last method is addressed in adopted §134.402(e)(3) and provides that if no contracted fee schedule exists that complies with Labor Code

§413.011, and an amount cannot be determined by application of the formula to calculate the MAR as outlined in subsection (f) of the section, then reimbursement shall be determined in accordance with §134.1 of this title.

Adopted amended §134.402(f) requires that the reimbursement calculation used for establishing the MAR shall be the Medicare ASC reimbursement amount determined by applying the most recently adopted and effective Medicare Payment System Policies for Services Furnished in Ambulatory Surgical Centers and Outpatient Prospective Payment System reimbursement formula and factors as published annually in the *Federal Register*. Reimbursement shall be based on the fully implemented payment amount as in ADDENDUM AA, ASC COVERED SURGICAL PROCEDURES FOR CY 2008, as published in the November 27, 2007 publication of the *Federal Register*, or its successor.

Adopted new §134.402(f)(1) allows two payment structures. The first reimbursement for non-device intensive procedures is to be the Medicare ASC facility reimbursement amount multiplied by 235 percent. In the alternative, if an ASC facility or surgical implant provider requests separate reimbursement for an implantable, reimbursement for a non-device intensive procedure is the sum of two parts. The first part is the lesser of the manufacturer's invoice amount or the net amount (exclusive of rebates and discounts) plus 10 percent or $1,000 per billed item add-on, whichever is less, but not to exceed $2,000 in add-on's per admission. The second part is the Medicare ASC facility reimbursement amount multiplied by 153 percent.

Adopted new §134.402(f)(2) allows a reimbursement for device intensive procedures to be the sum of the ASC device portion, and the ASC service portion multiplied by 235 percent. It also provides that if an ASC facility or surgical implant provider requests separate reimbursement for an implantable, reimbursement for the device intensive procedure shall be the sum of the lesser of the manufacturer's invoice amount or the net amount (exclusive of rebates and discounts) plus 10 percent or $1,000 per billed item add-on, whichever is less, but not to exceed in $2,000 in add-on's per admission and the ASC service portion multiplied by 235 percent.

Adopted amended §134.402(g) states that a facility, or surgical implant provider with written agreement of the facility, may request separate reimbursement for an implantable used in a device intensive procedure. Adopted amended §134.402(g)(1) provides that the facility or surgical implant provider requesting reimbursement for the implantable shall bill for the implantable on the Medicare-specific billing form for ASCs, and include with the billing a certification that the amount billed represents the actual cost as specified in the text. Adopted new §134.402(g)(2) states that an insurance carrier may use the audit process under §133.230 of this title (relating to Insurance Carrier Audit of a Medical Bill) to seek verification that the amount certified under paragraph (1) properly reflects the requirements of this subsection. Such verification may also take place in the Medical Dispute Resolution process under §133.307 of this title (relating to MDR of Fee Disputes), if that process is properly requested, notwithstanding §133.307(d)(2)(B). Adopted new §134.402(g)(3) provides that nothing in the rule precludes an ASC or insurance carrier from utilizing a surgical implant provider to arrange for the provision of implantable devices and that implantables provided by such a surgical implant provider shall be reimbursed according to the subsection.

Adopted new §134.402(h) establishes that for medical services provided in an ASC, but not addressed in the Medicare payment policies as outlined in subsection (f) of the section, and for which Medicare reimburses using other Medicare fee schedules, reimbursement shall be made using the applicable Division Fee Guideline in effect for that service on the date the service was provided.

Adopted new §134.402(i) provides that if Medicare prohibits a service from being performed in an ASC setting, the insurance carrier, health care provider, and ASC may agree, on a voluntary basis, to an ASC facility setting. Adopted new §134.402(i)(1) states that the agreement may occur before or during preauthorization. Adopted amended subsection (i)(2) also sets forth that a preauthorization request may be submitted for an ASC setting only if an agreement has already been reached and a copy of the signed agreement is filed as a part of the preauthorization request. Adopted amended subsection (i)(3) provides that the agreement between the insurance carrier and the ASC must be in writing and include the reimbursement amount; any other provisions of the agreement; and names, titles, and signatures of both parties, with dates. Adopted amended subsection (i)(4) states that copies of the agreement are to be kept by both parties and that the agreement does not constitute a voluntary network established in accordance with Labor Code §413.011(d-1). Adopted amended (i)(5) provides that copies of the agreement are to be kept by both parties and that upon request of the Division, the agreement information shall be submitted in the form and manner prescribed by the Division.

Adopted new §134.402(j) establishes the severability of this section and states, if a court of competent jurisdiction holds that any provision of the section is inconsistent with any statutes of this state, are unconstitutional, or are invalid for any reason, the remaining provisions of the section shall remain in full effect.

§134.402: Some commenters support the proposed rule. Agency Response: The Division appreciates the supportive comments.

§134.402: Some commenters commend the Division for allowing stakeholders the opportunity to be involved in this beneficial rulemaking process, for looking at the big picture, and understanding where ASCs fit into the delivery of health care and the benefits ASCs can provide to injured employees, employers, insurance carriers and other providers.

Agency Response: The Division appreciates the supportive comments and agrees that system participant input is an important component in exploring and understanding options for the development and operation of the Texas workers' compensation system.

§134.402: A commenter opines that the rule proposal will increase competition. The commenter suggests it may bring some doctors back into the workers' compensation system due to scheduling efficiencies appreciated in ASCs, which are less evident in hospital outpatient surgical departments. With surgery that can be accomplished sooner, an injured employee should be eligible for either rehabilitation services, or to return to work sooner, all of which are advantages to using the ASC site of service.

Agency Response: The Division acknowledges that the rule enhances access to surgical venue choices for injured employees. These choices may lead to increased competition with the potential for quality and outcome improvements.

§134.402(a)(1): A commenter asks if there will be a grace period applied to the new rule since such a short time frame from adoption to applicability date is extremely difficult.

Agency Response: The Division clarifies that previous §134.402(a)(2) contained a provision that prevents an extension beyond August 31, 2008, necessitating the implementation of these amendments by September 1, 2008.

§134.402(b)(5): A commenter supports the definition of "surgical implant provider." Agency Response: The Division appreciates the supportive comments.

§134.402(b)(5): A commenter believes the definition of "surgical implant provider" is overly broad and could lead to overpayment and abuses, but the commenter also recognizes this definition is consistent with other Division fee guidelines.

Agency Response: The Division disagrees the definition is overly broad and could lead to overpayment and abuses. However, the Division agrees that the definition is consistent with Division definitions relating to implantable devices. The Division is concerned with any potential abuse and will monitor the use of surgically implanted devices throughout the workers' compensation system. The Division will closely monitor implant costs. This may include a data call to capture specific implantable information, such as the invoice cost and facility charge. In addition, the Division may request other specific implantable information, such as the lot number, model number, or serial number of the device or other identifier used by a manufacturer. The latter identifiers are consistent with medical device tracking requirements imposed on a manufacturer when tracking is ordered by the Food and Drug Administration for a class II or class III medical device pursuant to 21 U.S.C. §360i (e) and 21 C.F.R. §821.1 et. seq. Additionally, insurance carriers have the ability to audit health care providers and surgical implant providers in part under the authority of §133.230 and §133.307 of this title.

§134.402(b)(5): Some commenters believe the definition of "surgical implant provider" invites billing abuse and suggest it is so broad as it could be used to apply to all forms of durable medical equipment that is in any way applied to the body, when often such type of equipment is potentially reusable by the facility for many other patients. The commenters are opposed to the insurance carrier being forced to pay up to $1,000 of a mark-up up each time the facility uses the equipment for a workers' compensation claim, and state this violates Labor Code §413.011(f) since it fails to achieve effective medical cost control.

Agency Response: The Division clarifies the components of an implantable device are generally tailored for the use by a specific patient and are not maintained or reused by a facility. The insurance carrier, through the bill review and audit processes, may address any potential insurance carrier uncertainty about the billing of an implantable. Reimbursement for the implantable and the appropriate add-on amount will be made to the entity that submitted the CMS-1500 form with the required documentation and certification. Additionally, a cap of $2,000 is identified in the rule to discourage unbundling of items that exceed the $1,000 per billed item cap. This definition and the associated processes are consistent with adopted §134.403 and §134.404 of this title.

§134.402(b)(7) and (c): Some commenters state the Division lacks the statutory authority to recognize implant providers as health care providers, and state that it is inaccurate and unlawful. A "surgical implant provider" does not meet the definition of "health care provider" found in Labor Code §401.011, and the Texas Legislature has not recognized "surgical implant provider" as a stakeholder in the Texas workers' compensation system as it has with pharmaceutical processing agents under Labor Code §413.0111.

Agency Response: The Division disagrees with the comment. The Division clarifies that the definition for "surgical implant provider" does not expressly define such an entity as being a health care provider. Rather, §134.402(c) states that a surgical implant provider is subject to Chapter 133 of this title (relating to Benefits - Medical Benefits) and is considered a health care provider for purposes of §§134.402, 134.403 and 134.404 and Chapter 133. It has been the Division's position in the past that a company that supplies medical equipment is a facility that provides "health care," and thus can meet the definition of "health care provider" under the Labor Code for purposes of Chapter 133. This interpretation was expressed in the adoption order for §133.1 (concerning Definitions for Chapter 133, Benefits - Medical Benefits) published in the Texas Register on March 10, 2000. (25 TexReg 2115 at 2118.) Subsequently, the statute changed to include surgical supplies as a form of health care pursuant to Labor Code §401.011(19)(F).

§134.402(b)(7): Some commenters recommend that the rule clarify in the definition of surgical implant provider that the definition does not pertain to or include an implant manufacturer.

Agency Response: The Division declines to make the change. The Division determines the definition for surgical implant provider is appropriate and that it maintains consistency with provisions contained in the Division's recently adopted hospital fee guidelines. This consistency is necessary to prevent confusion as to its application between fee guidelines.

§134.402(b)(7): Some commenters are concerned about the lack of rule language prohibiting device manufacturers from direct billing, and reference similarly stated concerns in response to the hospital outpatient and inpatient facility fee guideline proposals. One commenter states device manufacturers have no reason to work with insurance carriers in the discussion of what is reasonable and what should be paid, and suggests such activity could even cause abuse of that process.

Agency Response: The Division disagrees and believes that removing or restricting manufacturers from billing insurance carriers directly may inadvertently restrict business decisions available to facilities. This restriction could hinder injured employees' access to implantable devices. Additionally, the Division disagrees there is no incentive for any implantable supplier to refuse to negotiate with insurance carriers in respect to what is reasonable and should be paid for implantables. Providers and insurance carriers are free to negotiate reimbursement above or below fee guidelines in the Texas workers' compensation system. As with any negotiation, it is assumed that negotiating parties must find mutually beneficial common ground based on their particular business needs. Although contracting does not appear to be a common occurrence in the current system, as the system matures, opportunities for negotiations and agreements may evolve. The consistent definitions and concepts included in all of the facility fee guidelines concerning implantables may facilitate those contracting opportunities. The Division sees no need to hinder the potential for innovative arrangements between system participants.

§134.402(d)(3): A commenter recommends clarification be provided as to how Medicare program changes occur, when and

how they become effective in the workers' compensation system.

Agency Response: The Division clarifies that use of updated or revised Medicare components in the Texas workers' compensation system is not a new concept and §134.402(d)(3) requires use of the most recent payment policies adopted by the Medicare program for compliance with Division rules, decisions and orders for services rendered on or after the effective date, or after the effective date or the adoption date of the revised Medicare component, whichever is later. Further, the Division clarifies this is a standard provision that has been applied to other recently amended Division fee guideline rules in order to prevent the Texas workers' compensation system from falling out of synchronization with Medicare. Texas worker's compensation system participants have been supportive of this in previous rule efforts stating that without the provision, retrospective payments and refunds would make payment within the Texas workers' compensation system uncertain and unmanageable and would result in insurance carriers and hospitals incurring costs associated with making additional payments or refunding payments.

§134.402(d)(3): Some commenters encourage the Division to allow for a CPI-U increase even if Medicare should freeze this provision at some point in time. The commenters further indicate it may be difficult to address this by rule, and suggest a PAF adjustment in future years may be the solution. One commenter further states such CPI-U adjustment could be accomplished in a manner similar to the current conversion factor annual adjustment for professional services as outlined in §134.203 of this title (relating to Medical Fee Guideline for Professional Services).

Agency Response: The Division declines to make the change. The proposed and adopted rule automatically includes the CMS provisions for increases in ASC reimbursement based on the CPI-U that will begin in 2010. CMS utilizes different reimbursement methodologies and benchmarks for establishing inflation factors for outpatient hospital and ASC facility services. The Division adopts the CMS methodologies for updating reimbursement and consequently maintains a parallel relationship between both the CMS and the Texas workers' compensation system and the hospital outpatient and ASC facility reimbursements.

§134.402(d)(3): A commenter opposes any automatic annual inflation adjustment outside the Medicare methodology, as it is inconsistent with the Division's hospital outpatient fee guideline. The commenter advises that the Division review of fee guidelines is required every two years, and such review and revision, if necessary, can take into account whether an inflation adjustment is necessary considering all other relevant factors.

Agency Response: The Division agrees and no changes to the rule are necessary. Inflation adjustments are currently included in the CMS methodologies and the Division has incorporated these annual revisions into the adopted rule by adopting the Medicare reimbursement structure. Future rule review and, if necessary, revision will consider all the requirements of the Labor Code including those related to reimbursement and annual adjustments. §134.402(e)(2): Some commenters request clarification as to whether the reimbursement methodology related to the fee schedule and MAR is mandatory or discretionary and whether the statements made in an agency appellate brief contradict the methodology.

Agency Response: The Division clarifies §134.402 is mandatory for payment purposes. Labor Code §408.027(f) provides that "Any payment made by an insurance carrier under this section shall be in accordance with the fee guidelines authorized under this subtitle."

The issues raised by the commenters regarding an agency brief are currently before the Third Texas Court of Appeals where the Division is an appellee. The issues will be presented, and argued, before the Third Texas Court of Appeals at a hearing currently scheduled for September 10, 2008, and a ruling on these issues from the Third Texas Court of Appeals is expected after the hearing. As such, statements made in an agency appellate brief concerning medical fee dispute resolution are outside the scope of comments on this rule.

§134.402(f): A commenter states the rule's proposed rates are adequate to reimburse ASCs in a manner that their costs are covered and may make a profit on the treatments and services provided to injured employees.

Agency Response: The Division appreciates the supportive comment and the Division believes the adopted rule reflects appropriate reimbursement to ASCs in the Texas workers' compensation system.

§134.402(f): A commenter supports use of the current Medicare methodology.

Agency Response: The Division is appreciative of the supportive comment and is confident, based on the Division's internal and external analyses, that the adopted rule reflects appropriate reimbursement of ASCs and the Texas workers' compensation system, and that the adopted rule complies with the requirements of Labor Code §413.011.

§134.402(f): Some commenters support the rule's inference that there is no inclusion of a geographic wage adjustment, a component of the Medicare fee schedule, and state that such geographic wage adjustment would cause more payment problems than would be beneficial to system participants.

Agency Response: The Division clarifies that the most current Medicare reimbursement methodologies are included in the adopted rule. Although the wage adjustments and other specific components of the CMS calculation are not specifically mentioned within §134.402, the wage index adjustments and the other components of the calculation are necessary to maintain consistency with the CMS system. Additionally, the wage index adjustments attempt to recognize a portion of the geographic cost variations. These geographic variations are also included in other Division fee guideline rules through the use of CMS methodologies specific to those rules.

§134.402(f): A commenter recommends that this rule be reviewed in calendar years 2010 and 2011 to ensure the intent of *Federal Register* publications regarding the "fully implemented" reimbursement rates for ASCs.

Agency Response: The Division clarifies that the fully implemented rates are included in adopted §134.402(f). Also, future rule review and, if necessary, revision will consider all the requirements of the Labor Code including those related to reimbursement and annual adjustments.

§134.402(f): A commenter recommends adoption of a conversion factor in the final rule in lieu of a Medicare percentage.

Agency Response: The Division declines to make the change. Use of the adopted payment adjustment factors is consistent with the reimbursement methodologies included in the hospital outpatient reimbursement guidelines.

§134.402(f): A commenter recommends the establishment of a specific reimbursement, such as 60 percent of billed charges, in situations when no contracted fee schedule exists that complies with Labor Code §413.011.

Agency Response: The Division declines to make the change. The majority of services provided in ASCs are addressed by the adopted fee guidelines. In any instance where a reimbursement amount cannot be calculated through the use of adopted Division fee guidelines, then §134.1 of this title is to be applied. Section 134.1 establishes reimbursement parameters consistent with Labor Code §413.011.

§134.402(f): A commenter states that the proposed PAFs and implant provisions in proposed §134.402 violates Labor Code §413.011(a), which requires that the Division adopt the most current reimbursement methodologies, models, and values or weights used by CMS with "minimal modifications." Such PAFs and separate payments for implants are much more than a minimal modification and there is no data to justify such a major modification to ensure the quality of medical care and to achieve effective medical cost control as required by Labor Code 413.011(d). The commenter additionally asserts that the Legislature has expressly prohibited the Division from changing CMS methodology with regard to reimbursement of implantables and states the Division shall recommend to the Legislature any statutory changes necessary to ensure injured employees have appropriate access to surgically implanted devices.

Agency Response: The Division disagrees with the commenter's assertions. Section 413.011(b) states "this section does not adopt the Medicare fee schedule, and the commissioner may not adopt conversion factors or other payment adjustment factors based solely on those factors as developed by the federal Centers for Medicare and Medicaid Services." However, the Commissioner adopts the most current Medicare reimbursement methodologies as required by the Labor Code. In accordance with Labor Code §413.011(b), it is also clearly within the authority of the Commissioner to develop one or more conversion factors or other payment adjustment factors in determining the appropriate fees. The Commissioner adopts payment adjustment factors that provide appropriate reimbursement for facilities in order to provide reasonable injured employee access to procedures requiring surgically implanted devices. Further, the rule reflects minimal modifications to reimbursement methodologies to meet the occupational injury requirements as noted in Labor Code §413.011(a). Although Labor Code §413.011(i) states the Division shall recommend to the Legislature any statutory changes necessary to ensure appropriate access to surgically implanted devices, the Commissioner's current authority under the Labor Code allows the Commissioner to appropriately address access and reimbursement issues through the rulemaking process.

§134.402(f) and (g): Some commenters support the rule proposal in following the same basic structure as the Division's recently implemented rules for hospital outpatient and inpatient facility fee guidelines which allow providers a choice for separate reimbursement when implantables are involved in a surgical procedure.

Agency Response: The Division appreciates the supportive comments and acknowledgement of the consistency between this and other rules in respect to the provider's choice for reimbursement of implantable devices.

§134.402(f)(1) and (2): Some commenters recommend alternate PAFs of 246 percent of Medicare when implants are not paid separately, and 160 percent of Medicare when implants are paid separately. The commenters indicate that with a 24 percent discount noted by the proposed PAFs, three percent of the procedures may still be done at a higher cost location; whereas adjusting it to a 20 percent discount might eliminate that three percent completely and maximize the use of surgery centers. The commenters state that parity in reimbursement between ASCs and hospital outpatient departments when performing the same procedures for injured employees is supported by workers' compensation jurisdictions in California and Tennessee.

Agency Response: The Division declines to make the changes. In proposing and adopting PAFs for use in §134.402, the Division conducted extensive research to understand ASC facility reimbursement in the current Texas workers' compensation system, including: reimbursement rates, the reimbursement rates as compared to Medicare reimbursement, and the reimbursement rates as compared to non-workers' compensation reimbursement for ASC facility services, all of which are requirements of the Labor Code at §413.011. Upon consideration of the statutory requirements, the Division determines that adopted rates of 235 and 153 percent of the Medicare ASC reimbursement are the appropriate PAFs to be utilized in the Texas workers' compensation system, as explained earlier in the preamble. The adopted reimbursement may result in a more competitive relationship between the hospital outpatient and ASC facility settings for surgical services.

§134.402(f): A commenter recommends rule language be amended to address the payment of ancillary services (Addendum BB), and specifically provide that ancillary services may only be reimbursed when provided in connection with a primary procedure (Addendum AA).

Agency Response: The Division declines to make the change. The Division has adopted the most current CMS payment policies and structures for reimbursement of ASC services. In an effort to maintain synchronization with the most current payment policies and also to avoid micromanaging the reimbursement process, the rule relies on the most recently adopted and effective Medicare payment system policies including the necessary direction provided through any addenda or tables included in the CMS payment policies. Although Addendum AA is cited in subsection (f) of the rule, its purpose is to note the fully implemented payment amount. Consequently, any additional references to specific addenda or tables are unnecessary.

§134.402(f)(1): A commenter supports the proposed payment adjustment factors, believing they will encourage more ASCs and medical providers associated with ASCs to participate in the Texas workers' compensation system. The commenter believes it is appropriate for the ASCs to receive payment that is less than in a hospital outpatient setting, but that a lower range such as that adopted by CMS is not appropriate for ASCs in the Texas workers' compensation setting. ASC could potentially play a more critical role in helping employers control workers' compensation costs and helping workers become whole again. The proposed PAFs should encourage more frequent use of ASCs, which should offset any increased costs to the system and increase market penetration of ASCs in the Texas workers' compensation system.

Agency Response: The Division agrees and appreciates the supportive comment.

§134.402(f)(1): Some commenters are opposed to any PAF increase beyond what the Division proposed by rule.

Agency Response: The Division agrees that the adopted PAFs are the appropriate reimbursement levels for the Texas workers' compensation system.

§134.402(f)(1) and (f)(2): A commenter supports the provisions in (f)(1)(B) and (2)(B) of the proposed rule that appropriately deviates from Medicare policies that will allow ASCs to elect to be separately reimbursed for implants since a bundled payment in many cases would not be adequate to cover the cost of certain implantables. The commenter references Labor Code §413.011(i) that establishes a public policy priority to ensure appropriate access to implantable devices. To ensure appropriate patient access is maintained, the commenter believes the Division is well within these statutory provisions to adopt rules that deviate from strict Medicare policy.

Agency Response: The Division agrees that §413.011 provides the Commissioner with authority to adopt rules which comply with the statutory framework of §413.011.

§134.402(f)(1) and (f)(2): A commenter supports the separate reimbursement for implants at cost plus ten percent capped at $1,000 per billed item, which allows a facility to be reimbursed for both the invoice and "acquisition" costs. However, the commenter recommends a higher limit than $2,000 per admission add-on cap as this may not be at a high enough level to cover full acquisition and other costs for more expensive devices. The commenter notes these additional facility absorbed expenses include obtaining the medical devices, ordering, processing, storage, accounting, collections, cost of capital, depreciation, and amortization.

Agency Response: The Division appreciates the supportive comments regarding the add-on provisions. However, the Division disagrees that a higher limit than $2,000 per admission is necessary. The adopted add-on provisions for implantables is consistent with the provisions adopted for implantable reimbursement in a hospital outpatient setting. The reimbursement amount recognizes that there are administrative costs associated with acquisition of an item and that the entity (facility or surgical implant provider) responsible for these administrative tasks and billing for the item should be reimbursed. There is no reason to believe, however, that the administrative burdens extend to more than $1,000 per item. The acquisition activities of ordering, receiving, stocking, and billing for a $5,000, $10,000, or $50,000 item are similar. Consequently, in order to recognize costs of the acquisition and purchasing process, yet maintain cost control related to these administrative costs, the adopted rule limits add-ons to 10 percent of an item's cost up to $1,000 per item. Additionally, a limit of $2,000 in add-ons per admission is also adopted to discourage unbundling of expensive implantable items.

§134.402(f)(2): A commenter recommends subparagraph (B) should apply in all cases when the provider would want to bill separately for implants, and consequently recommends deletion of subparagraph (A).

Agency Response: The Division disagrees and declines to make the change. The option for separate billing and reimbursement of implantables is made at the election of the facility. If the facility should choose not to bill separately for implantables, then subparagraph (A) is necessary to assure appropriate reimbursement to the facility.

§134.402(f)(2): Regarding separate reimbursement of implantables, a commenter states that commonly, contracts for implantable devices are reimbursed on average at cost plus 10 percent. The commenter estimated that in 2007, approximately 24.2 percent of workers' compensation cases in ASCs involved implants and one percent of the cases involved device intensive procedures.

Agency Response: The Division appreciates the comment and notes that the adopted rule allows for separate reimbursement at cost plus 10 percent with an add-on limit of $1,000 per item with a limit of $2,000 in add-ons per admission.

§134.402(f)(2) and (g): A commenter asks if a uniform rule will be developed specifically addressing separate reimbursement for implantables, and suggests there are no rules, just suggestions as to how hospitals and ASCs may or may not indicate on a bill that a separate reimbursement for implantables is being sought. The commenter recommends the use of a modifier as an indicator of separate reimbursement request.

Agency Response: The Division agrees that identifying reimbursement methodologies is important to the successful implementation of the adopted rule. The Division is currently investigating the possibility of following the National Uniform Claim Committee's Instructions, which direct supplemental information to be placed in the shaded area above the applicable service line in Section 24 of the CMS-1500 form. This allows up to 61 characters to be printed in this space. In the eBilling structure this translates to a claim/line note in the 837(P). The Division anticipates providing additional instruction in the ASC rule implementation process similar to that offered with the hospital fee guidelines.

§134.402(f)(2): A commenter supports paying the higher PAF for the facility portion only, and paying implants separately. The commenter also supports the provision that allows implants to be reimbursed at cost plus 10 percent with a cap of $1,000 per billed item, or $2,000 per admission.

Agency Response: The Division appreciates the supportive comments.

§134.402(g): Some commenters support the provision that allows a surgical implant provider to bill insurance carriers directly. One commenter supports the ability of surgical implant providers to bill insurance carriers directly for implants because facilities often do not have the infrastructure to acquire, prior authorize, and secure payment for implantable devices.

Agency Response: The Division appreciates the supportive comments.

§134.402(g)(1)(B): A commenter recommends rule amendment to clarify that a surgical implant provider or facility requesting separate reimbursement must always submit the original manufacturer's invoice, which may be in addition to the vendor's invoice, so that an insurance carrier can calculate any add-on payments pursuant to (f)(2) of the rule. Transparency in implant billing from the manufacturer all the way to the payer has become increasingly important in light of recent implant billing trends and investigations by Medicare and other agencies.

Agency Response: The Division declines to make the change and notes that subparagraph B and its requirements have been deleted. The Division clarifies that providers are required to provide documentation of the cost of the implantable through §133.210 of this title (relating to Medical Documentation). Section 133.210(c)(4) of this title establishes insurance that a

provider should include with its bill any supporting documentation for procedures which do not have an established Division MAR and the exact description of the health care provided. Since surgically implanted devices do not have an established MAR, §133.210(c)(4) of this title applies.

§134.402(g)(1)(B): A commenter recommends the deletion of the requirement to submit an invoice, and emphasizes the need for parity between ASCs and hospital outpatient departments, as well as maintaining consistency with other Division fee guidelines that do not require a submitted invoice. This proposed requirement in addition to the billing certification in this rule is redundant and could hamper timely claims submission and payment when there is no factual justification for this required difference.

Agency Response: The Division agrees and subparagraph (B) is deleted from subsection (g)(1) of this section. The Division recognizes that inclusion of the deleted language would create a potential perceived conflict and inconsistency with the implantable billing requirements in §134.403 and §134.404 of this title. It is the Division's intent to maintain consistency in all facility settings for the billing and reimbursement processes concerning separate reimbursement of surgically implanted devices. Providers are required to provide documentation of the cost of the implantable through §133.210 of this title.

§134.402(g)(1)(C): A commenter states that it is a common business practice in commercial contracts to provide a certification of the cost of the implant, and that contractual agreements include billing a standard mark-up of, generally, two times the cost of the implant.

Agency Response: The Division appreciates the comment and notes that the adopted rule requires that the facility or surgical implant provider submit with the billing a certification regarding the actual cost (net amount, exclusive of rebates and discounts) for the implantable.

§134.402(i)(1): A commenter recommends the rule language be amended to provide that the agreement may occur only before preauthorization to ensure that preauthorization is utilized to determine medical necessity and is not delayed while the amount of reimbursement is negotiated.

Agency Response: The Division declines to make the change. The Division believes the parties to the agreement are best suited to determine how and when a negotiation could take place. The requirements of subsection (i), including the specific agreement, are adequate to facilitate the process without micromanagement by the Division.

For: Insurance Council of Texas, Medtronic, and Texas Association of Business.

For, with changes: Stratacare Inc., Texas Ambulatory Surgery Center Society, Texas Mutual Insurance Company, United Surgical Partners International, and Zenith Insurance Company.

The amendments to the rule are adopted under the Texas Labor Code §§408.021, 408.027, 408.031, 413.002, 413.007, 413.011, 413.012, 413.013, 413.014, 413.015, 413.016, 413.017, 413.019, 413.031; 413.041, 413.0511, 413.053, 402.0111, and 402.061.

Section 408.021 entitles injured employees to all health care reasonably required by the nature of the injury as and when needed. Section 408.027 sets out the process for payment of health care providers. Section 408.031 provides that an injured employee may receive benefits under a workers' compensation network established under Chapter 1305 of the Insurance Code. Section 413.002 requires the Division to monitor health care providers, insurance carriers and claimants to ensure compliance with rules adopted by the Commissioner of workers' compensation, including fee guidelines. Section 413.007 sets out information to be maintained by the Division. Section 413.011 mandates that the Division establish medical policies and guidelines by rule. Section 413.012 requires the Division to review and revise the medical policies and fee guidelines at least every two years to reflect fair and reasonable fees. Section 413.013 requires the Division by rule to establish programs related to health care treatments and services for dispute resolution, monitoring, and review. Section 413.014 requires preauthorization by the insurance carrier for health care treatments and services. Section 413.015 requires insurance carriers to pay charges for medical services as provided in the statute and requires that the Division ensure compliance with the medical policies and fee guidelines through audit and review. Section 413.016 provides for refund of payments made in violation of the medical policies and fee guidelines. Section 413.017 provides a presumption of reasonableness for medical services fees that are consistent with the medical policies and fee guidelines. Section 413.019 provides for payment of interest on delayed payments refunds or overpayments. Section 413.031 provides a procedure for medical dispute resolution. Section 413.041 requires health care practitioners and health care providers to submit certain financial disclosure information to the Division. Section 413.0511 requires the Medical Advisor to make recommendations regarding the adoption of rules and policies to develop, maintain, and review guidelines as provided by Section 413.011. Section 413.053 establishes the standards of reporting and billing. Section 402.00111 provides that the Commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.061 provides that the Commissioner of workers' compensation has the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

§134.402. Ambulatory Surgical Center Fee Guideline.

(a) Applicability of this rule is as follows:

(1) This section applies to facility services provided on or after September 1, 2008 by an ambulatory surgical center (ASC), other than professional medical services.

(2) This section does not apply to:

(A) professional medical services billed by a health care provider not employed by the ASC, except for a surgical implant provider as described in this section; or

(B) medical services provided through a workers' compensation health care network certified pursuant to Insurance Code Chapter 1305, except as provided in Insurance Code Chapter 1305.

(b) Definitions for words and terms, when used in this section, shall have the following meanings, unless clearly indicated otherwise.

(1) "Ambulatory Surgical Center" means a health care facility appropriately licensed by the Texas Department of State Health Services.

(2) "ASC device portion" means the portion of the ASC payment rate that represents the cost of the implantable device, and is calculated by applying the Centers for Medicare and Medicaid Services (CMS) Outpatient Prospective Payment System (OPPS) device offset percentage to the OPPS payment rate.

(3) "ASC service portion" means the Medicare ASC payment rate less the device portion.

(4) "Device intensive procedure" means an ASC covered surgical procedure that has been designated by CMS as device intensive in TABLE 56 - ASC COVERED SURGICAL PROCEDURES DESIGNATED AS DEVICE INTENSIVE FOR CY 2008 or its successor.

(5) "Implantable" means an object or device that is surgically:

(A) implanted,

(B) embedded,

(C) inserted,

(D) or otherwise applied, and

(E) related equipment necessary to operate, program, and recharge the implantable.

(6) "Medicare payment policy" means reimbursement methodologies, models, and values or weights including its coding, billing, and reporting payment policies as set forth in the Centers for Medicare and Medicaid Services (CMS) payment policies specific to Medicare.

(7) "Surgical implant provider" means a person that arranges for the provision of implantable devices to a health care facility and that then seeks reimbursement for the implantable devices provided directly from an insurance carrier.

(c) A surgical implant provider is subject to Chapter 133 of this title and is considered a health care provider for purposes of this section and the sections in Chapter 133.

(d) For coding, billing, and reporting, of facility services covered in this rule, Texas workers' compensation system participants shall apply the Medicare payment policies in effect on the date a service is provided with any additions or exceptions specified in this section, including the following paragraphs.

(1) Specific provisions contained in the Labor Code or the Texas Department of Insurance, Division of Workers' Compensation (Division) rules, including this chapter, shall take precedence over any conflicting provision adopted or utilized by the CMS in administering the Medicare program.

(2) Independent Review Organization decisions regarding medical necessity made in accordance with Labor Code §413.031 and §133.308 of this title (relating to MDR by Independent Review Organizations), which are made on a case-by-case basis, take precedence in that case only, over any Division rules and Medicare payment policies.

(3) Whenever a component of the Medicare program is revised and effective, use of the revised component shall be required for compliance with Division rules, decisions, and orders for services rendered on and after the effective date, or after the effective date or the adoption date of the revised Medicare component, whichever is later.

(e) Regardless of billed amount, reimbursement shall be:

(1) the amount for the service that is included in a specific fee schedule set in a contract that complies with the requirements of Labor Code §413.011; or

(2) if no contracted fee schedule exists that complies with Labor Code §413.011, the maximum allowable reimbursement (MAR) amount under subsection (f) of this section, including any reimbursement for implantables.

(3) If no contracted fee schedule exists that complies with Labor Code §413.011, and an amount cannot be determined by application of the formula to calculate the MAR as outlined in subsection (f) of this section, reimbursement shall be determined in accordance with §134.1 of this title (relating to Medical Reimbursement).

(f) The reimbursement calculation used for establishing the MAR shall be the Medicare ASC reimbursement amount determined by applying the most recently adopted and effective Medicare Payment System Policies for Services Furnished in Ambulatory Surgical Centers and Outpatient Prospective Payment System reimbursement formula and factors as published annually in the Federal Register. Reimbursement shall be based on the fully implemented payment amount as in ADDENDUM AA, ASC COVERED SURGICAL PROCEDURES FOR CY 2008, published in the November 27, 2007 publication of the Federal Register, or its successor. The following minimal modifications apply:

(1) Reimbursement for non-device intensive procedures shall be:

(A) The Medicare ASC facility reimbursement amount multiplied by 235 percent; or

(B) if an ASC facility or surgical implant provider requests separate reimbursement for an implantable, reimbursement for the non-device intensive procedure shall be the sum of:

(i) the lesser of the manufacturer's invoice amount or the net amount (exclusive of rebates and discounts) plus 10 percent or $1,000 per billed item add-on, whichever is less, but not to exceed $2,000 in add-on's per admission; and

(ii) the Medicare ASC facility reimbursement amount multiplied by 153 percent.

(2) Reimbursement for device intensive procedures shall be:

(A) the sum of:

(i) the ASC device portion; and

(ii) the ASC service portion multiplied by 235 percent; or

(B) If an ASC facility or surgical implant provider requests separate reimbursement for an implantable, reimbursement for the device intensive procedure shall be the sum of:

(i) the lesser of the manufacturer's invoice amount or the net amount (exclusive of rebates and discounts) plus 10 percent or $1,000 per billed item add-on, whichever is less, but not to exceed $2,000 in add-on's per admission; and

(ii) the ASC service portion multiplied by 235 percent.

(g) A facility, or surgical implant provider with written agreement of the facility, may request separate reimbursement for an implantable.

(1) The facility or surgical implant provider requesting reimbursement for the implantable shall:

(A) bill for the implantable on the Medicare-specific billing form for ASCs;

(B) include with the billing a certification that the amount billed represents the actual cost (net amount, exclusive of rebates and discounts) for the implantable. The certification shall include the following sentence: "I hereby certify under penalty of law that the following is the true and correct actual cost to the best of my

knowledge," and shall be signed by an authorized representative of the facility or surgical implant provider who has personal knowledge of the cost of the implantable and any rebates or discounts to which the facility or surgical implant provider may be entitled.

(2) An insurance carrier may use the audit process under §133.230 of this title (relating to Insurance Carrier Audit of a Medical Bill) to seek verification that the amount certified under paragraph (1) of this subsection properly reflects the requirements of this subsection. Such verification may also take place in the Medical Dispute Resolution process under §133.307 of this title (relating to MDR of Fee Dispute), if that process is properly requested, notwithstanding §133.307(d)(2)(B) of this title.

(3) Nothing in this rule precludes an ASC or insurance carrier from utilizing a surgical implant provider to arrange for the provision of implantable devices. Implantables provided by a surgical implant provider shall be reimbursed according to this subsection.

(h) For medical services provided in an ASC, but not addressed in the Medicare payment policies as outlined in subsection (f) of this section, and for which Medicare reimburses using other Medicare fee schedules, reimbursement shall be made using the applicable Division Fee Guideline in effect for that service on the date the service was provided.

(i) If Medicare prohibits a service from being performed in an ASC setting, the insurance carrier, health care provider, and ASC may agree, on a voluntary basis, to an ASC setting as follows:

(1) The agreement may occur before, or during, preauthorization.

(2) A preauthorization request may be submitted for an ASC facility setting only if an agreement has already been reached and a copy of the signed agreement is filed as a part of the preauthorization request.

(3) The agreement between the insurance carrier and the ASC must be in writing, in clearly stated terms, and include:

(A) the reimbursement amount;

(B) any other provisions of the agreement; and

(C) names, titles and signatures of both parties with dates.

(4) Copies of the agreement are to be kept by both parties. This agreement does not constitute a voluntary network established in accordance with Labor Code §413.011(d-1).

(5) Upon request of the Division, the agreement information shall be submitted in the form and manner prescribed by the Division.

(j) Where any terms or parts of this section or its application to any person or circumstance are determined by a court of competent jurisdiction to be invalid, the invalidity does not affect other provisions or applications of this section that can be given effect without the invalidated provision or application.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804265

Stanton K. Strickland

Deputy Commissioner, Legal Services

Texas Department of Insurance, Division of Workers' Compensation

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For further information, please call: (512) 804-4715

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 217. DESIGN CRITERIA FOR DOMESTIC WASTEWATER SYSTEMS

The Texas Commission on Environmental Quality (commission) adopts new §§217.1 - 217.17; 217.31 - 217.39; 217.51 - 217.70; 217.91 - 217.100; 217.121 - 217.129; 217.151 - 217.164; 217.181 - 217.193; 217.201 - 217.213; 217.241 - 217.252; 217.271 - 217.283; 217.291 - 217.300; and 217.321 - 217.333.

Sections 217.14; 217.15; 217.17; 217.33; 217.36; 217.37; 217.51; 217.52; 217.54; 217.55; 217.61; 217.62; 217.64 - 217.68; 217.70; 217.91 - 217.94; 217.96 - 217.100; 217.123 - 217.127; 217.129; 217.151; 217.153; 217.154; 217.156 - 217.164; 217.181; 217.184 - 217.193; 217.201; 217.202; 217.204 - 217.213; 217.241 - 217.246; 217.251; 217.252; 217.272; 217.273; 217.275 - 217.283; 217.291; 217.294; 217.297; 217.299; 217.300; 217.324; 217.325; 217.327; 217.330 - 217.333 are adopted *without changes* to the proposed text as published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2126) and will not be republished.

Sections 217.1 - 217.13; 217.16; 217.31; 217.32; 217.34; 217.35; 217.38; 217.39; 217.53; 217.56 - 217.60; 217.63; 217.69; 217.95; 217.121; 217.122; 217.128; 217.152; 217.155; 217.182; 217.183; 217.203; 217.247 - 217.250; 217.271; 217.274; 217.292; 217.293; 217.295; 217.296; 217.298; 217.321 - 217.323; 217.326; 217.328; and 217.329 are adopted *with changes* to the proposed text and will be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Adopted new Chapter 217, *Design Criteria for Domestic Wastewater Systems*, has three major goals: implementing the commission's goal of having all water related rules in the 200 series by repealing 30 TAC Chapter 317 and adopting a new chapter; bringing the standards and criteria for wastewater collection systems and treatment facilities up-to-date with current engineering practices and technology; and updating the rules to reflect the current permitting practices of the commission.

The commission last comprehensively revised Chapter 317 in 1986. Since then, minor revisions in 1988, 1990, and 1994, have addressed specific concerns, but did not seek to bring the whole chapter in line with advances in wastewater technologies. These rules incorporate those advances. Additionally, revisions are needed to address requirements in current wastewater treatment facility discharge permits that are not addressed by Chapter 317 requirements.

These new rules will ease the administrative burden on the commission by providing additional specific criteria for building, expanding, or materially altering wastewater collection systems

and treatment facilities. The adopted rules provide minimum design standards for wastewater collection and treatment. The criteria require a licensed professional engineer to design the systems and facilities.

The adopted rules also allow the executive director to approve variances for innovative technology on a case-by-case basis. Approval may include requirements for pilot studies, demonstration projects, and/or performance bonds. If the executive director grants conditional approval and recognizes after a reasonable time that the technology meets the design standards, a performance bond would no longer be required. The objectives of these rules are to ensure that wastewater collection systems and treatment facilities designed using innovative technology will be protective of human health and environment, as well as cost effective.

The adopted rules also provide flexibility for the approval of nonconforming technology, which is defined in this rulemaking as technology that is not addressed in or does not conform to the design criteria in this chapter, but produces effluent that protects human health and environment. The rule also establishes criteria for a treatment facility's use of reclaimed water and establishes design criteria for reclaimed water use, as authorized by 30 TAC Chapter 210, Use of Reclaimed Water.

Adopted new Chapter 217 eliminates the use of appendices. The information that was in Chapter 317 appendices has been incorporated into the body of the rule. This format groups all like requirements together and improves readability.

Until March 1, 2009, the executive director will grant variance requests that meet the design criteria of Chapter 317 for any project that was in its design phase when these rules were adopted. Projects that were in the design phase will not have to be re-engineered. To be granted, variances must be protective of human health and the environment.

A corresponding rulemaking is published in this issue of the *Texas Register* and includes the repeal of Chapter 317, Design Criteria for Sewage Systems.

SECTION BY SECTION DISCUSSION

The adopted rulemaking would repeal Chapter 317. However, the commission will retain some of the existing Chapter 317 requirements and move these requirements to adopted new Chapter 217. For clarity and readability, the adopted rulemaking would reorganize, reformat, and revise Chapter 317 provisions to bring them up-to-date with current agency rule standards regarding style, formatting, and structure. The adopted rulemaking would amend some of the Chapter 317 requirements and add new requirements that would bring the design criteria up-to-date with current technology and engineering practice.

Many of the modifications to the provisions being moved to Chapter 217 allow increased flexibility in designing wastewater collection systems and treatment facilities. By providing more flexibility in design, a system or facility will be better able to meet the current and future needs of the community for which the system or facility is designed. Owners need more flexibility to meet changing and more site-specific effluent limitations. Increased flexibility will also allow designs to incorporate evolving technology.

The commission adopts the change of the following terms throughout the rule: "pond" to "lagoon;" "plant" to "facility;" "lines" to "pipe;" "sewage system" or "sewerage system" to "collection system;" and "permittee" to "owner." The commission also changed the terms "modify," "modification," "substantially modify," and "substantial modification" to "materially alter" or "material alteration" to use the terminology and definition found in Texas Water Code (TWC), §26.034(b). The commission adopts these changes for consistency with other rules and readability.

Additionally, the commission changed the word "commission" to "executive director" where appropriate in the rule to conform to current agency rule standards. The term "executive director," as defined in 30 TAC Chapter 3, means the executive director of the commission or any authorized individual designated to act for the executive director. The agency uses the term "executive director" in rules to denote any actions carried out by the executive director's staff.

SUBCHAPTER A: ADMINISTRATIVE REQUIREMENTS

Subchapter A consolidates and streamlines the administrative requirements relating to collection systems and treatment facilities.

Adopted new §217.1, Applicability, establishes that Chapter 217 applies to any person who proposes to construct facilities that will collect, transport, treat, or dispose of domestic wastewater. This section contains the specific requirements for the administrative processes that govern the implementation of this chapter. Until March 1, 2009, the executive director will grant variance requests that meet the design criteria of Chapter 317 for any project that is in its design phase when this rule is adopted. This section also states that Chapter 217 does not apply to facilities constructed to comply with non-domestic wastewater permits or constructed under 30 TAC Chapter 285, On-Site Sewage Facilities.

Adopted new §217.2, Definitions, defines terms as used in this chapter. The definitions for these words are consistent with wastewater industry standards.

Adopted new §217.3, Purpose, explains that these design criteria are minimum requirements necessary for domestic wastewater collection, treatment, and disposal systems to meet state water quality standards. In order for the executive director to evaluate a project, the plans, specifications, and reports for a proposed project must meet the requirements of this chapter. The executive director may require more stringent criteria than those in this chapter, if necessary to meet public health and water quality goals.

Adopted new §217.4, Variances, states the requirements for applying for and reviewing variances. The rule clarifies and expands the former Chapter 317 variance requirements.

Adopted new §217.4(a) requires that the report include all requested variances from the requirements of this chapter.

Adopted new §217.4(b) requires that a technical justification be included for any request for a variance.

Adopted new §217.4(c) authorizes the executive director to deny a variance or require additional protective measures if the executive director determines that the variance would result in a potential compromise of public health or environment.

Adopted new §217.4(d) states that the executive director may not grant or approve a variance from any expressed prohibition within this chapter. The executive director determined that the prohibitions in Chapter 217 are necessary to protect public health and environment. The commission adopts this provision to provide notice to the regulated community.

Adopted new §217.4(e) provides that a variance is conditionally approved if the executive director does not notify the owner in writing within 30 days that further information is requested or that the variance is denied. The commission adopts 30 days instead of the 10 days allowed in Chapter 317 to allow sufficient time for the executive director to complete a thorough review of a variance request.

Adopted new §217.4(f) provides that any plans and specifications that do not meet the conditions in subsections (c) and (d) are not eligible for the automatic approval process in subsection (e).

Adopted new §217.4(g) provides that any plans and specifications that include design elements that require an affirmative approval are not eligible for the automatic approval process in subsection (e).

Adopted new §217.5, Plans and Specifications General Requirements, explains how plans and specifications approval relates to wastewater permits.

Adopted new §217.5(a) requires that the effluent limits used as the basis of the plans and specifications for a facility be at least as stringent as the effluent limits in the associated wastewater permit. This requirement ensures that a treatment facility will meet the effluent limits in the current wastewater permit, but allows the owner the flexibility to design to a higher standard to meet future needs, such as population growth, industrial development, more stringent effluent limits, or other contingencies.

Adopted new §217.5(b) expressly states that an owner is not required to submit plans and specifications for a proposed facility prior to the commission issuing a wastewater permit. Under the Chapter 317 rules, the question regarding when plans and specifications must be submitted arose in contested case hearings. This requirement specifically states that an owner has no obligation to submit plans and specifications prior to receiving an issued permit. Because the preparation of plans and specification is costly, the commission will not require an owner to submit them prior to knowing that the facility is authorized and what effluent limits and other conditions the issued permit will ultimately require.

Adopted new §217.5(c) explains that approval of plans and specifications under this chapter does not relieve the owner of the responsibility to obtain a wastewater permit or any other authorization required by TWC, Chapter 26. The commission has made this provision more specific than the requirement in Chapter 317 so that an owner knows additional authorizations may be needed.

Adopted new §217.5(d) specifies that the executive director's approval of a wastewater permit does not relieve an owner of the responsibility to obtain plans and specifications approval of a facility before commencing construction.

Adopted new §217.5(e) requires that a facility's design meet all the design requirements in the associated wastewater permit. Design requirements are sometimes added to wastewater permits to ensure compliance with specific effluent limitations.

Adopted new §217.6, Submittal Requirements and Review Process, outlines the procedure an owner must follow to submit a project for the executive director's review and the process that the review will take.

Adopted new §217.6(a) enumerates the elements required in the transmittal letter and names the recipients as the executive director and the appropriate regional office. This list is similar to the requirements of Chapter 317 with the exception of an additional requirement to add all requested variances to the transmittal letter.

Adopted new §217.6(b) states that the executive director may review any facility's plans and specifications. This requirement states that although the executive director may not review all plans and specifications, all are subject to review. The commission removed the list of factors that were listed in Chapter 317, because it is not an exhaustive list.

Adopted new §217.6(c) states that an owner is not required to submit plans and specifications unless the owner receives a written request from the executive director within 30 days after submitting a transmittal letter. The commission changed the 10-day approval to 30 days to allow staff adequate time to review a transmittal letter and determine if a full plans and specifications review is warranted.

Adopted new §217.6(d) is a requirement that an owner must respond to a request for additional information or plans and specifications within 30 days after receiving the executive director's request. The 30-day deadline for submittal of plans and specifications or additional information is intended to make the review process more efficient.

Adopted new §217.7, Types of Plans and Specifications Approvals, lists the ways the executive director may approve plans and specifications.

Adopted new §217.7(a) states that a plans and specifications approval does not relieve an owner of the responsibility for designing, constructing, and operating a facility in accordance with commission rules and the associated wastewater permit.

Adopted new §217.7(b) explains that there are three types of plans and specifications approvals that may be granted by the executive director: standard approval for plans and specifications with no requested variances; approval of innovative or nonconforming technologies; and conditional approval based on specific parameters.

Adopted new §217.7(b)(1) requires the executive director grant a standard approval for plans and specifications that comply with all applicable parts of the design criteria listed in these rules.

Adopted new §217.7(b)(2) authorizes the executive director to grant approval for innovative or nonconforming technology after the executive director evaluates the supporting documentation and determines that the innovative or nonconforming technology will be as protective of public health and environment as the design criteria in this chapter.

Adopted new §217.7(b)(2)(A)(iv) authorizes the executive director to require evidence of an acceptable two-year performance bond that insures the performance of the innovative or nonconforming technology. This provision ensures that a wastewater facility will have funds available to replace a failed unit or facility if an innovative or nonconforming technology fails. The provision allows owners the flexibility to use innovative and nonconforming technology without threatening public health or environment.

Adopted new §217.7(b)(3) contains the provisions regarding conditional approvals. A conditional approval grants approval for a set of plans and specifications that the executive director determined may work only in certain circumstances. A conditional approval will contain conditions, stipulations, or restrictions that are necessary to ensure compliance with this

chapter and protect human health and environment. The commission removed the following language from the Chapter 217 requirements, "Any conditional approval granted may be issued for a specific set of flow situations, wastewater characteristics, and/or required effluent quality." Because these items are examples, they are more appropriately included in this preamble rather than the rule.

Adopted new §217.8, Municipality Reviews, allows certain municipalities to apply for authorization to perform technical reviews of wastewater collection systems within their boundaries, and incorporates requirements of TWC, §26.034(d) and (e).

Adopted new §217.8(g)(8), requires a municipality whose review authority is revoked to inform all applicants for new projects in its jurisdiction of the requirement to contact the executive director for review and approval. The commission adopts this section to ensure that owners are aware of the proper review authority.

Adopted new §217.9, Texas Water Development Board Reviews, provides that if the Texas Water Development Board (TWDB) reviews and approves plans and specifications, in accordance with TWC, §17.276(d), the owner must send a copy of the approval to the executive director. This section ensures that the agency is aware of facilities approved by the TWDB.

Adopted new §217.10, Final Engineering Design Report, contains the requirements for the final engineering design report (report). The rule provides that the report contain the necessary information for a staff engineer to evaluate a project.

Adopted new §217.10(a) requires that an owner submit a report for each facility or system that is adopted for new construction, expansion, re-rating, or material alteration.

Adopted new §217.10(b) requires that the report be signed, sealed, and dated by the engineer that prepared the report.

Adopted new §217.10(c) requires the report to include information and data used to comply with this chapter or to justify variances.

Adopted new §217.10(d) requires that an owner submit any additional requested information within 30 days after the request. This added requirement makes the plans and specification review process more efficient.

The commission will not include the requirements for a preliminary engineering report from Chapter 317 in adopted new Chapter 217. Staff has found that a preliminary engineering report adds cost and time to the review process, but adds little value. Discussions between staff engineers and design engineers resolve most issues.

In adopted new §217.10(e) the commission specifies a list of what is required in the report for wastewater collection systems. These requirements ensure the executive director has sufficient information to evaluate the proposed plans and specifications. For clarity, the new rule adopts separate lists of required elements in the reports for wastewater collection systems and treatment facilities.

In adopted new §217.10(f) the commission specifies a list of what is required in the report for wastewater treatment facilities. These requirements ensure the executive director has sufficient information to evaluate the proposed plans and specifications. For clarity, the new rule adopts separate lists of required elements in the reports for wastewater collection systems and treatment facilities.

Adopted new §217.11, Construction of an Approved Facility, states that approval of plans and specifications alone do not imply that construction of the facility may begin.

Adopted new §217.11(a) states that construction must not begin on a facility with approved plans and specifications until the executive director issues a wastewater permit, unless the commission authorized the applicant to construct before permit issuance, under TWC, §26.027. In most instances, the wastewater permit will be issued before the plans and specifications review, but this requirement covers the contingency that the review may precede the issuance of the permit. This requirement will not affect collection system construction since there is no corresponding permit for collection systems.

Adopted new §217.11(b) requires an owner to obtain plans and specifications approval before the facility may begin constructing or operating at the next permit phase. This requirement ensures consistency between phases included in the wastewater permit, plans and specifications review, and construction. This requirement will not affect collection system construction since there is no corresponding permit for collection systems.

Adopted new §217.11(c) requires that phased construction of a facility correspond to phases included in the associated wastewater permit. If an owner desires to phase construction differently, the owner must request a variance through the procedure outlined in §217.4. This requirement provides notice that the executive director's approval will be based on the phases approved in the issued wastewater permit. This requirement will not affect collection system construction since there is no corresponding permit for collection systems.

Adopted new §217.11(d) prohibits a collection system or treatment facility from creating a bypass that discharges untreated or partially treated wastewater during construction without a commission order. This requirement provides that construction does not justify a discharge of untreated or partially treated wastewater. This requirement applies equally to treatment facilities and collection systems.

Adopted new §217.11(e) states that an owner must meet the design criteria in effect at the time that the plans and specifications for a new, expanded or materially altered system or facility are submitted to the executive director. This requirement eliminates any ambiguity regarding what design criteria apply to a facility or collection system's plans and specifications. This requirement applies equally to treatment facilities and collection systems.

Adopted new §217.11(f) states that an owner is subject to the design criteria in place at the time a new permit application is submitted or when plans and specifications are submitted for approval if the owner's wastewater permit was allowed to lapse or the owner failed to get a plans and specifications approval when the facility was built.

Adopted new §217.11(g) requires the owner of a collection system to meet the collection system design criteria in effect when it is discovered that the plans and specifications of the system have not been approved. Subsections (f) and (g) prevent an owner from claiming to comply with rules that have been superseded.

Adopted new §217.12, Substantial Design Changes, specifies how to address changes to approved plans and specifications.

Adopted new §217.12(a) defines substantial design change. Minor changes dictated by things such as material substitutions, (e.g., cast aluminum walkways instead of steel) unforeseen site

anomalies (i.e., an underground boulder in the path of the collection system), and minor design changes (e.g., installing a board fence instead of a chain link fence) will not be submitted to staff engineers for review. Staff engineers plan to review only those design changes that may affect the way a collection system or a treatment facility operates. Some examples of substantial design changes are adding a treatment unit, switching from chlorine disinfection to ultraviolet disinfection, or including 50 extra connections in a collection system.

Adopted new §217.12(b) requires that the request for approval of a substantial design change include the dated signature and seal of an engineer.

Adopted new §217.12(c) authorizes the executive director to deny the substantial design change or require more stringent criteria as necessary to ensure protection of public health or environment.

Adopted new §217.12(d) notifies the regulated community that the executive director may not approve a design change that violates an expressed prohibition in this chapter.

Adopted new §217.12(e) states that a substantial design change is approved unless the executive director notifies the owner in writing within 30 days that further information is requested or that the substantial design change is denied. The commission adopts 30 days to allow sufficient time for the executive director to review a substantial design change request.

Adopted new §217.13, Final Construction Drawings and Technical Specifications, divides construction drawings for collection systems and treatment facilities into two different paragraphs for clarity.

Adopted new §217.13(a) states that an owner must submit final construction drawings and technical specifications only if requested by the executive director. The executive director will request final construction drawings or technical specifications if there is a question about the treatment facility or collection system's ability to protect human health or environment.

Adopted new §217.13(b) requires that any final construction drawings or technical specifications submitted must include the dated signature and seal of an engineer.

Adopted new §217.13(c) lists the items that must be submitted with the final construction drawings and technical specifications. Because the lists are different for collection systems and treatment facilities and for new, expanded, and materially altered projects, the lists are divided. Section 217.13(c)(1) lists the items for a new collection system; §217.13(c)(2) lists the items for a new treatment facility; §217.13(c)(3) lists the items for a materially altered or expanded collection system; and §217.13(c)(4) lists the items for a materially altered or expanded treatment facility.

Adopted new §217.14, Completion Notice, requires an owner to provide notice to the executive director when construction of a collection system or treatment facility is complete.

Adopted new §217.14(a) lists the elements that must be included in a completion notice.

Adopted new §217.14(b) requires the completion notice to include all deviations from the approved plans and specifications and substantial design changes. The completion notice must also certify that any change not submitted for approval does not qualify as substantial design change.

Adopted new §217.15, Inspection, notifies the regulated community that the executive director may inspect a project at any point during construction to determine compliance with the project's plans and specifications, report, approval letters, or other requirements of this chapter.

Adopted new §217.16, Treatment Facility Operation and Maintenance Manual, states that the requirements for an operations and maintenance manual, including emergency procedures. The rule expands the requirements from Chapter 317 to outline more specifically what is required to ensure enough detail for operators to manage the day-to-day and emergency operation of a facility.

Adopted new §217.17, Collection System Records, requires that a collection system owner keep a specific set of records necessary to facilitate operation during the expected life of the system.

SUBCHAPTER B: TREATMENT FACILITY DESIGN REQUIREMENTS

Subchapter B updates the Chapter 317 treatment facility design requirements. A significant amount of flexibility has been incorporated into the design requirements while maintaining the standard of protecting human health and environment.

Adopted new §217.31, Applicability, contains the design values that must be used to determine the size of any wastewater treatment component. Additionally, this section specifically applies Subchapter B to designs for new treatment facilities, upgrades of existing facilities, and re-ratings of existing facilities.

Adopted new §217.32, Organic Loadings and Flows, states the organic loading and flow values that must be used to design a wastewater treatment facility. This section updates past commission practices and procedures, incorporates new procedures requested by the regulated community, and adds new requirements from Chapter 319, General Regulations Incorporated into Permits.

Adopted new §217.32(a) prescribes the method to determine design requirements if there are no pre-existing loading and flow data on which to base calculations. Table B.1 is included to simplify selection of the correct parameters.

Adopted §217.32(b) authorizes an owner to use data from an existing facility in accordance with §217.33, Flow Measurement, when constructing a new facility to serve the same area as an existing facility with sufficient historical data. This requirement allows the design of a wastewater treatment facility to be based on actual data.

Adopted new §217.33, Flow Measurement, outlines the requirements for flow measurement in a treatment facility. Accurate flow measurement is necessary for both reporting and efficient operations.

Adopted new §217.33(a) requires that each facility have a method to accurately measure effluent flow.

Adopted new §217.33(b) requires that the flow-measuring device be located for easy inspection and maintenance.

Adopted new §217.33(c) lists the requirements for primary and secondary flow-measuring devices.

Adopted new §217.34, Re-Rating, Expanding, or Materially Altering an Existing Facility, authorizes existing facilities that are being materially altered, expanded, or re-rated to meet new permit conditions to justify the size of existing or proposed treatment components by using historical data as the design basis. This

section updates past commission practices and procedures and adds new requirements from Chapter 319.

Adopted new §217.34(1) lists the requirements that flow data must meet before being used as the basis for design criteria.

Adopted new §217.34(2) lists the requirements that loading data must meet before being used as the basis for design criteria.

Adopted new §217.35, One Hundred-Year Flood Plain Requirements, lists the requirements related to a treatment facility located in or near a flood plain.

Adopted new §217.35(a) requires that the site plan for a proposed wastewater facility include the 100-year flood plain if there is a 100-year flood plain within 1,000 feet of the proposed site. The subsection further outlines the requirements for the 100-year flood plain determination. The subsection also states that Federal Emergency Management Agency maps are prima facie evidence of flood plain locations. The owner must determine the elevation and design to prevent flood damage to the facility or allow unanticipated discharges of untreated or partially treated wastewater.

Adopted new §217.35(b) requires that the hydraulic profile of the wastewater facility show the 100-year water surface elevation. This requirement is to enable the commission to confirm the protection of all units and the ability of the facility to operate during a 100-year flood event.

Adopted new §217.35(c) prohibits the executive director from approving a proposed treatment unit within the 100-year flood plain unless satisfactory measures to protect all open process tanks and electric units are provided as part of the proposed design. This requirement provides notice to the regulated community that protection from a 100-year flood event is required.

Adopted new §217.36, Emergency Power Requirements, outlines the requirements for emergency power supply for treatment facility components.

Adopted new §217.36(a) requires that an owner obtain the power outage records from the appropriate power company(s) showing the reliability of the power service for the facility. Chapter 317 required the commission to collect the data. The owner has the responsibility to provide the records regarding the power service reliability to the executive director.

Adopted new §217.36(b) requires the power reliability documentation to be included in the report. The executive director will then review the documentation and determine the power service's reliability.

Adopted new §217.36(c) lists the required procedure when the executive director determines that the power supply is unreliable. The commission requires the facility to incorporate an on-site, automatically-starting generator, capable of ensuring continuous operation of all critical facility components for a period equal to the longest power outage in the power records if the executive director determines the power supply is unreliable.

Adopted new §217.36(c)(4) contains the exceptions to the auxiliary power generator requirements for wastewater treatment facilities and off-site lift stations. Included in this paragraph are the requirements for qualifying for an exemption to the requirement for an automatically-starting generator. These requirements were not in Chapter 317. The new requirements are to ensure the disinfection units can operate during a power outage, a minimum air supply is maintained, and pumping requirements are met to prevent an unauthorized discharge into or adjacent to water in the state.

Adopted new §217.37, Disinfection System Power Reliability, contains additional requirements for power reliability and emergency power for disinfection units because their operation is vital even under emergency conditions.

Adopted new §217.38, Buffer Zone and Odor Abatement, lists the requirements for buffer zones and other abatement requirements to manage odor.

Adopted new §217.38(a) states that the buffer zone restrictions in §309.13 apply to all construction of wastewater treatment facilities.

Adopted new §217.38(b) requires the report include any design for odor abatement facilities intended to attain compliance with permit buffer zone requirements. This provision ensures that this information is included in the report and available for staff review.

Adopted new §217.38(c) requires that the executive director consider all odor abatement measures as nonconforming or innovative technologies and review them on a case-by-case basis under §217.7(b)(2), because of the site-specific nature of potential odor issues for a wastewater treatment facility.

Adopted new §217.39, Facility Use of Reclaimed Water, requires the use of reclaimed water for equipment washing and irrigating the treatment facility grounds. It also requires the use of use reclaimed water for any other suitable purpose. An owner may make a determination of other suitable uses based on water quality requirements, such as for chemical mixing, or cost of infrastructure or additional treatment required.

Adopted new §217.39(a) specifies that all facilities designed after the effective date of these rules must use reclaimed water in place of potable water for wash down water and for irrigating the facility grounds. The commission adopts this requirement as a measure to conserve potable water and to be consistent with Chapter 210.

Adopted new §217.39(b) requires that reclaimed water be metered. This requirement is included so that accurate effluent flows for the facility can be determined, since reclaimed water is considered part of the total effluent flow.

Adopted new §217.39(c) requires that water be disinfected before it can be reclaimed for use at the facility. This requirement is included to protect the health of the facility staff and to prevent degradation of any adjacent surface water or groundwater.

Adopted new §217.39(d) authorizes an owner to use water that meets the requirements of either Type I or Type II reclaimed water for any appropriate use. This subsection allows an owner the flexibility to design a reclaimed water system that fits the needs of a particular treatment facility.

Adopted new §217.39(e) reiterates that no further authorization is necessary to use reclaimed water at a treatment facility, provided the requirements in this section are met.

SUBCHAPTER C: CONVENTIONAL COLLECTION SYSTEMS

Subchapter C expands and updates the design requirements for collection systems. This subchapter also adds flexibility, while protecting human health and environment. Alternative collection systems have been separated from conventional collection systems and given their own subchapter.

Adopted new §217.51, Applicability, states that this subchapter covers the design, construction, and testing standards for conventional gravity wastewater collection systems, conventional wastewater lift stations, force mains, and reclaimed water conveyance systems.

Adopted new §217.52, Edwards Aquifer, notifies the regulated community that all wastewater collection systems located over the recharge zone of the Edwards Aquifer must be designed and installed following the requirements of Chapter 213, Edwards Aquifer, in addition to the requirements in these rules.

Adopted new §217.53, Pipe Design, establishes the requirements for all collection system designs, including but not limited to flow design and pipe material. This section specifies requirements for separation distances between wastewater pipes and drinking water pipes, laterals and traps, odor and corrosion control, and structural analysis of flexible and rigid pipe.

Adopted new §217.53(a) specifies the flow design basis for collection systems and the required calculations. This subsection formalizes the existing staff review procedures by specifying the computations involved in determining the flow design basis for collection systems.

Adopted new §217.53(b) specifies that the report must identify the proposed collection system pipes with their appropriate standard numbers for both quality control and installation. This subsection also specifies that quality control includes dimensions and tolerances and that installation includes bedding and backfill. This subsection also lists the considerations for choosing collection system pipes.

Adopted new §217.53(c) lists the requirements for pipe joints. The technical specifications must include the materials and methods used in making joints. This subsection also requires that the technical specifications include an appropriate national reference standard for the joints. This requirement ensures that the executive director has sufficient information to review the joint construction.

Adopted new §217.53(d) requires that the wastewater pipes and manholes maintain certain separation distances from potable water pipes to protect potable water from cross contamination from wastewater.

Adopted new §217.53(e) requires that laterals and taps on a new collection system include manufactured fittings that limit infiltration, prevent protruding service pipes, and protect the mechanical and structural integrity of the collection system. This requirement ensures the mechanical and structural integrity of the collection system. An unprotected pipe may have a higher incidence of infiltration, which could lead to sanitary sewer overflows or hydraulic overload of the treatment facility.

Adopted new §217.53(f) requires that the spacing of supports for carrier pipe through casings ensure and maintain grade, slope, and structural integrity as required by §217.53(k) and (l). This requirement ensures that the carrier pipe has the same slope as the collection system pipe.

Adopted new §217.53(g) specifies that if a pipe deteriorates when subjected to corrosive internal conditions, the collection system must incorporate a corrosion-resistant liner installed by the pipe manufacturer, unless the report demonstrates that the design and operational characteristics of the facility will maintain the structural integrity for at least 50 years.

Adopted new §217.53(h) contains requirements for odor control. If wastewater does not always flow at a constant rate through the pipes, there is a potential for odors. This requirement ensures that potential odors are controlled throughout the life of the collection system.

Adopted new §217.53(i) contains the requirements for laying a collection system near active geologic faults. This subsection requires an owner to locate any active faults within the area of the collection system and minimize the number of pipes crossing faults. This requirement states that the design must use joints that provide maximum deflection and manholes on both sides of a fault so that a portable pump may be used in the event of a collection system failure. Section 217.53(i)(2) states that no collection system service connection may be installed within 50 feet of an active fault. In Chapter 317, both of these provisions were optional. The executive director determined that these requirements are needed to ensure the protection of human health and the environment.

Adopted new §217.53(j) requires that a collection system have the capacity for the service area during the expected life of the system. For example, if there are 100 houses currently in the subdivision with another 100 to be added during the next 10 years, the collection system must be designed to handle 200 houses. This subsection lists the considerations necessary to successfully size a collection system. The considerations are population; institutional, industrial, and commercial flows; peak flows; surcharges; minimum pipe diameters; and storm water drains. The prohibition against allowing storm water in a wastewater collection system is added to be consistent with §281.25 and 40 Code of Federal Regulations (CFR) §122.26.

Adopted new §217.53(k) states the structural analysis requirements for collection systems. Their design must provide a minimum structural life expectancy of 50 years. This subsection also requires an owner to provide inspection during the construction and testing phases of the project. This subsection includes definitions and design analysis requirements for both flexible and rigid pipes.

Adopted new §217.53(l) states the requirements for minimum and maximum slopes to ensure that gravity collection systems flow correctly.

Adopted new §217.53(m) states the alignment requirements for collection systems. The commission will prohibit variances from uniform grade, grade breaks, and vertical curves, without manholes with open cut construction and prohibit construction methods that use flexure of a pipe joint. The prohibitions are necessary to protect human health and environment.

The rule authorizes horizontal pipe curvature if supporting calculations are included in the report and the plans. The executive director receives frequent requests for this type of variance. The rule allows this type of construction with proper safeguards, because it is not always possible to construct straight pipes due to topographic features. The rule sets 300 feet as the maximum allowable manhole spacing for sewers with horizontal curvature and requires that a manhole must be at the point of curvature and point of termination of each curve. These manhole spacing requirements are consistent with §217.55(a)(1).

Adopted new §217.53(n) enumerates the requirements for inverted siphons and sag pipes, including sizing, cleaning, velocity, odors, and testing.

Adopted new §217.53(o) contains requirements for bridged sections. These requirements give the regulated community criteria to design bridged pipelines and allow the executive director to perform consistent reviews of bridged sections.

Adopted new §217.54, Criteria for Laying Pipe, establishes the requirements for pipe embedment material, embedment compaction, envelope size, and excavated trench width. Proper pipe construction is necessary for proper operation and life expectancy of a collection system. This provision will protect human health and the environment.

Adopted new §217.55, Manholes and Related Structures, explains manhole placement, size, structure, types, spacing, and the size increase of a manhole opening. This section requires that manholes be placed at all points of change in alignment, grade, or size of the collection system and lists specific design requirements for manholes. The rule specifies spacing for straight alignment and uniform grade, with modifications in areas subject to flooding. The inside diameter of manhole openings is specified, as well as size of manhole covers and design requirements for manholes in the 100-year floodplain. This section also provides the design specifications for manhole inverts, connections, vents, and cleanouts.

Adopted new §217.55(k) changes the minimum clear opening from 24 inches required in Chapter 317 to 30 inches in diameter for a manhole where personnel entry is anticipated. This diameter requirement will ease the entry of personnel and equipment and provide additional safety when necessary for sewer maintenance and repairs. Additionally, the rule specifies that the opening must be free of any obstructions.

Adopted new §217.55(l)(1)(D) requires that a manhole cover located in a public or private roadway meet the American Association of State Highways and Transportation Officials (AASHTO) standard M-306 in relation to load bearing. The commission adopts this new standard to ensure that manhole covers are strong enough to support vehicle traffic. This standard protects vehicles and the integrity of the manholes.

Adopted new §217.55(m) prohibits steps in a manhole. The environment inside a manhole may be corrosive and cause the steps to deteriorate.

Adopted new §217.55(n) contains the requirements for connections made within and to a manhole.

Adopted new §217.55(o) requires vents be located above the 100-year flood elevation to prevent flooding, and that tunnel venting requirements are consistent with manhole venting requirements.

Adopted new §217.55(p) requires that cleanouts are equal in size to the collection main to allow the cleaning equipment to fit into the cleanouts.

Adopted new §217.56, Trenchless Pipe Installation, describes the trenchless technologies that may be approved through the standard approval process. Trenchless methods other than those listed in this section are subject to the nonconforming technology approval process.

Adopted new §217.57, Testing Requirements for Installation of Gravity Collection Pipes, requires that the design specify an infiltration, exfiltration, or low-pressure air test and that test results are submitted to the executive director upon request. This section also contains the testing requirements. The section requires that a pipe be retested following any remediation action to clarify that a test must ensure that the remediation action was successful.

Adopted new §217.58, Testing Requirements for Manholes, requires that all manholes must pass a leak test and outlines the requirements for leak-testing a manhole. The commission modified these requirements from Chapter 317 by requiring the test to be run after assembly and backfilling the manholes. These requirements conform to the wastewater industry standards for manhole testing and allow an owner to select an appropriate testing method.

Adopted new §217.59, Lift Station Site Requirements, establishes the criteria for lift station sites. They ensure accessibility by authorized personnel only, protection from 100-year flood events, and minimization of odors.

Adopted new §217.60, Lift Station, Wet Well, and Dry Well Designs, establishes criteria for pump controls, flood protection, wet wells, lift station ventilation (including passive ventilation for wet wells and mechanical ventilation in lift stations), wet well slope, hoisting equipment, dry well/vault valve drains, and dry well sump pumps. These requirements ensure proper operations, prevent sanitary sewer overflows, and protect the safety of the surrounding community.

Adopted new §217.61, Lift Station Pumps, establishes general requirements for the pumps that may be used in lift stations. This section incorporates current engineering practices.

Adopted new §217.61(a) requires that all raw wastewater pumps must be capable of passing a sphere equal to or greater than 2.5 inches in diameter.

Adopted new §217.61(b) states that pump design must accommodate easy removal of the rotation elements.

Adopted new §217.61(c), (d), and (e) add requirements to ensure that a lift station does not pump more water into a treatment facility than it can process, unless flow splitting or equalization is provided.

Adopted new §217.61(f) specifies how a self-priming pump must be designed for a collection system.

Adopted new §217.61(g) specifies the provisions for vacuum priming pumps that allow flexibility in selecting pumps for lift stations.

Adopted new §217.61(h) specifies the requirements for vertical positioning of pumps. Because the commission added vacuum-primed pumps in §217.61(g), the rule includes them as exempted pumps for consistency with the requirements for self-priming pumps.

Adopted new §217.61(i) states that a grinder pump that is privately owned, maintained, and operated and serves only one structure is not subject to this chapter because it is considered part of the plumbing of the structure and not part of the collection system.

Adopted new §217.61(j) sets the standards for a pump for a low-flow lift station so that odors do not collect.

Adopted new §217.62, Lift Station Pipes, establishes requirements for pump suctions, valves, and pipes that must be used in the design of lift stations. The rule allows flexibility in the design of lift station piping.

Adopted new §217.63, Emergency Provisions for Lift Stations, establishes provisions for handling a lift station failure. This sec-

tion incorporates current engineering practices and requires lift station designs to prevent water pollution in the event of an overflow or discharge of raw wastewater.

Adopted new §217.63(e) prohibits the use of spill containment structures to provide service reliability, but authorizes a spill containment structure if service reliability is provided by another approved method.

Adopted new §217.64, Materials for Force Main Pipes, establishes the requirements for materials used for force main pipe. The rule requires that the force main pipes material must withstand the pressure generated by instantaneous pump stoppage due to power failure under maximum pumping conditions.

Adopted new §217.65, Force Main Pipe Joints, incorporates current engineering practices for joints of force mains in buried service. This section requires that joints have either push-on rubber gaskets or be mechanical joints with a pressure rating equal to or greater than the pipe material. Additionally, this section requires that exposed joints be flanged or flexible and adequately secured to prevent movement due to surges. National reference standards for the joints must be included in the project specifications. These requirements specify force main pipe joint requirements for the regulated community.

Adopted new §217.66, Identification of Force Main Pipes, requires a detector metal tape in the same trench above and parallel to the force main. The words "pressurized wastewater" must be repeated continuously on the tape in letters at least 1.5-inch high. The commission adopts this requirement to ensure that the pipe can be located by conventional equipment and by sight.

Adopted new §217.67, Force Main Design, specifies the requirements for velocities, detention time, water hammer from surges, gravity main connections, pipe separation distances, odor control, and air release valves in force main design to reflect current engineering practices and standards.

Adopted new §217.68, Force Main Testing, explains the required pressure testing procedures for force mains. To simplify the calculation for the minimum test pressure, the design pressure was set at 50 pounds per square inch (psi) above the normal operating pressure of the force main.

Adopted new §217.69, Reclaimed Water Facilities, states the requirements for the design of distribution systems that will convey reclaimed water to a user. These requirements are written for consistency with Chapter 210, Use of Reclaimed Water.

Adopted new §217.70, Storage Tanks for Reclaimed Water, is the design requirements for both elevated and ground-level storage tanks. These requirements are written for consistency with the storage requirements in Chapter 210, Use of Reclaimed Water, and Chapter 331, Underground Injection Control.

SUBCHAPTER D: ALTERNATIVE COLLECTION SYSTEMS

Subchapter D expands the requirements for alternative collection systems so that more of these systems can be given a standard review and approval. Under Chapter 317, many of these systems required review and approval under the variance, nonconforming, or innovative technology sections. These rules expand the criteria to provide the owner of an alternative collection system more options for design, management, and oversight of the system.

Adopted new §217.91, Edwards Aquifer, notifies the regulated community that the design of alternative collection systems must comply with Chapter 213, Edwards Aquifer, in addition to the requirements in this chapter.

Adopted new §217.92, Component Sizing, uses current engineering practices to establish that component size must be based on existing flow data from similar systems and service areas whenever such data is available. It contains the formulas for sizing components if there is no comparable data. This section also prohibits roof, street, or other types of drains that permit entrance of storm water runoff into the wastewater collection system because combined collection systems are prohibited by §281.25 and 40 CFR §122.26.

Adopted new §217.93, General Requirements, subsection (a) states that, except where specifically stated in this subchapter, designs for alternative wastewater collection systems must comply with the applicable requirements of Subchapter C, in addition to the requirements of Subchapter D.

Adopted new §217.93(b) requires the owner to prepare a manual that specifies the operating procedures and maintenance practices for each alternative wastewater collection system.

Adopted new §217.93(c) ensures compliance with subsection (b).

Adopted new §217.94, Management, states the requirements for management of an alternative collection system by making them specific. This provision will allow the owner of an alternative collection system to know more precisely what is required for managing these types of systems.

Adopted new §217.94(a) requires that an alternative wastewater collection system discharge to wastewater facility permitted by the commission.

Adopted new §217.94(b) authorizes the owner of an alternative wastewater collection system to operate the system or to contract for management and operation services with a public or private service provider. The owner may terminate the contract if the provider's services are in conflict with the contract requirements, the wastewater permit, the requirements of this chapter, or other commission rules. These requirements provide owner flexibility in the management of an alternative collection system.

Adopted new §217.94(c) exempts grinder pumps and septic tank effluent pumps discharging directly into a conventional wastewater collection system because these items are considered part of a service lateral pipe and not part of the alternative collection system.

Adopted new §217.95, Service Agreements, specifies the requirements for alternative collection system service agreements and establishes that a service agreement must be executed between the system owner and the service provider. These requirements eliminate inconsistencies regarding how the rule is interpreted. In the past, the executive director has received questions and reviewed submissions regarding the interpretation of these provisions on a case-by-case basis.

Adopted new §217.96, Small Diameter Effluent Sewers, establishes the criteria for the components of a Small Diameter Effluent Sewer, including interceptor tank design, pre-treatment units, tank monitoring, service pipe design, and collection system design, including hydraulic design and vertical alignment.

Adopted new §217.96(a) contains the requirements for interceptor tank design. These requirements were added to ensure consistency with Chapter 285, On-Site Sewage Facilities.

Adopted new §217.96(b) adds requirements for pretreatment units to prevent fats, oils, grease, and sludge from entering the collection system.

Adopted new §217.96(c) contains requirements to ensure that service pipe design conforms to standard engineering practices.

Adopted new §217.96(d) contains requirements for an acceptable SDES design, including hydraulic and vertical design, and to ensure that the executive director can determine compliance with these requirements.

Adopted new §217.97, Pressure Sewers, contains requirements that establish the design criteria for pressure sewers, including pumps service pipes, on-site mechanical equipment, discharge pipes and the collection system. These requirements are included because of questions from the regulated community regarding pressure sewer requirements. These requirements conform to standard engineering practices.

Adopted new §217.98, Vacuum Sewer Systems, brings the provisions for vacuum sewer systems up-to-date with current technology and industry standards. The requirements in this section clarify that a vacuum sewer system is nonconforming technology and may be reviewed by the executive director in accordance with §217.7(b)(2). Historically, the design criteria rules have not contained specific provisions regarding vacuum sewers and the staff has answered questions on a case-by-case basis or reviewed requests for variances for vacuum sewers. These requirements standardize the requirements for vacuum sewers and eliminate the need for many variances.

Adopted new §217.99, Testing Requirements, requires testing all components of an alternative collection system for leaks. These provisions set the minimum testing requirements that conform to standard engineering practices.

Adopted new §217.100, Termination, requires that an alternative collection system terminate at a treatment facility or into a conventional collection system. It also outlines the parameters of the connection between an alternative collection system and a treatment facility or conventional collection system.

SUBCHAPTER E: PRELIMINARY TREATMENT UNITS

Subchapter E creates a separate place for the requirements relating to the first units in a treatment facility. Chapter 317 combined all treatment facility design requirements into one section. This subchapter allows for better, clearer organization and explanation of the requirements for these units.

Adopted new §217.121, Coarse Screening Devices, specifies that all wastewater treatment facilities must use a coarse screening device, unless otherwise provided in this chapter. This section also incorporates new safety and design requirements for coarse screening devices, including location, screen openings, hydraulics, and corrosion resistance of screens and related structure. These requirements protect the process units in the facility because coarse screening devices prevent large debris from entering the treatment units.

Adopted new §217.122, Fine Screening Devices, provides a definition for a fine screen that conforms to industry standards and explains that, although not required, fine screens may be used in lieu of coarse screens, because of improved technology. This section also provides the circumstances under which it is acceptable to use a fine screen in lieu of a primary sedimentation unit. These requirements incorporate improved technology and ensure consistency with new design parameters.

Adopted new §217.123, Screenings and Debris Handling, specifies that all screenings and debris collected must be managed and disposed of in accordance with 30 TAC Chapter 330, Municipal Solid Waste.

Adopted new §217.124, Grit Removal Systems, requires that all treatment facilities using anaerobic digesters must have grit removal systems, because grit can damage anaerobic digesters. Grit removal must occur prior to an anaerobic digester to ensure that as little inert material as possible enters the anaerobic digester. The rule also defines what constitutes grit removal and makes grit removal optional for other facilities.

Adopted new §217.125, Grit Chambers, updates the Chapter 317 requirements and adds new requirements for horizontal flow grit chambers, aerated grit chambers, mechanical grit chambers, cyclonic degritters, and vortex chambers. These requirements are based on manufacturer's recommendations and standard engineering practices.

Adopted new §217.126, Grit Handling, explains the requirements for grit washing, storage, and disposal.

Adopted new §217.127, Pre-aeration Units, authorizes pre-aeration to be used for odor control, flocculation of solids, reducing septicity, grease separation, and promoting uniform distribution of solids to clarifiers. It also requires the report to include the basis for pre-aeration system designs. These requirements clarify when a facility requires a pre-aeration unit.

Adopted new §217.128, Flow Equalization Basins, explains design requirements for determining when a flow equalization basin must be used, and the mixing, aeration, volume and pumped flow requirements of equalization basins. These requirements ensure that facilities can handle periodic high flows.

Adopted new §217.129, Primary Clarifiers, establishes the design criteria for primary clarifiers, including the requirements for inlets, scum removal, effluent weirs, basin sizing, including the maximum surface loading at peak flow, maximum surface loading at design flow, minimum effective detention time at peak flow, and minimum effective detention time at design flow. The requirements for final clarifiers are in Subchapter F for better organization of the requirements. This section also includes the requirements for sidewater depth, freeboard, drains, accessibility, 5-day biochemical oxygen demand (BOD_5) removal, sludge pumping, and sludge pipes.

SUBCHAPTER F: ACTIVATED SLUDGE SYSTEMS

Subchapter F explains the requirements for activated sludge systems, which comprise the majority of treatment facilities. Rule provisions are included to address new technologies, such as sequencing batch reactors and membrane bioreactor systems and other rule provisions are included to allow for flexibility in design methods, such as the volume flux method.

Adopted new §217.151, Requirements for an Aeration Basin, provides the requirements for minimum dissolved oxygen concentration in aeration basins and alternate aeration basin volumes. The requirements ensure that the contents of the basin are thoroughly mixed, allow flexibility in the design of aeration basins, and prohibit the use of contact stabilization for nitrification. These requirements meet current engineering standards for aeration basins.

Adopted new §217.152, Requirements for Clarifiers, provides the requirements for activated sludge clarifier components such as inlets, scum removal, effluent weirs, sludge pipes, sludge col-

lection equipment, pumped inflow, side water depth, and redundancy. This section also provides restrictions on hopper bottom clarifiers, prohibits designs that allow short-circuiting of influent or effluent weirs, and specifies the calculations that are required to determine return sludge pumping capacity. Additionally, the language notes that the sludge digester or disposal methods must comply with 30 TAC Chapter 312, Sludge Use, Transportation, and Disposal.

Adopted new §217.153, Requirements for Both Aeration Basins and Clarifiers, lists the requirements related to construction material, freeboard, redundancy, and flow control that are common to both aeration basins and clarifiers.

Adopted new §217.154, Aeration Basin and Clarifier Sizing--Traditional Design, subsection (a) provides the standard design values to be used to size aeration basins and clarifiers when using the traditional design approach.

Adopted new §217.154(b) contains the requirements for aeration basin sizing. The size of an aeration basin must be based on the organic loading of the influent and the permitted effluent limits. The aeration basin volume must be calculated to ensure that the organic loading on the aeration basins does not exceed a rate that might cause a violation of permitted effluent limits. This requirement also authorizes loading rates to vary from the requirements of this section, if justified in the report.

Adopted new §217.154(c) contains the requirements for clarifier sizing. It establishes the maximum surface loading rates and the minimum detention times used to determine the size of an activated sludge clarifier.

Adopted new §217.155, Aeration Equipment Sizing, updates, explains, and adds flexibility to the methods for achieving the proper oxygenation of the wastewater by mechanical or diffused aeration systems. It includes processes formerly considered nonconforming or innovative technologies that have become industry standards. This will streamline the review process and allow the executive director to grant a standard approval to facilities that would have needed a variance under Chapter 317.

Adopted new §217.156, Sequencing Batch Reactors, explains the design criteria for Sequencing Batch Reactors (SBRs), including the number of basins and tanks, aeration requirements, utilization of duplicate controllers, measures for flow variation, and decanting devices. These requirements allow greater flexibility in SBR design options. Staff has identified a trend of increased use of these designs in Texas. SBRs have a significant appeal for small communities because a properly designed SBR can achieve a high degree of treatment at a reduced cost. In order to ensure protection of human health and environment, the rules codify the standards for SBRs that the executive director currently uses to review these designs.

Adopted new §217.157, Membrane Bioreactor Systems, outlines the requirements for Membrane Bioreactor Systems (MBRs) that were considered innovative technology in Chapter 317. MBRs have gained wide acceptance in the wastewater industry. Including standards for these systems informs the regulated community of the standards the executive director will use to review these systems. It also authorizes the executive director to grant a standard approval for MBRs that meet these requirements instead of reviewing each facility for a variance on a case-by-case basis. Standards for these requirements were based on information gathered from other states' rules and numerous engineers, consultants, and vendors experienced in MBR design and operation.

Adopted new §217.157(a) is the applicability statement. It includes the notice that an MBR that does not meet the requirements of this section is innovative technology and is subject to approval under §217.7(b)(2).

Adopted new §217.157(b) contains the acceptable performance standards for MBRs. Any design based on performance standards greater than the ones in this subsection must be justified by supporting data.

Adopted new §217.157(c) contains the design standards for both flat plate and hollow tube MBRs, including parameters for pretreatment, biological treatment, aeration, recycle rates, nutrient removal, use of membranes, membrane design, supporting data, redundancy, other equipment, and disinfection.

Adopted new §217.157(d) contains the standards for operating an MBR including membrane cleaning, operational parameters, and control instrumentation.

Adopted new §217.157(e) outlines the requirements for the use and disposal of chemicals associated with an MBR.

Adopted new §217.157(f) ensures that operators assigned to an MBR are trained and familiar with its operation.

Adopted new §217.157(g) requires an MBR to be covered by a warranty and authorizes the executive director to require a performance bond if there is a question about the MBR's ability to perform to the standards of this chapter.

Adopted new §217.158, Solids Management, specifies the requirements for properly handling sludge within the treatment facility, including recycling, monitoring, wasting, solids blanket, return activated sludge pump design, waste activated sludge pump design, and piping.

Adopted new §217.158(a) requires that the return sludge system operate satisfactorily at all anticipated flow conditions in order to protect human health and environment.

Adopted new §217.158(b) requires adequate equipment to store and/or process the waste activated sludge under all flow conditions. Staff experience has shown that some small facilities did not have adequate sludge wasting equipment, causing unauthorized discharges into waters in the state. This provision prevents this shortcoming to protect human health and the environment.

Adopted new §217.158(c) and (d) contains the sludge pump requirements. This requirement ensures that the facility will be able to pump sludge under all conditions with the largest pump out of service and is consistent with other redundancy requirements in this chapter.

Adopted new §217.158(e) includes the standards for the design of the sludge pipe system that include provisions to address cleaning, flushing, solids settling, and scouring.

Adopted new §217.159, Process Control, provides the criteria for implementing solids retention time (SRT) control and aeration system control.

Adopted new §217.159(a) requires that an activated sludge facility be designed with the necessary equipment for an operator to control the SRT in the aeration tanks by wasting a measured volume of surplus activated sludge regularly. The report and the operating manual must provide the formulas for determining the SRT. This requirement was added because an operator must manage for an activated sludge facility to operate properly.

Adopted new §217.159(b) lists the requirements for aeration control. A facility may be designed to adjust the airflow in proportion to the biological loading of the influent. If this type of control is installed, the aeration equipment must be easily adjustable and must maintain solids in suspension. This requirement allows flexibility in designing aeration controls and conserves energy.

Adopted new §217.160, Operability and Maintenance Requirements, explains the requirements of having equipment that is designed to operate at the temperature extremes of the facility location, being accessible to staff for operation and maintenance, and being housed in facilities with adequate room for removal, repair, and installation. This section was added in response to problems encountered.

Adopted new §217.161, Electrical and Instrumentation Systems, establishes power supply requirements for facility equipment, safety requirements for electrical equipment, and design standards for alarm systems for malfunctioning equipment. These requirements ensure that a facility is monitored and protected from vandalism, natural disasters, power interruptions, and equipment failures.

Adopted new §217.162, Internal Process Flow Measurement, requires facilities with design flows greater than 400,000 gallons per day to include process flow measurement. An operator must be able to determine the return rates and flow rates to properly operate the facility. This requirement addresses this operational need.

Adopted new §217.163, Advanced Nutrient Removal, provides the requirements for including processing units that removed nutrients other than the standard effluent set (total suspended solids, biochemical oxygen demand, ammonia-nitrogen). Chapter 317 considered advanced nutrient removal innovative technology, but technology has improved and advanced nutrient removal is required at many facilities. It authorizes the executive director to grant a standard approval for advanced nutrient removal designs that meet these requirements instead of reviewing each facility on a case-by-case basis. Standards for these requirements were based on information gathered from other states' rules and numerous engineers and consultants.

Adopted new §217.164, Aeration Basin and Clarifier Sizing--Volume-Flux Design Method, provides an alternative method to determine the size of aeration basins and clarifiers. This requirement was added to allow flexibility in designing a treatment facility and is needed to ensure that the volume-flux design methods are consistent with sound engineer practice. The volume-flux design approach is as protective of human health and the environment as the traditional design method.

SUBCHAPTER G: FIXED FILM AND FILTRATION UNITS

Adopted new §217.181, Applicability, states that this subchapter applies to trickling filters, rotating biological contactors, submerged biological contactors, and filtration systems.

Adopted new §217.182, Trickling Filters--General Requirements, states the general requirements for the use of trickling filters, which are secondary aerobic biological processes used for treatment of wastewater. This section defines biofilters or biotowers as trickling filters that use random or stackable modular synthetic media. This section also provides requirements for determining process applicability and pretreatment requirements.

Adopted new §217.182(a) contains the requirements for process applicability and explains that trickling filters are classified according to applied influent hydraulic and organic loadings.

Adopted new §217.182(b) contains the requirements for trickling filter classification and classifies trickling filters based loading rates. In Chapter 317, trickling filters were distinguished based on their role in treatment. These requirements specify the different types of trickling filters according to their capacity.

Adopted new §217.182(c) contains Table G.1, which contains the hydraulic and organic loadings for different classes of trickling filters. The values in the table update the standards for consistency with current technology.

Adopted new §217.182(d) contain the requirements for pretreatment. All trickling filters must have upstream preliminary treatment units that remove grit, debris, suspended solids, oil, grease, and large particles, as well as control the release of hydrogen sulfide.

Adopted new §217.182(e) contains the requirements for materials and placement of rock filter media. These requirements ensure that the rock media filter material will function properly.

Adopted new §217.182(f) contains the requirements for synthetic (manufactured or prefabricated) media materials. The executive director may consider synthetic media materials to be innovative or nonconforming technology subject to review under §217.7(b)(2). Additionally, the provisions for structural integrity state that the structural design must support the synthetic media, water flowing through or trapped in voids, the maximum anticipated thickness of wetted biofilm. The synthetic media must also support the weight of a person while the trickling filter is in operation, unless separate provisions are made for maintenance access.

Adopted new §217.182(g) contains the requirements for filter dosing and requires that the design include suitable flow characteristics for the application of wastewater to the filters by siphons, pumps, or gravity discharge from preceding treatment units. The commission requires design provisions to control instantaneous dosing rates under both normal operating conditions and filter-flushing conditions. Table G.2 provides design ranges of dosing intensity for normal usage and flushing periods. This requirement is included for consistency with current industry standards and to provide more specific information regarding filter dosing.

Adopted new §217.182(h) includes the requirements for distribution equipment. A trickling filter must include electrically driven, variable speed filter distributors to allow operation at optimum dosing intensity independent of recirculation pumping. This requirement prevents failures from unequal distribution and drying of the media and conforms to standard engineering practices. Additionally, the rule specifies that if existing rectangular trickling filters are retrofitted with rotary distributors, any media that will not be fully wetted must not be considered as part the effective treatment area of the process.

Adopted new §217.182(h)(11) requires that rotary distributors operate at speeds of at least one revolution per 30 minutes to prevent unequal distribution and drying of the media.

Adopted new §217.182(h)(12) requires that trickling filters with a height or diameter that does not allow removal and replacement of distributors by a crane must provide jacking columns and pads at the distributor column. Some trickling filters have been designed without a way to remove the distributors once they are in place. This situation has caused problems when the distributors

need to be repaired or replaced and this requirement is included to address the problem.

Adopted new §217.182(i) contains the requirements for recirculation. In paragraph (1), it requires the minimum flow rate be sufficient to keep the rotary distributors turning by requiring designs using hydraulically driven distributors to keep rotary distributors turning at the minimum design rotational velocity. This requirement applies to any facility that treats at least 400,000 gallons per day to remain consistent with the other requirements in this chapter.

Adopted new §217.182(i)(2) contains the requirements to provide recirculation that supplements influent flow if design and flushing dose intensities are not achieved solely by control of distributor operation. Controls for the distributor speed and recycle pumping rate must provide optimum dosing intensity under all anticipated influent flow conditions. This provision is included because recirculation helps to optimize removal efficiencies.

Adopted new §217.182(i)(3) contains the requirements for process calculations. The benefits of recirculation are primarily related to dosing intensity, and may often be achieved by control of the distributor speed only. The report must describe a design that proposes recirculation for removal of remaining organic matter in the wastewater, identify the effect of dilution of the influent on the rate of diffusion of dissolved organic substrates into the biofilm, the effect of reduced influent concentrations on reaction rates in sections of the filter having first order kinetics. This requirement is included because it is consistent with current industry standards and provides more specific direction regarding process calculations.

Adopted new §217.182(i)(4) contains the requirement that recirculation rates may not exceed four times design flow, unless the report provides calculations to justify the higher rate. This requirement was added for consistency with industry standards.

Adopted new §217.182(i)(5) states that if influent organic loadings are constant, a facility must use direct recirculation of unsettled trickling filter effluent and that the distributor nozzles handle the sloughed biofilm. These provisions ensure that distributor nozzles do not become clogged. If influent organic loadings are variable, a facility must recirculate effluent from the final clarifier to either the primary clarifier or to the trickling filter to equalize organic loading. The input point of recirculated influent depends on the content of the influent.

Adopted new §217.182(j) contains the requirements for average hydraulic surface loading. Section 217.182(j)(2) includes "except in roughing applications" to the requirement because roughing applications can exceed the average hydraulic surface loadings of filters with crushed rock, slag, or similar media. Roughing applications by definition are systems that only partially filter the wastewater.

Adopted new §217.182(k) contains the requirements for underdrain system design. The requirement follows the manufacturer's recommendation to ensure that the media will be properly installed and used.

Adopted new §217.182(l) requires the floors of underdrain systems to be sloped. Trickling filters using stackable modular synthetic media must slope toward the drainage channel based upon filter size and hydraulic loading. Staff has identified an increased use of stackable modular synthetic media and the provision set requirements for stackable modular synthetic media in order to protect human health and the environment.

Adopted new §217.182(m) contains the requirements for passive ventilation that are included to conform to standard industry practice and to protect human health and the environment.

Adopted new §217.182(n) contains the requirements for forced ventilation. Equation G.2 and the values in Table G.3 set minimum airflow rates. These requirements provide an option for nitrification. They establish the minimum criteria for forced air ventilation for trickling systems based on standard engineering practices.

Adopted new §217.182(o) contains the requirements for cleaning, sloughing, controlling nuisance organisms, and corrosion control. Proper maintenance is necessary for proper operation of the equipment.

Adopted new §217.182(p) requires that a trickling filter system include a means to measure flows to the filter and recirculation flows.

Adopted new §217.182(q) contains the requirement for odor control. Paragraph (1) requires that a trickling filter system use ventilation capable of controlling odors at design flow and during periodic flushing. The paragraph also states that the executive director may require a facility with a history of odor complaints to cover its trickling filter. Covers trap odors and the scrubbers or adsorption columns remove the odors from the air before it is vented from the system.

Adopted new §217.182(q)(2) requires that a trickling filter with high influent organic loadings have forced ventilation to minimize odors and lists the options for handling odorous off-gases. These requirements are included to allow design options for odor control.

Adopted new §217.182(r) requires that the final clarifiers be sized to handle the additional total suspended solids due to the biomass.

Adopted new §217.182(s) lists elements that must be included in the report related to fixed film and 74filtration.

Adopted new §217.183, Nitrifying Trickling Filters--Additional Requirements, provides requirements in addition to §217.182 for using trickling filters to provide nitrification sufficient to meet the requirements of a wastewater permit. This section includes requirements for ventilation, temperature, pH, predation, hydraulic application rates, media, tertiary nitrification filter, combined BOD/nitrification filters, and to update the rules to comply with engineering design advances. Currently, many wastewater permits require nitrification based on modeling of the receiving water for a wastewater discharge. This requirement was added to reduce toxicity and maintain the dissolved oxygen level in receiving waters. To assist facilities in meeting the new nitrification requirements, new engineering standards were developed and these provisions are consistent with current industry standards.

Adopted new §217.184, Dual Treatment Using Trickling Filters, explains the requirements and processes for use of trickling filters or other attached growth units in series with suspended growth processes. This section includes classification of dual treatment processes, design criteria for attached and suspended growth processes, and treatment unit design criteria. Each combination option in this section is protective of human health and the environment.

Adopted new §217.184(c)(1) - (4) require that the design of suspended and attached growth systems include all of the

features and operational capabilities required for the same treatment units when used for single-process treatment, as well as pretreatment, snail control, return sludge, and aeration. Additionally, an aeration system for a second-stage treatment unit in a facility designed for nitrification must transfer sufficient oxygen for biomass growth; respiration for both carbonaceous material oxidation and nitrification; and oxygen demand due to biomass sloughing events from the first stage.

Adopted new §217.184(c)(5) requires that a second-stage suspended growth process operate in a way that varies the age of the sludge and that a nitrifying dual system control the total combined mean cell residence time. This provision ensures adequate time for nitrification to occur.

Adopted new §217.184(c)(6) requires a minimum hydraulic residence time for consistency with standard engineering practices.

Adopted new §217.184(c)(7) requires nitrification using a dual treatment process including a sludge re-aeration basin if the second process is an aerated solids contact basin or an intermediate clarifier if the second process is an activated sludge aeration basin. This provision is consistent with standard engineering practices.

Adopted new §217.185, Rotating Biological Contactors, provides the requirements and provisions for the use of improved Rotating Biological Contractors (RBC) units, including pretreatment, enclosures and ventilation, media design, design flexibility, tank configuration, control of unwanted growth in the initial stages, downtime maintenance provisions, bearing maintenance, organic loading design requirements, hydraulic loading design requirements, stages of RBC units, drive systems, and dissolved oxygen.

Adopted new §217.185(a) requires pretreatment of wastewater entering an RBC so that the RBC will operate properly and provide the expected treatment results.

Adopted new §217.185(b) requires that the RBC unit be covered and have adequate ventilation, and to include access doors and observation ports to allow access and a visual inspection of the RBC without having to open the unit.

Adopted new §217.185(c) and (d) contain the required and optional design criteria for RBCs and requires that these items be included in the report.

Adopted new §217.185(e) requires that an RBC tank minimize the zones in which solids will settle out and contains a requirement that an RBC tank must include tank drains to facilitate removal of any accumulated solids. This requirement is included to ensure that the tanks maintain adequate treatment capacity.

Adopted new §217.185(f) authorizes the use of chlorine upstream of an RBC system to control the growth of beggiatoa, which is an unwanted microorganism that may inhibit the initial stage of an RBC system. This requirement was added because chlorine may control the growth of beggiatoa without harming the operation of the RBC.

Adopted new §217.185(g) and (h) contains the provisions for maintenance. An RBC system designed for a facility with a permitted flow of at least 1.0 mgd must have three or more stages in series. A stage must be capable of being taken off-line for maintenance or cleaning. RBC bearings must be easily accessible for inspection and lubrication. These requirements ensure that maintenance can be performed without interrupting operation of the facility.

Adopted new §217.185(i) contains the requirements to base the organic loading for an RBC system on total BOD_5, to adjust the required RBC media area to compensate for the ratio of soluble BOD_5 to total BOD_5, and to set the allowable organic loading for the entire RBC system. In Chapter 317, these requirements were in a table. This provision incorporates them into the adopted rule language to make them more readable.

Adopted new §217.185(j) contains the requirements for an RBC system to include flow equalization when the peak-to-design flow ratio is higher than 2.5 to 1.0 to prevent loss of fixed growth from the media. The first stage of the RBC system must include a means of spreading the influent evenly across the media to ensure that the fixed growth is not scoured. This provision is consistent with industry standards.

Adopted new §217.185(k) contains the requirements for stages. A stage includes one or more RBC unit divided by a vertical baffle or wall. An RBC system designed for BOD_5 removal must have at least three stages in series, unless the report justifies a lesser number.

Adopted new §217.185(l) requires that an RBC drive system handle the maximum anticipated media load and allows a variable speed drive system and the RBC units to be mechanically or air driven.

Adopted new §217.185(m) contains the requirements for dissolved oxygen in an RBC and states that the executive director may require supplemental aeration.

Adopted new §217.186, Nitrifying Rotating Biological Contactors, provides additional requirements for RBCs used for BOD_5 removal and nitrification.

Adopted new §217.186(a) requires that an RBC system designed for BOD_5 removal and nitrification in a single system include four stages. This subsection also sets the maximum overall organic loading rate to be consistent with industry standards.

Adopted new §217.186(b) requires that a nitrifying RBC system include capabilities for chemical addition if the influent pH is below 7.0. This requirement ensures that the pH can be raised to a neutral level if the pH is too acidic. The fixed growth media does not function efficiently if the pH is below 7.

Adopted new §217.186(c) requires that the report justify the nitrification rate of the system to ensure that the executive director can efficiently review the design of the nitrification rate of the system.

Adopted new §217.186(d) states that a nitrifying RBC system may be subject to the requirements of §217.7(b)(2).

Adopted new §217.187, Dual Treatment Systems Utilizing Rotating Biological Contactors, explains the requirements for allowing RBC units to be used in conjunction with other units and to conform to engineering design advances. These combined systems may be subject to the requirements of §217.7(b)(2). This provision allows an owner the flexibility to use RBC units in conjunction with existing treatment units.

Adopted new §217.188, Submerged Biological Contactor, proscribes the process for designing SBCs using criteria similar to RBC criteria except that two air headers are required for each SBC unit and any submerged bearings must be sealed. These changes comply with current engineering standards.

Adopted new §217.188(a) states that an air driven SBC system does not require a cover, since 60% of a unit is submerged and the possibility of the media drying out is low.

Adopted new §217.188(b) requires an SBC system to use the same pretreatment as an RBC and must meet the criteria §217.184 with two exceptions, headers and bearings.

Adopted new §217.189, Dual Treatment Systems Utilizing Submerged Biological Contactor, authorizes an SBC unit to be used in conjunction with other systems. This provision allows an SBC system to be used as a roughing unit in series with activated sludge and to be installed in existing activated sludge basins to create a combination fixed and suspended growth process. The rule requires that the report include supporting data, calculations, process descriptions, and vendor information to describe how the proposed system will provide the required treatment levels; and specifies that these designs may be subject to the requirements of §217.7(b)(2). These provisions allow flexibility to use existing systems when expanding an existing facility and are consistent with standard engineering practices.

Adopted new §217.190, Filtration, states the general requirements for filtration systems such as permit water quality requirements, redundancy, source of backwash water, disposition of backwash water, sequence of treatment units, overload conditions, and control of slime growth.

Adopted new §217.190(a)(1) requires that a treatment facility with tertiary effluent limitations (e.g., total suspended solids effluent limit less than 15 milligrams per liter) use filtration to supplement suspended solids removal.

Adopted new §217.190(a)(2) authorizes a treatment facility with secondary or advanced secondary effluent limitations to use filtration to supplement operation if filters are not necessary to meet permitted effluent limitations. Filtration reduces oxygen-demanding substances by removing the non-soluble fraction of the clarifier effluent and normally provides effective removal for suspended biological floc and residual materials that remain after secondary clarification.

Adopted new §217.190(b) requires that a treatment facility using filtration to provide tertiary treatment for have a minimum of two filter units, and must provide adequate filtration with the largest filter unit out of service. If a filter is not required to meet permit requirements, only one filter is required. This may save the owner of the facility the expense of installing two filters.

Adopted new §217.190(c) requires a filtration system to use filtered effluent as the source of backwash water to ensure that the backwash sufficiently cleans the filter.

Adopted new §217.190(d) requires that a filtration system to return backwash water containing material cleaned from the filter to the head of the treatment facility for processing. Chapter 317 required that the wastewater be returned to an upstream treatment unit. This provision defines "upstream treatment unit."

Adopted new §217.190(e) requires that a final clarifier designed in accordance with Subchapter F precede a filter unit. A filter system may be used in conjunction with disinfection tanks to provide additional detention time. These provisions will allow by rule a practice that the executive director has allowed by variance. This process is protective of human health and the environment.

Adopted new §217.190(f) requires a facility design include a method to prevent effluent from overflowing from the wastewater treatment units. If not properly designed, during peak flows or excessive carryover of suspended solids from the final clarifier for an extended period of time, the filter units may overload and overflow.

Adopted new §217.190(g) requires that a filtration system provide periodic disinfection of the filters to control slime growth in the filter and backwash storage tank.

Adopted new §217.191, Additional Requirements for Deep Bed, Intermittently Backwashed, Granular Media Filters, includes the design criteria required in addition to the requirements in §217.190 for deep bed, intermittently backwashed, granular media filters, including application rates, media design, backwash system, underdrain system, tank design and controls.

Adopted new §217.191(a) sets application rates for single, dual, and mixed media filters. This subsection also requires that filters be able to treat the peak flow with one filter out of service.

Adopted new §217.191(b) contains the requirements for media design, including uniformity coefficient, particle size, depth of media, and underdrain systems.

Adopted new §217.191(c) contains the requirements for backwash systems. Backwash systems are critical to the operation of filters. These requirements ensure that the backwash systems function properly and adequately clean the filters.

Adopted new §217.191(d) requires that the underdrain system provide a uniform distribution for filter backwash without excessive head loss or plugging.

Adopted new §217.191(f) lists the requirement regarding tank design in relation to backwashing filters. These requirements are in place to ensure that filter media is not lost during backwashing.

Adopted new §217.191(g) sets the requirements for the backwash system control mechanism. These requirements ensure that the controls are adequate to allow proper monitoring and operation of the backwash process.

Adopted new §217.192, Additional Design Requirements for Multi-Compartmented, Low Head, Automatically Backwashed Filters, updates and explains that in addition to meeting the requirements in §217.191, additional design criteria for multi-compartmented, low head, automatic backwash filters including application rates, media design, backwash system, and traveling bridge apply.

Adopted new §217.192(a) sets the application rate for single, dual, and multi media filters. This option allows short-term overloading of the unit because it will not impair its function.

Adopted new §217.192(b) specifies media sizes and depths consistent with standard engineering practices.

Adopted new §217.192(c) contains the requirements for automatic backwash systems. This requirement changes the Chapter 317 requirement of 10 gallons per minute to 20 gallons per minute to reduce the backwash duration. The provision reduces the requirement of "30 to 60 seconds" in the Chapter 317 rules to "at least 20 seconds" to correspond to the increased gallons per minute. This change allows the filters to return to service more quickly.

Adopted new §217.192(d) provides that a traveling bridge that provides support and access to the backwash pumps and equipment must be constructed of corrosion-resistant materials, have adequate bridge tracking, safe support of the power cords, and automatic initiation of the backwash cycle. The requirement responds to questions from the regulated community regarding

what is required for a traveling bridge and is consistent with current industry standards.

Adopted new §217.192(e) provides for automatic and regular removal of any floating material. Floating materials that are too large to pass through the filter system must be returned to the head of the facility to pass through a bar screen. This requirement ensures that floating material is properly processed.

Adopted new §217.193 Alternative Designs for Effluent Polishing, explains that the use of other processes for tertiary suspended solids removal, such as microscreens or countercurrent, continuous filtrate and backwash flow filters, will subject to the nonconforming technology requirements of §217.7(b)(2).

SUBCHAPTER H: NATURAL TREATMENT FACILITIES

Subchapter H addresses natural treatment systems separately from mechanical treatment facilities. This separation lets the commission address the different criteria and requirements needed to construct and operate treatment lagoons.

Adopted new §217.201, Applicability, states that this subchapter applies to Imhoff tanks, constructed wetlands, facultative lagoons, aerated and partially aerated lagoons, stabilization lagoons, treated effluent storage lagoons, evaporative lagoon systems, and overland flow processes.

Adopted new §217.202, Primary and Secondary Treatment Units, is the requirements for primary and secondary treatment units in natural treatment systems.

Adopted new §217.203, Design Criteria for Natural Treatment Facilities, updates and groups the requirements that apply to one or more of the natural treatment facilities or units. Natural treatment include flow distribution, windbreaks and screening, maximum liner permeability, embankment design and construction, disinfection, sampling point significance, and storm water drainage. These criteria provide more flexibility by allowing options that combine treatment methods. These options allow better use of the surrounding land features and better long range planning.

Adopted new §217.203(a) requires the shape and size of these treatment facilities to ensure even distribution of the wastewater.

Adopted new §217.203(b) requires that all natural treatment units include windbreaks if spray irrigation is used in a location where drift presents a risk of contact with the general public and allows the use of vegetative screening. The use, the type, and the extent of windbreaks or vegetative screening are subject to approval by the executive director.

Adopted new §217.203(c) contains the requirements for maximum liner permeability. These rules provide greater flexibility than the Chapter 317 rules and may allow a cost savings for the owner of the facility. Section 217.208 and §217.209 establish liner and permeability requirements for evaporative lagoon facilities or overland flow facilities systems.

Adopted new §217.203(d) contains the requirements for testing and compliance with the liner permeability requirements and requires that the report include the results of any tests required in this subsection. This testing protocol is consistent with the commission's current permit requirements and is more cost effective. This subsection establishes protocols to eliminate the need for a variance for using amended in-situ soils because amended in-situ soil protocol is as protective as using in-situ soils. The provision also requires a synthetic liner to have a thickness of 40 millimeters to protect groundwater from contamination.

Adopted new §217.203(e) contains the requirements for embankment design and construction. It will allow access for vehicles and maintenance equipment. It also prohibits steep embankments because these slopes have a greater potential to fail and make it difficult to maintain a vegetative cover. All embankments must be protected against erosion by planting grass, paving, riprapping, or other approved methods.

Adopted new §217.203(f) specifies that chemical or ultraviolet disinfection is not required if a detention time of at least 21 days is provided in a entire, free-water surface, natural treatment unit. This requirement is consistent with 30 TAC Chapter 309.

Adopted new §217.203(g) requires that holding time in a storage lagoon cannot be used to meet the permit 21-day detention time requirement for disinfection. Treated effluent storage lagoons may be used for municipal permit storage requirements or for reclaimed water projects and must comply with other requirements of Chapter 210.

Adopted new §217.203(h) requires that a natural treatment facility prevent storm water drainage into the treatment units.

Adopted new §217.204, Imhoff Tanks, provides updated design criteria for constructing Imhoff tanks that address settling compartments, surface loading, scum baffles, gas vents, digestion compartment loading, Imhoff tank dimensions, sludge removal, odor management, treatment efficiency, material, and construction. The design criteria regulating Imhoff tanks were repealed by the commission in 1990. These requirements are standard engineering designs for Imhoff tanks and are consistent with other commission rules.

Adopted new §217.205, Facultative Lagoons, provides the design criteria for facultative lagoons, including configuration of inlets and outlets, depth, organic loading, odor control, and removal efficiency. This provision allows flexibility in the design of lagoons protecting human health and the environment.

Adopted new §217.206, Aerated Lagoons, provides updated requirements for completely and partially mixed aerated lagoons. The requirements address redundancy, piping, monitoring, location temperature, sizing, and scouring. The requirements offer flexibility as well as protection of human health and the environment.

Adopted new §217.207, Stabilization Lagoons, requires lagoons that are designed as secondary units to treat suspended and dissolved organic matter in wastewater. It addresses primary treatment, odor management, the number of lagoons, dimensions of the lagoons, water level considerations, hydraulic and pipe considerations, maximum organic loading, and inlet and outlet structures.

Adopted new §217.207(a) requires primary treatment to remove the settleable and floatable solids in the influent wastewater prior to the stabilization lagoons, which treat suspended and dissolved organic matter in wastewater.

Adopted new §217.207(b) requires an owner to include measures to manage odors from stabilization lagoons.

Adopted new §217.207(b)(1) requires that a stabilization lagoon be located so that prevailing winds will be toward less populated areas to minimize nuisance odors.

Adopted new §217.207(b)(2)requires that the lagoons must be pre-filled to the two-foot level at start-up, if uncontaminated water is available. This requirement is included to encourage the rapid start-up of the biological process and to discourage odor.

Adopted new §217.207(b)(3) requires that a lagoon system must include a pipe arrangement that allows the recirculation of effluent. Surface spray may be used to assist in maintaining aerobic conditions at the lagoon surface and reduce potential odors. These requirements are included because recirculation provides active algal cells to the upstream feed area, which provides photosynthetic oxygen for organic digestion. Recirculation also provides a more completely-mixed environment within the lagoon system.

Adopted new §217.207(c) requires that a facility must have at least two stabilization lagoons if they are used to meet effluent limits. The stabilization lagoons must be in series with each other following the primary treatment unit.

Adopted new §217.207(d) contains the design requirements for stabilization lagoons.

Adopted new §217.207(d)(1) requires a minimum length-to-width ratio of a stabilization lagoon to ensure that the wastewater is properly treated.

Adopted new §217.207(d)(2) avoids dead zones and ensures proper treatment by prohibiting islands, peninsulas, or coves within the lagoon boundaries.

Adopted new §217.207(d)(3) specifies the normal water depth for stabilization lagoons to ensure the proper stratification of water treatment.

Adopted new §217.207(d)(4) specifies that inlet and outlet structures must allow for adjusting water levels to assist in controlling weeds and other vegetative growth to ensure proper operation and maintenance of the facility.

Adopted new §217.207(d)(5) requires that a stabilization lagoon have a 2.0 foot minimum freeboard if less than 20 acres and a 3.0 foot minimum freeboard if 20 acres or more. The potential for white-capping on a larger lagoon surface may encourage erosion. A deeper freeboard compensates for the erosion potential in lagoons with larger surface areas.

Adopted new §217.207(e) contains the requirements for hydraulic and pipe considerations. These requirements are included to ensure that an operator has flexibility to manage the lagoons properly in normal and worst-case conditions.

Adopted new §217.207(f) contains the requirements for the maximum surface organic loading rate for stabilization lagoons. The provision is included to specify that the loading rates are based on the BOD_5 influent load after the preliminary treatment units.

Adopted new §217.207(g) contains the requirements for inlet and outlet structures.

Adopted new §217.207(g)(1) requires that an outlet must include removable baffles to prevent floating material from being discharged and be constructed to operate varying surface levels under normal operating conditions.

Adopted new §217.207(g)(2) specifies that the discharge must be submerged. If a lagoon does not have submerged outlets, the lagoons may have a discharge that contains algae and high fecal coliform.

Adopted new §217.207(g)(3) specifies that multipurpose control structures may be used to facilitate normal operational functions to and allow the operator to properly operate and maintain the facility.

Adopted new §217.207(g)(4) specifies that all pipe embankment penetrations must have seep water-stop collars to prevent wastewater from leaking through or eroding an embankment.

Adopted new §217.207(g)(5) specifies that a stabilization lagoon must have a drainage system to allow scheduled maintenance or emergency repair on the lagoon.

Adopted new §217.208, Evaporative Lagoons, establishes the requirements for evaporative lagoons, including size and number, odor management, liners, and configuration of depth and loading, embankment, and inlet and outlet structures of the lagoon. These requirements are included in response to questions from the regulated community regarding minimum design criteria for evaporative lagoons.

Adopted new §217.208(a) is the minimum design criteria necessary for using evaporative lagoons in a treatment facility.

Adopted new §217.208(a)(1) requires that an evaporative lagoon process must have a minimum of two lagoons. Redundancy is necessary to keep the treatment process operating during repairs and maintenance.

Adopted new §217.208(a)(2) specifies that the primary evaporative lagoon must provide at least 60% of the total surface area. These provisions are consistent with standard engineering practices.

Adopted new §217.208(a)(3) requires the minimum number and size of evaporative lagoons provide adequate evaporation of the design flow during periods of low evaporation. During low evaporation or wet weather periods, secondary lagoons may be required to provide adequate evaporative surface area to accommodate influent flows and precipitation.

Adopted new §217.208(b) specifies that evaporative lagoons be located so that the local prevailing winds will be toward less populated areas to minimize nuisance odors.

Adopted new §217.208(c) contains the requirements for evaporative lagoon liners.

Adopted new §217.208(c)(1) requires that evaporative lagoons be constructed with synthetic membrane liners with a minimum thickness of 40 millimeters. The provision requires synthetic membrane liners because they are less likely to crack than clay liners.

Adopted new §217.208(c)(2) requires that the liners have an underdrain leak detection system consisting of at least a leachate collection and a detection system to ensure that the liner is intact and groundwater is not threatened.

Adopted new §217.208(c)(3) specifies that the liner construction requires proper compaction of soils beneath the liner so that the liner is not compromised by settling or shifting.

Adopted new §217.208(c)(4) specifies that the liner material must be capable of receiving constant sunlight without degrading to lengthen the functional life expectancy of the liner.

Adopted new §217.208(d) contains the requirements for configuration, depth, and loading.

Adopted new §217.208(d)(1) authorizes an evaporative lagoon to be constructed in round, square or rectangular style shapes to ensure that an evaporative lagoon can be designed to fit the topography of the location.

Adopted new §217.208(d)(2) specifies that the depth of an evaporative lagoon is dependent on its location within the lagoon sys-

tem. These requirements are included for consistency with standard engineering practices.

Adopted new §217.208(d)(3) contains the evaporation and organic loading requirements.

Adopted new §217.208(e) specifies that the owner must construct embankments for evaporative lagoons in accordance with §217.203(e). This requirement is included to maintain consistency throughout the design criteria rules.

Adopted new §217.208(f) contains the requirements for inlet and outlet structures to be consistent with standard engineering practices.

Adopted new §217.209, Constructed Wetlands, includes general requirements for artificially constructed wetlands designed to simulate natural wetland ecologic conditions based on advances in engineering design.

Adopted new §217.209(a) authorizes the construction of wetlands at wastewater treatment facilities that are either free surface water systems (FWS) or subsurface flow systems (SFS).

Adopted new §217.209(b) prohibits the use of natural wetlands in order to protect them and clarify that constructed wetlands may not use any water in the state, as defined by TWC, §26.001(5).

Adopted new §217.209(c) established the general design criteria for constructed wetlands. Later sections address the two different types of constructed wetlands.

Adopted new §217.209(d) specifies that a constructed wetland must have a diverse vegetative community. This subparagraph also specifies that a constructed wetland may have both emergent and floating aquatic vegetation to maintain a diverse vegetative community suitable to local growing conditions. An acclimated and diverse vegetative community helps minimize adverse impacts from potential disease, insect pests, or species-specific toxicity.

Adopted new §217.209(d)(4) requires that the plans for harvesting aquatic plants from waters of the state must be reviewed with the United States Corp of Engineers to determine if regulatory coordination is required. This requirement is consistent with 40 CFR §122.2 and the Clean Water Act, §404. The use of indigenous plants is recommended, if the species have demonstrated they are effective for use in a constructed wetlands wastewater environment.

Adopted new §217.209(d)(5) requires that procurement of seed plants from natural wetlands must assure minimum impact on the harvested plant community. The use of indigenous plants is recommended, if these species have demonstrated they are effective for use in a constructed wetlands wastewater environment.

Adopted new §217.209(d)(6) specifies that the Texas Parks and Wildlife Department must approve use of all harmful or potentially harmful wetlands plants and organisms, as described in 31 TAC §§57.111 - 57.118 and 31 TAC §§57.251 - 57.258. This rule requires that the report identify the wetlands plants and organisms that will be used so that the executive director can ensure compliance with this requirement.

Adopted new §217.209(e) sets the maintenance requirements for constructed wetlands.

Adopted new §217.209(e)(1) prohibits the use of herbicides, insecticides, and fertilizers. Without an individual review of each chemical being discharged, a chemical could cause a water quality violation in the receiving stream.

Adopted new §217.209(e)(2) contains the requirements for floating material removal. For proper functioning, constructed wetlands systems must remove the primary treated effluent algal mat or other floating materials prior to entering the wetlands. The use of covered primary treatment systems may eliminate the need for algal mat removal. The rule also requires the removed floating material be stored and disposed of in a way to minimize nuisance odors. The disposal practices must conform to the requirements in Chapter 330.

Adopted new §217.209(e)(3) requires that the facility operations and maintenance manual include the maintenance of emergent and aquatic vegetation in constructed wetlands. Periodic removal of dead plant matter and detritus must prevent damage to living plants, liners, and system hydraulics. Constructed wetlands maintenance may include promoting active growth, controlling of mosquitoes, maintaining hydraulic capacity, and must not result in a deterioration of water quality. This provision is included to ensure that the manual contains the information necessary to operate the facility and so that the executive director can ensure compliance during the executive director's review.

Adopted new §217.209(f) requires that a properly functioning wetlands system be allowed to mature before wastewater effluent is processed. This requirement is included to ensure that constructed wetlands have adequate time for flow ecosystems to mature since mature ecosystems are required for effective wastewater treatment. It also requires the report to include the plan for establishing the constructed wetland before wastewater is introduced

Adopted new §217.209(g) specifies that the liners for wetlands systems must comply with the requirements of §217.203(3) and (4) and prohibits synthetic liners in wetland systems. A minimum 6-inch layer of productive topsoil must be placed above the liner to encourage subgrade root penetration. This requirement is included to protect against contamination of groundwater and to conform to standard engineering practices.

Adopted new §217.209(h) contains the requirements for berms. These requirements are included to prevent erosion of the side slopes and to conform to standard engineering practices and to allow synthetic side slopes to provide flexibility in designing berms.

Adopted new §217.209(i) requires that a constructed wetland must be protected from a 100-year flood event in accordance with the requirements of §217.35.

Adopted new §217.209(j) specifies that all constructed wetlands intended to provide nitrification are innovative and nonconforming technology, subject to §217.7(b)(2). The provision authorizes the executive director to consider these facilities on a case-by-case basis because of the inherent site-specific nature of nitrification at an individual treatment facility.

Adopted new §217.209(k) authorizes constructed wetlands to be used as secondary treatment units, advanced secondary treatment units, or as a means of polishing wastewater effluent. This provision specifies how the engineer may use FWS wetlands and SFS wetlands.

Adopted new §217.210, Constructed Wetlands--Free Water System (FWS) Design, contains the design criteria for FWS wetlands, which are shallow open water bodies and populated principally by emergent plants. Wastewater flows through the

wetland, primarily in a horizontal direction, and is treated by a variety of physical, biological, and chemical processes.

Adopted new §217.210(a) requires a FWS wetlands design to be based on a maximum water depth of no more than 24 inches in emergent vegetation areas at design flow. Chapter 317 set the maximum depth at 18 inches, but 24 inches allows greater flexibility in design and plant selection.

Adopted new §217.210(b) sets the standards for plants in an FWS. Plant spacing must allow for growth of the wetlands flora ecosystem under normal conditions. The rule prohibits floating plants because flowing water would continually displace them.

Adopted new §217.210(c) requires the FWS to meet permitted effluent limits with any single cell removed from service. This requirement ensures that the design will be able to meet a wastewater facility's permit requirement during routine maintenance or emergency repair of an FWS cell.

Adopted new §217.210(d) requires that an FWS wetland cell have adequate bottom slope to facilitate drainage for maintenance and to maintain appropriate wetlands water depth range along the entire wetlands length under all anticipated operational flow conditions. This allows flexibility to meet local conditions in the design of the cell.

Adopted new §217.210(e) requires parallel treatment trains to increase operational flexibility and to allow routine maintenance without compromising the system.

Adopted new §217.210(f) requires that an FWS wetland cell be oriented to avoid cross winds perpendicular to the process flow direction or use elevated berms or vegetative windbreaks to prevent cross winds. The provision allows the use of elevated berms or vegetative windbreaks, which were not allowed in Chapter 317, to provide more flexibility to meet the needs of the topographical area of the constructed wetland.

Adopted new §217.210(g) contains the requirements relating to FWS inlets and outlets.

Adopted new §217.210(g)(1) requires that the FWS inlets and outlets of a wetland assure uniform flow across the cell. This requirement is included to prevent localized overloading on the treatment system.

Adopted new §217.210(g)(2) requires inlets and outlets to minimize erosion of wetlands substrate by controlling locally high flow velocities.

Adopted new §217.210(g)(3) requires inlet and outlets to allow variations in operational water level to ensure that the cell can treat a fluctuating flow volume.

Adopted new §217.210(g)(4) requires that the inlets be submerged under normal operational conditions to reduce the potential for odors.

Adopted new §217.210(g)(5) specifies that the design allow inspecting and cleaning of inlet and outlet devices for routine maintenance.

Adopted new §217.210(i) contains the design requirements for organic loading and treatment efficiencies of an FWS.

Adopted new §217.210(i)(1) authorizes a constructed wetlands design to be based on organic loading of the facility's primary or secondary effluent. This requirement is included because suspended solids removal efficiency normally does not require separate design consideration, being equally efficient or more efficient than organic removal efficiency.

Adopted new §217.210(i)(2) requires the organic removal treatment efficiency for FWS wetlands be based on the areal loading rate equation (Equation H.3), unless the report justifies an alternate method, the source of the method, and all supporting calculations. This provision is included to allow more site-specific calculations for each FWS wetland.

Adopted new §217.210(j) contains the requirements for vector control.

Adopted new §217.210(j)(1) requires mosquito control using mosquito fish, (Gambusia) other natural predators, aerobic conditions, and other biological controls.

Adopted new §217.210(j)(2) requires design controls to minimize the potential damage to wetlands caused by mammals such as nutria and muskrats, which can damage FWS wetland systems by burrowing into the berms.

Adopted new §217.211, Constructed Wetlands--Subsurface Flow System (SFS) General Design, contains the design criteria for SFS constructed wetlands, which are shallow water bodies populated by various floating and emergent plants. Wastewater flow in SFS wetlands is maintained below the surface of a porous media, such as gravel, where the emergent plants are rooted. Wastewater flows primarily in a horizontal direction and is treated by a variety of physical, biological, and chemical processes.

Adopted new §217.211(a) specifies that SFS media must allow root penetration. Treatment efficiency generally improves with effective root penetration through the entire wetted media depth. The provision requires the report to identify the wetted subsurface media so that the executive director can ensure compliance.

Adopted new §217.211(b) requires that the operational water depth of an SFS wetland not exceed the lesser of 18 inches at design flow or the maximum anticipated root penetration for the emergent plant species.

Adopted new §217.211(c) requires seasonal draw down of the water level to encourage deeper root penetration into the wetted media. This requirement ensures plants have adequate root penetration to grow to maturity and encourages new plant growth.

Adopted new §217.211(d) requires that plant spacing must not exceed 36 inches and be based on the size of the mature plant. The vegetation in an SFS wetland system will take at least one full growing season to mature and that adequate spacing allows for growth of the plants. The requirements for plant spacing are included to ensure that the wetland system will reach maturity in an efficient time frame.

Adopted new §217.211(e) contains the configuration requirements for SFS.

Adopted new §217.211(e)(1) requires multiple cells that may be operated independently, allowing individual cells to be removed from service while maintaining system operations. This provision allows the number of cells that are in service to match the amount of flow that the facility is receiving.

Adopted new §217.211(e)(2) requires that the size of the cells continue to meet permit effluent limits with any single cell out of service. This provision allows the operator to perform routine maintenance without compromising the treatment system.

Adopted new §217.211(e)(3) contains the hydraulic design requirements. An SFS wetland must maintain a minimum media cover to ensure that the cell does not dry out.

Adopted new §217.211(e)(4) specifies that the maximum wetted media depth of an SFS wetland is the lesser of 24-inches at design flow, or the maximum anticipated root penetration for the planned primary population of emergent plant species. Additionally, an SFS wetland must have a dry media cover depth of 6 to 9 inches above the design flow hydraulic gradient. These requirements are included because the hydraulic profile of SFS wetlands may be significantly steeper than FWS systems.

Adopted new §217.211(e)(6) specifies that an SFS wetland must provide parallel treatment trains must be provided to increase operational flexibility. This rule ensures consistency with the free water surface system requirements in this section.

Adopted new §217.211(f) requires the design to include minimum flow distribution, submergence, maintenance, and staged influent feed standards for an SFS system. Constructed wetlands treatment efficiency depends on effective flow distribution, loading, maintenance, and depth of the water. These requirements are included to ensure that the design meets certain minimum standards.

Adopted new §217.211(g) contains the requirements for SFS organic loading and treatment efficiency. This provision is included to allow more site-specific calculations to determine the total suspended solids (TSS) and biochemical oxygen demand (BOD) information for each SFS wetland.

Adopted new §217.211(h) requires that temperature the design of the SFS be adequate to provide treatment at the temperatures expected.

Adopted new §217.211(i) specifies that the vegetation maintenance practices be part of an SFS design. This requirement is included to reduce mosquito breeding opportunities.

Adopted new §217.211(j) requires that the media must be hard rock, slag, or other clean, comparable media material. Synthetic media is nonconforming technology and subject to §217.7(b)(2). These requirements ensure that the proper media is included in the design of an SFS.

Adopted new §217.212, Overland Flow Process, requires that an overland flow process be reviewed as a nonconforming technology. This system does not have a successful track record in Texas.

Adopted new §217.213, Integrated Facultative Lagoons, sets the requirements for new engineering design of integrated facultative lagoons, which the executive director will consider nonconforming technology. The section provides design criteria for integrated facultative lagoons including configuration of inlets and outlets, depth, organic loading, odor control, and removal efficiency.

All the requirements in this section are based on research conducted by Texas Tech University. Research using small-scale facilities has shown that a deeper pit in a facultative lagoon located in the center of the lagoon allows the lagoon to produce a higher quality of effluent using a smaller amount of land. The commission is incorporating the research into this section to provide another option for designing integrated facultative lagoons. This technology can help to reduce the cost and natural resources required for a lagoon system. To ensure that lagoons designed using this research are appropriate for full-scale facilities, the executive director will review all integrated facultative lagoons as nonconforming technology.

SUBCHAPTER J: SLUDGE TREATMENT UNITS

Subchapter J contains more detailed requirements than were contained in Chapter 317. Sludge management and sludge handling technology has advanced as disposal has become more expensive and more of a public issue. Today, there are more environmentally compatible ways to manage sludge, many, such as beneficial land application, enhance the environment rather than taxing it like landfilling sludge.

Adopted new §217.241, General Requirements, sets the minimum design requirements for sewage sludge treatment processes and treatment units; defines the sludge process to include thickening, stabilization, and dewatering; and requires the engineer to base the selection and operation of the sludge unit processes on the final sludge product. Additionally, this section requires that all municipal wastewater treatment facilities that dispose of sludge under Chapter 312 must stabilize the sludge and that all municipal wastewater treatment facilities that dispose of sludge under Chapter 330 must comply with the requirements of that chapter.

Adopted new §217.242, Control of Sludge and Supernatant Volumes, contains the requirements for controlling sludge supernatant volumes. This section ensures that the facility will transfer waste sludge to the sludge digester in a manner that minimizes the volume of digester supernatant. The supernatant from thickeners and digesters must be returned to the head of the treatment works or to the aeration system.

Adopted new §217.243, Sludge Pipes, provides the requirements for pipes used in the treatment of sludge. The piping design must be an adequate size, allow for cleaning, and prevent blockages and corrosion.

Adopted new §217.244, Sludge Pumps, contains the design standards for sludge transfer pumps, based on the quantity and character of the anticipated solids load and adequate redundancy.

Adopted new §217.245, Exclusion of Grit and Grease from Sludge Treatment Units, incorporates provisions of Chapter 312 into the design criteria for wastewater treatment facilities. These provisions are included to ensure that the design criteria rules are consistent with Chapter 312 requirements.

Adopted new §217.246, Ventilation and Odor Control, provides the ventilation requirements for wastewater treatment facilities to eliminate the presence of fumes or gases. This requirement is included to ensure that the design of the ventilation system eliminates the danger to human health and the environment in areas where the presence of fumes or gases rise to a level that might constitute a public health hazard or a threat to air quality. It also requires the sludge treatment design to minimize potential nuisance odors.

Adopted new §217.247, Chemical Pretreatment of Sludge, establishes criteria incorporating new state and federal requirements from 40 CFR Part 503 and Texas Health and Safety Code, Chapter 361, for the use and handling of chemicals used to enhance solids removal, necessary for many sludge treatment or processing units.

Adopted new §217.247(a) requires that chemical used in the pretreatment of sludge be compatible with the treatment process and not affect water quality.

Adopted new §217.247(b) requires that the choice and amount chemicals be based on pilot or field data.

Adopted new §217.247(c) requires chemicals to be stored safely.

Adopted new §217.247(d) states the requirements for a liquid storage tank.

Adopted new §217.247(e) requires activated carbon properly stored due to its combustible properties.

Adopted new §217.247(f) requires explosion-proof electrical devices in areas where volatile or explosive chemicals are used.

Adopted new §217.247(g) prohibits the discharge of volatile chemicals.

Adopted new §217.247(h) requires the facility to maintain a 30-day supply of needed chemical to ensure uninterrupted operations, unless an alternate method of ensuring uninterrupted service is included in the report.

Adopted new §217.247(i) requires chemical tanks to be an adequate size to operate at design flow.

Adopted new §217.247(j) requires written procedures for measuring chemical mixed into solutions to ensure that solutions contain the appropriate amount of each chemical required for treating sludge.

Adopted new §217.247(k) requires tank and pipe material to be appropriate to the chemicals being used. The material should be resistant to any reaction caused by the chemicals in use.

Adopted new §217.247(l) prohibits mixing chemicals prior to preparing the feed solution to prevent unintended chemical reactions.

Adopted new §217.247(m) prohibits storing a concentrated liquid acid in an open vessel and requires it be transferred directly to the point of use. This requirement is included to prevent the chemical reactions that can concentrated acids can undergo when exposed to air or moisture.

Adopted new §217.247(n) requires concentrated liquid acid storage containers be able to prevent discharge or unintended chemical reactions.

Adopted new §217.247(o) requires a toxic material to be transferred by a device that is engaged by the action of a person or automatic controller upon demand. This requirement is included to protect facility staff, human health, and the environment.

Adopted new §217.247(p) requires that a facility have a method for dust control during the transfer of dry chemicals. This requirement is included to protect facility staff, human health, and the environment.

Adopted new §217.247(q) requires disposal of chemicals and chemical containers be done in compliance with the waste disposal requirements in Chapter 335.

Adopted new §217.247(r) contains the requirements chemical feed equipment, including structures, redundancy, design, capacity, spill containment, controls, scales, protection, water supply, solution tanks, and application. These requirements are included to ensure that the sludge pretreatment process is designed for adequate and safe operation.

Adopted new §217.248, Sludge Thickening, establishes minimum criteria for sludge thickening for use in volume reduction and conditioning as an aid to processing and managing the sludge waste stream. Sludge thickening is optional. If sludge thickeners are used, the criteria outlined in this section must be used.

Adopted new §217.248(a) contains general requirements for thickeners. Section 217.248(a)(1) requires that the thickeners be capable of operating during the two-hour peak flow. The commission adopts this requirement to be consistent with clarifier design requirements and disinfection design requirements. Section 217.248(a)(2) requires that the sludge thickening system have a bypass. All facilities with a design flow greater than 1.0 mgd must have dual units, an alternate means of thickening, or an alternate disposal method. This requirement ensures that the facility is designed to manage its sludge if the sludge thickening system is out of service.

Adopted new §217.248(b) contains the requirements for mechanical gravity thickeners that ensure these thickeners will meet engineering standards and properly thicken the sludge by allowing the solids to settle and the liquid to be scraped away. The requirements also ensure that the executive director has sufficient information to review the design of the thickeners.

Adopted new §217.248(c) contains the design criteria for dissolved air flotation thickeners, which includes equipment feature requirements and design requirements.

Adopted new §217.248(d) contains the design criteria for centrifugal thickeners. The executive director may require pilot or field data for the review of any centrifugal thickener design.

Adopted new §217.248(e) contains the design criteria for gravity belt thickeners, which includes equipment feature requirements and design requirements.

Adopted new §217.249, Sludge Stabilization, contains the requirements for sludge stabilization based on requirements in 40 CFR Part 503 and Chapter 312. This provision addresses the stabilization processes including anaerobic digestion, aerobic sludge digestion, heat stabilization, and alkaline addition. In addition, the section states the requirements for anaerobic digesters. Additionally, the design requirements for the stabilization processes in this section are based on the assumption that the process is the sole stabilization process employed at the facility. If a facility employs series of two or more stabilization processes or methods, the report must justify a variance for reducing these requirements.

Adopted new §217.249(c) contains the requirements for anaerobic digestion. Section 217.249(c)(1) requires that a facility with a design flow exceeding 0.4 mgd have a minimum of two anaerobic digesters, so each digester may be used as a first stage or primary reactor for treating primary and secondary sludge flows. Each digester must have the means for transferring a portion of its contents to other digesters. A facility without multiple digesters must have an emergency storage basin, so the digester may be taken out of service. This provision allows the operator to perform routine maintenance without compromising the treatment system.

Adopted new §217.249(d) specifies that the anaerobic digester must provide a minimum of six feet of storage depth for supernatant liquor. This requirement is included to be consistent with standard engineering practice.

Adopted new §217.249(e) requires that the design allow access to all units that require maintenance. This provision allows the operator to perform routine maintenance without compromising the treatment system.

Adopted new §217.249(f) requires that a digester bottom slope towards the withdrawal drain pipe. The rule prohibits a flat-bottomed digestion chamber. The requirement is included to ensure the effective removal of the digester contents.

Adopted new §217.249(g) requires that the top of the digester have at least two access manholes and a gas dome. One manhole must have sufficient diameter to permit the use of mechanical equipment to remove grit and sand. A digester system must have a separate side wall manhole at ground level. This requirement is included to ensure that the digester is accessible for maintenance without compromising the system.

Adopted new §217.249(h) requires that the operation and maintenance manual require the use of non-sparking tools, rubber-soled shoes, safety harness, gas detectors for flammable and toxic gases, and at least one self-contained breathing apparatus. These requirements are included to ensure that unsafe working conditions for facility staff do not interrupt or stop the functions of the facility. An interruption of the treatment processes at a facility could compromise the protection of human health and the environment.

Adopted new §217.249(i) requires that a digester have multiple sludge inlets, outlets, and at least three recirculation sections and discharge points to facilitate effective mixing of the digester contents. One inlet must discharge above the liquid level and be located at the center of the digester. Raw sludge inlet discharge points must be located to minimize short circuiting to the supernatant draw-off. This requirement is included to ensure consistency with standard engineering practices.

Adopted new §217.249(j) contains the requirements for digester capacity. The digester capacity must be designed to process the expected volume and character of the sludge. The report must include the calculations to justify the basis of design. These requirements are included to ensure that the executive director has sufficient information to review the design for digester capacity and to be consistent with requirements in Chapter 312 and 40 CFR Part 503.

Adopted new §217.249(k) contains the requirements for gas collection pipes, storage, and appurtenances. This rule is included to be consistent with standard engineering practices and to allow routine maintenance without compromising the treatment system.

Adopted new §217.249(l) requires that the waste gas burners be accessible and must be located at least 50 feet away from any structure if placed at ground level. The waste gas burners may be located on the roof of the control building. The waste gas burners must not be located on top of the digester. The discharge of less than 100 cubic feet per hour (CFH) of digester gas through a return bend screened vent with a flame trap terminating at least 10 feet above the walking surface is allowed. These requirements are included to ensure that unsafe working conditions for facility staff do not interrupt the functions of the facility. An interruption of the treatment processes at a facility could compromise the protection of human health and the environment.

Adopted new §217.249(m) requires that all underground enclosures connected to anaerobic digesters tanks, gas pipes, or sludge equipment have forced ventilation in accordance §217.246. All underground enclosures must include tightly fitting, self-closing doors to minimize the spread of gas. This requirement is included to prevent the accumulation of explosive gases in underground enclosures.

Adopted new §217.249(n) requires that the system have a gas meter with a bypass to measure total gas production, which is an indicator of the activity in the digester. This requirement is included to authorize the operator to monitor the activity in the digester.

Adopted new §217.249(o) requires that the gas manometers have shut-off vents and vent cocks. The vent pipes must extend outside the buildings. The vent pipe openings must have screens and be arranged to prevent the entrance of rainwater, which can cause fouling of the manometers. The safety devices are required for the manometer pipe system.

Adopted new §217.249(p) requires the gas pipes for anaerobic digesters be equipped with pressure gauges. These requirements are included to ensure that unsafe working conditions do not interrupt the functions of the facility. An interruption of the treatment processes at a facility could compromise the protection of human health and the environment.

Adopted new §217.249(q) contains the requirements for digestion temperature control. These requirements are included to be consistent with standard engineering practices.

Adopted new §217.249(r) contains the requirements for supernatant withdrawal. This requirement is included to ensure the proper operation of the digester, to prevent damage to the unit, and to ensure that the executive director has sufficient information to review the report.

Adopted new §217.249(s) contains the requirements for digester covers. It prohibits uncovered anaerobic digesters; requires pipes be arranged to minimize air in the gas chamber; requires a digester cover to include a gas chamber, be gas tight, be tested, and be equipped with an air vent with a flame trap, a vacuum breaker, and a pressure relief valve.

Adopted new §217.249(t) contains the requirements for aerobic sludge digestion and applies to the stabilization of waste sludge to Class B biosolid by aerobic digestion. Class B biosolid is defined in Chapter 312. This requirement is included to be consistent with Chapter 312 and to ensure that the executive director has sufficient information to review the report. Adopted new §217.249(t)(5) - (7) is included to ensure the efficient operation of the system and to be consistent with Chapter 312 and 40 CFR Part 503.

Adopted new §217.249(u) contains the requirements for heat stabilization. The system must operate continuously to minimize additional heat input required to start up the system. This requirement is included to be consistent with standard engineering practices Chapter 312 and 40 CFR Part 503.

Adopted new §217.249(v) requires that the report must identify the method of treatment for recycle streams from heat treatment. The recycle streams must not impact effluent quality or the facility's treatment processes. This requirement is included to ensure that the executive director has sufficient information to review the report and to be consistent with standard engineering practices.

Adopted new §217.249(w) contains the requirements for alkaline stabilization. The design must include provisions for maintenance and repair based on data from comparable facilities and adequate storage for process, feed, and downtime. This requirement is included to be consistent with standard engineering practices Chapter 312 and 40 CFR Part 503, for vector and pathogen reduction. It also ensures the executive director has sufficient information to review the report.

Adopted new §217.250, Sludge Dewatering, contains the minimum design criteria for comprehensive consideration of sewage sludge dewatering unit processes, including general requirements, sludge conditioning, sludge drying beds, innovative sludge drying beds, rotary vacuum filtration, centrifugal dewatering, plate and frame presses, and belt presses.

Adopted new §217.250(a) requires the report to include justification for the sludge dewatering design.

Adopted new §217.250(b) requires the sludge dewatering design be based on mass balance principles.

Adopted new §217.250(c) contains general dewatering requirements. Section 217.250(c)(1) requires the drainage from beds and centrate or filtrate from dewatering units to be returned to the head of the facility for treatment. The organic loading from the centrate or filtrate must be included in the design of the facility's treatment units.

Adopted new §217.250(c)(2) requires that the dewatering system not allow the release of constituents that threatens water quality or wastewater permit compliance.

Adopted new §217.250(c)(3) contains the requirements for redundancy. This provision is included to allow operations during breakdowns and routine maintenance without compromising the treatment system and to be consistent with standard engineering practices.

Adopted new §217.250(c)(4) contains storage requirements. These requirements are included to prevent nuisance odor conditions, to be consistent with standard engineering practice, and to ensure the protection of human health and the environment.

Adopted new §217.250(c)(5) requires that the dewatering system have sampling stations before and after each dewatering unit or any other segment of the unit identified in the report and allow periodic evaluation of the dewatering process. This requirement is included to ensure efficient operation of the facility.

Adopted new §217.250(c)(6) requires that all dewatering system units must have bypass capabilities to allow maintenance. This provision is included to authorize the operator to perform routine maintenance without compromising the treatment system.

Adopted new §217.250(d) contains the requirements for sludge conditioning. These requirements are included to be consistent with standard engineering practices and to ensure that the executive director has sufficient information to review the report.

Adopted new §217.250(e) contains the requirements for sludge drying beds. The sludge drying beds size must be based on data from similar facilities in the same geographical area with the same influent sludge characteristics. If such data is unavailable or if the executive director determines that the data is not appropriate for the proposed facility, the sludge drying bed design must be based on the requirements in §217.250(e)(2) - (5). These requirements are included to authorize a sludge drying bed to be designed for the geographic region, consistent with current engineering practices, and protective human health and the environment.

Adopted new §217.251, Sludge Storage, contains specific criteria for the storage of residuals after processing and prior to final disposal or removal from the site, including general criteria, solids storage, dewatered solids storage, and dried solids storage to protect the environment. Staff experience has shown that some facility designs have failed to include sludge storage.

Adopted new §217.251(a) specifies that this section applies to sludge after processing and before disposition or disposal.

Adopted new §217.251(b) states that sludge may be stored in liquid, dewatered, or dry forms, if properly processed.

Adopted new §217.251(c) contains general requirements. These requirements are included to ensure that the sludge storage minimize nuisance conditions. Additionally, the requirement that the report include a solids management plan is to ensure that the executive director has sufficient information to ensure compliance with these rules.

Adopted new §217.251(d) contains the requirements for non-dewatered solids storage that are consistent with standard engineering practices. Section 217.251(d)(2) authorizes a storage facility to store anaerobically digested solids in covered basins that control odor. The executive director determined that this option is protective of human health and the environment.

Adopted new §217.251(e) contains the requirements for dewatered solids storage. The commission adopts these requirements to be consistent with standard engineering practices.

Adopted new §217.251(f) contains the requirements for open stockpiles, including an impervious pad and the ability to collect rainfall runoff and return it to the head of the treatment facility. Because rainfall runoff from stockpiles will not meet the discharge limits for storm water, the water must be treated.

Adopted new §217.251(g) contains the requirements for dried solids storage. This requirement is included to be consistent with standard engineering practices.

Adopted new §217.252, Final Use or Disposal of Sludge, contains the criteria for the final use or disposal of sewage sludge, including quantities of solids, pollutants, pathogens, vector attraction, emergency provisions and weather factors.

Adopted new §217.252(b) requires the quantity of solids generated by the treatment process must be based on similar full scale facilities or pilot facilities and a mass balance. This requirement is included to be consistent with Chapter 305.

Adopted new §217.252(c) requires the sludge use or disposal option be based on the character of the sludge. The pollutant levels must be less than the levels specified in §312.82 and determined by Standard Method's laboratory test procedures.

Adopted new §217.252(d) requires that metals, pathogens, and vector attraction meet the requirements of Chapter 312 concerning the ultimate use or disposal method.

Adopted new §217.252(e) requires that the design include a backup plan in the event of equipment failure or conditions that prevent the facility's primary use or disposal method. The requirement to include the secondary plan in the report ensures that the executive director has sufficient information to review the design.

Adopted new §217.252(f) requires the design to include contingencies for weather factors such as rainfall, wind conditions, and humidity in the selection of the use or disposal of sewage sludge. This requirement is included to account for site-specific conditions.

SUBCHAPTER K: CHEMICAL DISINFECTION

The requirements in this subchapter are related to disinfecting treated effluent with chlorine and the subsequent dechlorination of the effluent. Chlorine and sulfur dioxide are toxic, oxidizing

chemicals, which makes them very effective for disinfection and dechlorination. But, both are harmful or fatal if inhaled. These required specifications represent commonly accepted best practices for the safe handling of these hazardous chemicals and should be considered minimum requirements to protect facility staff, the public, and the environment.

The requirements also ensure consistency with permitting requirements for facilities that use chlorination disinfection and have a Texas Pollutant Discharge Elimination System (TPDES) permit that are required to conduct biomonitoring. Dechlorination is a requirement of these permits.

Adopted new §217.271, Chlorine (Cl_2) Disinfection and Sulfur Dioxide (SO_2) and Dechlorination System Redundancy Requirements, contains the redundancy requirements to ensure continuing operation of the disinfection system.

Adopted new §217.271(a) requires each chlorine disinfection system to have at least two banks of chemical cylinders.

Adopted new §217.271(b) requires that a bank of cylinders automatically switch from an empty bank to a full bank of cylinders in a manner that ensures continuous disinfection.

Adopted new §217.271(c) requires that the facility to have sufficient space to store empty cylinders.

Adopted new §217.271(d) requires that the chemical delivery system so that the pound per day requirements in §217.272 are met with the largest chlorinator, sulfonator, or evaporator out of service.

Adopted new §217.271(e) requires that a chemical delivery system include backup pumps for any injector water supply systems requiring booster pumps. These requirements are included to ensure that this subsection is consistent with the other redundancy requirements in this rule.

Adopted new §217.272, Capacity and Sizing of Chlorine (Cl_2) Disinfection and Sulfur Dioxide (SO_2) Dechlorination Systems, contains the requirements for determining capacity and size of the system.

Adopted new §217.272 (a) requires the capacity of the chlorine and sulfur dioxide gas withdrawal systems be based on the two-hour peak flow in accordance with organic and hydraulic loading requirements in §217.32(1), EquationK.1 (a standard engineering equation), and Table K.1 (minimum concentration needed for disinfection). This requirement is included to ensure consistency in the design criteria rules.

Adopted new §217.272(b) establishes the minimum chlorine dosage necessary for disinfection in Table K.1.

Adopted new §217.272(c) requires the dechlorination system design to include at least an equal amount of sulfur dioxide as chlorine.

Adopted new §217.273, Cylinder Requirements for Chlorine (Cl_2) Disinfection and Sulfur Dioxide (SO_2) Dechlorination Systems, contains the general requirements for using chemicals stored in cylinders for disinfection and dechlorination.

Adopted new §217.273(a) requires gas withdrawal rates to be based on Equation K.2, using the variables in Table K.2 and sets maximum withdrawal rates for liquid chemicals. It also prohibits the use of heating blankets on chlorine gas cylinders.

Adopted new §217.273(b) sets the number of cylinders required based on Equation K.3.

Adopted new §217.274, Dosage Control for Chlorine (Cl_2) Disinfection and Sulfur Dioxide (SO_2) Dechlorination Systems, requires systems to have automatic controls that adjust chemical levels to meet effluent flow levels.

Adopted new §217.275, Requirements for Chlorine (Cl_2) Disinfection and Sulfur Dioxide (SO_2) Dechlorination Systems Using 150 pound (lb) Cylinders, contains the requirements for the smaller of the two cylinder sizes that facilities can use. Chemicals are always withdrawn from this size cylinder in a gaseous state.

Adopted new §217.275(a) states the requirements for storing cylinders in heated rooms.

Adopted new §217.275(b) states the requirements for using heating blankets on cylinders. Heating blankets are prohibited on chlorine cylinders because of the inherent dangers of chlorine. Heating blankets may be used on sulfur dioxide cylinders, but only if it does not heat the cylinder above 100 degrees and has the required safety features.

Adopted new §217.275(c) requires that chlorine and sulfur dioxide cylinders are stored separately and are handled so that they never come into close proximity to each other.

Adopted new §217.276, Requirements for Chlorine (Cl_2) Disinfection and Sulfur Dioxide (SO_2) Dechlorination Systems Using Gas Withdrawal from One-Ton Cylinders, contains the requirements for using the larger cylinder size and drawing the chemicals from them in the gaseous state.

Adopted new §217.276(a) requires the equipment that injects the chemicals into the effluent to be in a temperature controlled room because temperature affects gas pressure and therefore the chemical dosing levels.

Adopted new §217.276(b) states the requirements for storing cylinders outdoors, including the requirements for sizing, storage facilities, and piping.

Adopted new §217.276(c) prohibits the use of heating blankets on chlorine cylinders and proscribes the requirements for using heating blankets on sulfur dioxide cylinders.

Adopted new §217.276(d) states the requirements for maintaining the separation between chlorine cylinders and sulfur dioxide cylinders.

Adopted new §217.277, Requirements for Chlorine (Cl_2) Disinfection and Sulfur Dioxide (SO_2) Disinfection Systems Using Liquid Withdrawal from One-Ton Cylinders, contains the requirements related to withdrawing chemicals from large cylinders in a liquid state.

Adopted new §217.277(a) requires the equipment that injects the chemicals into the effluent to be in a temperature controlled room because temperature affects gas pressure and therefore the chemical dosing levels. Even with liquid withdrawal, chemicals are in a gaseous state when injected into the effluent stream.

Adopted new §217.277(b) requires withdrawal at the limits set in §217.273(a)(2).

Adopted new §217.277(c) states the requirements for maintaining the separation between chlorine cylinders and sulfur dioxide cylinders.

Adopted new §217.278 Housing Requirements for Chlorine (Cl_2) Disinfection and Sulfur Dioxide (SO_2) and Dechlorination Systems, contains the requirements for housing facilities for chemi-

cals, including drainage, door and windows, ventilation, and gas detectors and protection.

Adopted new §217.278(a) requires that the drainage system for a room that contains either chlorine or sulfur dioxide be separate from every other drain system to ensure that chlorine or sulfur dioxide does not migrate into other areas and does not mix with any other substances.

Adopted new §217.278(b) contains the requirements for openings into a room that contains chlorine or sulfur dioxide equipment or cylinders. These requirements ensure the safety of facility staff and the safe operation of the disinfection system.

Adopted new §217.278(c) requires that any room that contains chlorine or sulfur dioxide equipment or cylinders have ventilation sufficient to prevent a buildup of chemical fumes. These requirements ensure the safety of facility staff and the safe operation of the disinfection system.

Adopted new §217.278(d) requires that any room that contains pressurized chlorine or sulfur dioxide equipment or cylinders have detection and protection devices. These requirements ensure the safety of facility staff and the safe operation of the disinfection system.

Adopted new §217.279, Equipment and Material Requirements for Chlorine Disinfection (Cl_2) and Sulfur Dioxide (SO_2) Dechlorination Systems, includes the specification necessary to ensure that equipment and material used in chlorine/sulfur dioxide systems are appropriate for that use.

Adopted new §217.279(a) ensures that equipment and materials used in these systems were designed and manufactured to be compatible with these chemicals.

Adopted new §217.279(b) ensures that cylinders are stored appropriately.

Adopted new §217.279(c) contains the requirements for gas piping for chlorine/sulfur dioxide systems. These requirements ensure the safe transfer of chemicals in a gaseous state.

Adopted new §217.279(d) contains the requirements for piping for liquid chlorine/sulfur dioxide. These requirements ensure the safe transfer of chemicals in a liquid state.

Adopted new §217.280, Design of Sodium Hypochlorite (NaClO) Disinfection and Sodium Bisulfite ($NaSO_3$) Dechlorination Systems, contains the requirement for systems that use alternate chemicals to achieve chlorination and dechlorination.

Adopted new §217.280(a) contains the requirements to ensure that the system can operate during times that a pump is out of service.

Adopted new §217.280(b) contains the capacity sizing requirements for a sodium hypochlorite/sodium bisulfite system. These requirements ensure that the designed size of the system is appropriate for the amount and properties of the facility's effluent.

Adopted new §217.280(c) contains the requirement for automatic control of positive-pressure chemical dosing.

Adopted new §217.280(d) contains the requirements for proper chemical handling, including storage and temperature considerations. These requirements ensure the safe storage and transfer of sodium hypochlorite and sodium bisulfite.

Adopted new §217.280(e) requires that the equipment and materials used in a sodium hypochlorite/sodium bisulfite system be designed and manufactured to be compatible with these chemicals.

Adopted new §217.280(f) contains the safety requirement for a hypochlorite/sodium bisulfite system, including ventilation, tank indicator, spill containment, and emergency and protective equipment for facility staff. These chemicals are liquid and are therefore not as great a safety risk as chlorine and sulfur dioxide.

Adopted new §217.281, Application of Chlorination and Dechlorination Chemicals, contains the requirements to ensure that chemicals are added to effluent in an effective manner.

Adopted new §217.281(a) requires that chlorine is thoroughly mixed with effluent before the calculation of the chlorine contact time begins.

Adopted new §217.281(b) ensures that chlorine contact basins are properly sized to allow the necessary chlorine contact time.

Adopted new §217.281(c) ensures that the effluent is dechlorinated sufficiently to meet the limits of the facility's permit. *Adopted new §217.282, Other Chemical Disinfection or Dechlorination Processes*, requires that any chemical process not covered by Subchapter K must be approved through the variance process in §217.7(b)(2).

Adopted new §217.283, Post-Disinfection Requirements, contains the design requirements necessary for the treatment train after the disinfection units.

Adopted new §217.283(a) requires the design include a sufficient number access points from which effluent samples may be taken so that the system may be monitored and adjust to keep the disinfection/dechlorination process within the limits of the wastewater permit.

Adopted new §217.283(b) requires that the disinfection/dechlorination system be designed to be capable of maintaining the permitted dissolved oxygen levels in the effluent. For facilities with high dissolved oxygen minimum limits, the report must justify the design.

SUBCHAPTER L: ULTRAVIOLET LIGHT DISINFECTION

This subchapter regulates the use of ultraviolet light to disinfect wastewater. Ultraviolet (UV) is a growing segment of the disinfection technology. An advantage of UV disinfection is that it does not require the addition of chemicals and thereby avoids the environmental impact of production, transport, and disposal of disinfection chemicals.

Adopted new §217.291, Ultraviolet Light Disinfection System Definitions, contains definitions specific to this subchapter.

Adopted new §217.292, Ultraviolet Light Disinfection Systems Effluent Limitations, requires UV systems to be designed with the capability of meeting the permit limits regarding disinfection in the facility's wastewater permit.

Adopted new §217.293, Ultraviolet Light Disinfection Systems Redundancy Requirements, requires UV systems to have sufficient backup equipment to be able to provide disinfection during equipment outages for maintenance or repairs.

Adopted new §217.294, Ultraviolet Light Disinfection Systems Monitoring and Alarms, contains the monitoring and alarm requirements that allow an operator to monitor and adjust the UV system and alert an operator of a problem. This requirement is included to ensure proper operations during normal operating and emergency situations.

Adopted new §217.295, Ultraviolet Light Disinfection Dosage and System Sizing, contains the requirement for designing the amount of UV required and the size of the UV system. This requirement is included to ensure that a UV system is capable of delivering adequate disinfection to meet permitted effluent limits.

Adopted new §217.296, Ultraviolet Light Disinfection Bioassay Test Procedure, contains the requirement for the bioassay test used as the basis for UV dosing and system sizing. This requirement is included to ensure the reliability of the bioassay.

Adopted new §217.297, Ultraviolet Light Disinfection Reactor Design, contains the specifications for a UV reactor. This requirement is included to ensure the UV reactor meets engineering standards.

Adopted new §217.298, Ultraviolet Light Disinfection System Cleaning and Maintenance, contains the requirement that the design of a UV system must allow adequate cleaning and maintenance. This requirement is included because cleaning and maintenance are essential for proper operation of a UV system.

Adopted new §217.299, Ultraviolet Light Disinfection System Safety, contains the requirement that personal safety equipment must be worn by any person entering the UV area. This requirement is included to protect operators, contractors, investigators and any other person who might be exposed to UV light by the UV disinfection system.

Adopted new §217.300, Post-Disinfection Requirements,contains the design requirements necessary for the treatment train after the disinfection units.

Adopted new §217.300(a) requires the design include a sufficient number of access points from which effluent samples may be taken so that the system may be monitored and adjust to keep the disinfection process within the limits of the wastewater permit.

Adopted new §217.300(b) requires that the disinfection system be designed to be capable of maintaining the permitted dissolved oxygen levels in the effluent. For facilities with high dissolved oxygen minimum limits, the report must justify the design.

SUBCHAPTER M: SAFETY

Subchapter M is included to ensure that wastewater collection systems and treatment facilities provide safe working conditions. Safety-related incidents often result in an environmental threat or incident. To protect public health and the environment, a system or facility must be designed to be safe for the workers who operate it.

Adopted new §217.321, Safety Design, specifies the general safety guidelines for designing collection systems and treatment facilities.

Adopted new §217.321(a) requires a facility design to be based on a widely accepted safety design standard. This requirement is included to ensure that unsafe working conditions for staff do not interrupt the facility's functions.

Adopted new §217.321(b) requires collection system and treatment facility designs to address workplace safety and the safety of the public located near the system or facility.

Adopted new §217.321(c) requires the design specifies treatment processes that use non-hazardous, non-toxic, less hazardous, less toxic, dilute chemicals, and a minimum inventory of chemicals. This requirement is included to ensure that only the minimum amount of chemicals needed to produce a quality effluent are used. This will limit the likelihood of human exposure, spills, and contamination of groundwater or surface water.

Adopted new §217.321(d) requires that the applicable standards in 29 CFR Part 1910, Occupational Safety and Health Administration (OSHA), be the basis for the safety elements in the design of a collection system or treatment facility.

Adopted new §217.321(e) requires the owner to demonstrate compliance with this section by implementing §217.322 and §217.323. This requirement is included to ensure that the safety aspects of the design are verifiable.

Adopted new §217.322, Safety and Security Audits, requires a collection system or treatment facility owner to conduct a safety audit of the working conditions. The commission envisions these audits being conducted by the owner, the design engineer, and facility staff. The intent of this requirement is to ensure that safety is an integral part of any design. Security audits are not required but are strongly encouraged.

Adopted new §217.322(a) requires that the owner of an existing facility being materially altered or expanded review the safety related injuries and incidents from the prior three years, identify problem locations and tasks, report any corrective action taken, and address any outstanding problems in the design of the facility upgrade.

Adopted new §217.322(b) authorizes an owner to evaluate the security of a collection system or treatment facility based on *Asset Based Vulnerability Checklist for Wastewater Utilities* by the Association of Metropolitan Sewerage Agencies (AMSA) or its equivalent. This section is included to be consistent with the National Homeland Security Act. At this time, the United States Department of Homeland Security is recommending, but not requiring, a security audit.

Adopted new §217.323, Hazardous Operation and Maintenance, requires an owner to perform an analysis of hazardous operation and maintenance activities for new, expanded, or materially altered facilities. From that analysis, the owner must develop an inventory of necessary equipment, tools, and supplies needed for each task. The tools supplied must be sufficient to allow workers to safely and properly operate equipment, to perform required preventive maintenance, and to make repairs according to manufacturers' recommendations.

Adopted new §217.324, Chemical Handling, requires that the necessary equipment is available for personnel to handle chemicals safely and to address any accident that may happen.

Adopted new §217.325, Railings, Ladders, Walkways, and Stairways, specifies criteria for the use of railings, ladders, walkways, and stairways contained in safety requirements from the Occupational Safety and Health Act, §1910.23.

Adopted new §217.326, Electrical and Fire Code Compliance, requires that electrical design must conform to local electrical codes or if none, to the National Electrical Code.

Adopted new §217.327, Non-Potable Water, explains that when non-potable water is made available to any part of the plant, all yard hydrants and outlets must be properly marked.

Adopted new §217.328, Facility Access Control, requires that the facility area be completely fenced, have lockable gates at all access points, and have a means of access during 100-year flood conditions. This requirement is included to allow flexibility in the access control design of a treatment facility.

Adopted new §217.329, Color Coding of Pipes, specifies the color coding for pipes used in a wastewater facility. Standardization of color coding makes it safer for staff who change facilities and commission investigators who visit many facilities. These colors were chosen because they correspond with national standards provided by the American Water Works Association (AWWA) and the Water Environment Federation (WEF). The colors for the wastewater and related pipes are from the WEF and the colors for water and related pipes are from the AWWA.

Adopted new §217.330, Public Drinking Water Supply Connections, requires a facility with a potable water connection to have double check backflow preventers at the water main and atmospheric vacuum breakers for all potable water wash down hoses. These requirements protect the potable water supply from cross contamination.

Adopted new §217.331, Freeze Protection, requires the facility design to prevent ice formation on equipment that might be damaged by ice and to prevent personnel from walking on icy surfaces.

Adopted new §217.332, Noise Levels, requires that the noise levels in all working areas must remain below standards established by the Occupational Safety and Health Act, and prohibits removable noise attenuations.

Adopted new §217.333, Confined Spaces, requires that the design of collection systems and treatment facilities minimize the use of confined spaces as defined in 29 CFR §1910.146. Confined spaces present an inherent danger to personnel required to work in them.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225, because it does not meet the criteria for a "major environmental rule" as identified in that statute. Major environmental rule is defined as 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. This rulemaking does not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of this rulemaking is to update the design standards and criteria for wastewater treatment systems to current engineering practices and include recent advances in wastewater treatment technologies. Additionally, the adopted rules will allow increased flexibility to attain the design standards and criteria; update the standards and criteria to reflect the commission's related permitting practices; and amend and specify the commission's review and approval process for proposed wastewater treatment facility projects. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Specifically, the adopted rule does not exceed a federal standard because no applicable federal standards exist. The adopted rule does not exceed an express requirement of state law nor exceed a requirement of a delegation agreement. The adopted rule was not developed solely under the general powers of the agency; but also under the specific authority of TWC, §26.034. Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because the adopted repeals do not constitute a major environmental rule, a regulatory impact analysis is not required. The commission solicited public comment regarding this draft regulatory impact analysis determination. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission performed an assessment of these rules in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to update the design standards and criteria for wastewater treatment systems to current engineering practices and include recent advances in wastewater treatment technologies. Additionally, the adopted rules will allow increased flexibility to attain the design standards and criteria; update the standards and criteria to reflect the commission's related permitting practices; and amend and specify the commission's review and approval process for adopted wastewater treatment facility projects. Promulgation and enforcement of these rules will constitute neither a statutory nor a constitutional taking of private real property. This rulemaking will impose no burdens on private real property because the adopted rule neither relates to, nor has any impact on the use or enjoyment of private real property, and there is no reduction in value of the property as a result of this rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

CMP goals applicable to the adopted rule are: to protect; preserve; restore; and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; and, to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone.

CMP policies applicable to the adopted rule include the standards for the discharge of municipal and industrial wastewater to coastal waters in 31 TAC §501.14(f) and standards for development in critical areas in 31 TAC §501.14(h).

The rules are consistent with the goals and policies of the Coastal Management Program because, even though these rules do not directly govern wastewater discharge permits but rather set the minimum criteria for designing wastewater treatment facilities, the rules are written to support the commission's rules that do govern wastewater discharge permits. Additionally, these rules are as stringent as the existing design criteria; therefore, there will be no reduction in the quality of the effluent reaching the receiving waters.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies. The adopted rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any Coastal Natural Resource Areas, and because the adopted rules do not reduce the quality of the effluent reaching the receiving waters. The commission invited public comment regarding the consistency of the rules with the CMP. No comments were received regarding the consistency of the rules with the CMP.

PUBLIC COMMENT

The proposal was published on March 14, 2008 in the *Texas Register* (33 TexReg 2126). The commission held a public hearing on this proposal in Austin on April 10, 2008, at 10:00 a.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building B, Room 201A. The comment period closed on April 14, 2008. No comments were received at the hearing.

The Commission received comments from the City of Garland (Garland), Process Engineered Equipment Company (PEECO), Trojan Technologies (Trojan), UtraTech Systems, Inc. (UltraTech), Water Environment Association of Texas (WEAT), Texas Parks and Wildlife Department (TPWD), Harris County, and seven individuals. The comments received addressed specific technical issues or requested clarification of certain sections of the rule. The commission requested and received clarification from Trojan regarding its comments.

RESPONSE TO COMMENTS

GENERAL COMMENTS

Comment

An individual asked what modifications or changes in equipment would trigger the new design criteria to be required for an existing system.

Response

Only new construction or changes that alter the efficiency of a treatment facility or collection system will be subject to the new design criteria. TWC, §26.034(b) gives the commission the authority to review plans and specifications for any proposed construction or material alterations that affect the efficiency of a treatment works. To clarify the rule and to more closely reflect the statute, the commission inserted a definition of "materially alter." The commission also changed rule language that referred to "modify," "modification," and "substantial modification" to "materially alter" or "material alteration."

Comment

An individual asked what modification would trigger a requirement that an existing lift station install generator connections.

Response

Existing lift stations will not be subject to §217.36, Emergency Power Requirements, unless the lift station is materially altered, such as a change in capacity or location.

Comment

An individual asked what procedures would be used to address wastewater treatment facility and collection system projects that are under way.

Response

Projects that have been approved and are under construction at the time new Chapter 217 becomes effective are not subject to the new design criteria. Section 217.1(c) has been edited to clarify that collection system or treatment facility projects submitted for review between the effective date of this rule and March 1, 2009 will be evaluated by the design criteria that were in effect when the project engineering began. The commission intends on granting variances for designs that meet Chapter 317 standards for the first six months that the new Chapter 217 is in effect.

Comment

An individual stated that the terms "modify," "modification," and "substantial modification" are not defined. The individual stated that no portion of a facility or collection system is grandfathered under the rule when new work takes place or changes are made in another portion of the facility or collection system. The individual suggested the phrase "construct or materially alter the efficiency of" (TWC,§26.034) be used in lieu of defining modification.

Response

The commission agrees with the comment. A definition of "materially alter" has been added to the rule in §217.2(28) that reflects the definition found in TWC, §26.034(b). All references to "modify," "modification," "substantially modify," and "substantial modification" have been changed to "materially alter" or "material alteration."

Comment

An individual stated that the rules do not address structural design of treatment units with respect to concrete standards. The individual stated that American Concrete Institute (ACI) Code 350 is written to address concrete in environmental structures. The individual suggested that the rule include a requirement for all treatment units to meet the ACI 350 standard.

Response

The commission does not review the structural portions of the design. The commission requires that a licensed professional engineer design be employed to design wastewater treatment facilities. The Texas Engineering Practice Act and the Texas Board of Professional Engineers govern engineering standards. The commission accepts the seal of the engineer to certify that the design meets all applicable engineering standards.

Comment

An individual stated that the rules do not include a requirement to meet a fire code. The individual suggested that the rule require compliance with either the IBC Fire Code or the NFPA Fire Code.

Response

The commission agrees with this comment. Section 217.326 was amended to include a requirement to comply with the local fire code or to the National Fire Protection Association Uniform Fire Code if there is no local code.

Comment

An individual stated that collection systems are inadvertently excluded from several requirements because "facility" is defined as the treatment plant. She lists affected sections as §§217.2(15) & (39), 217.6(c), 217.10(a), 217.11, 217.16, and 217.322.

Response

The commission agrees in part with this comment. References to collection systems were added to §§217.2(39), 217.6(c), 217.10(a), and 217.11, as well as §217.7. No changes were made to §§217.2(15), 217.16, or 217.322 as these sections correctly included references to treatment facilities only.

Comment

An individual commented that this chapter includes provisions directed at operations and construction and suggested renaming the chapter *Design Criteria and Selected Operations and Construction Standards for Domestic Wastewater Systems*.

Response

The commission disagrees with this comment. The chapter refers only to projected operations as an element of design. Certain operating parameters affect the bases for designing both collection systems and treatment facilities.

Comment

An individual commented that 30 TAC Chapter 210, Use of Reclaimed Water, refers to design standards in 30 TAC Chapter 317.

Response

The commission did not propose to correct cross-references in other chapters, such as Chapter 210, that reference Chapter 317. Chapter 217 establishes design criteria for reclaimed water use, consistent with Chapter 210. Cross-references will be changed when chapters are opened for substantive changes.

Comment

An individual commented that "30" and "thirty" are used inconsistently and suggested use of "30" in all instances.

Response

The commission agrees with the comment. The rule was edited to use the numeral in all instances.

Comment

WEAT commented that the reference to 50-year projection of a collection system's performance is not feasible. There is no scientific means to predict how infrastructure material will perform in 50 years.

Response

The commission disagrees with this comment. Although there may not be scientific testing to predict all material performance, it is industry standard to design a collection system for a minimum 50-year lifespan.

Comment

WEAT commented that the rule makes reference to "no surcharge" and should be clarified to include only preventable occurrences of surcharge. WEAT commented that wastewater infrastructure in rivers, creeks, fields/easements will always be required, and especially common when utility infrastructure is constructed in advance of development. The accumulation of extraneous water around an infrastructure access point (manhole) or "ponding" is common in both street and non-street conditions. Ponding in a low point of an asphalt constructed street is very common and documented to enable extraneous water to enter the collection system.

Response

The commission disagrees with the comment. The collection system design should handle the maximum flow under expected conditions, based on the location of the system. If a collection system is proposed for a low lying area that is prone to collect water, the system should be designed to handle the resulting surcharge.

Comment

A white paper titled *The High Performance Biofiltration Concept: The "Workhorse" Technology of Distributed Treatment Systems* was received from an individual. No accompanying comment was received.

Response

The commission reviewed the paper. A treatment facility designed to use this technology would be considered innovative and require that it be reviewed under the provisions of §217.7(b)(2).

SUBCHAPTER A

§217.1(c)

Comment

An individual asked why a variance would be needed if as the requirement says ". . . if the plans and specifications for the project meet the design criteria."

Response

The commission agrees that the requirement is vague. The requirement was edited to read, ". . . if the plans and specifications for the project are submitted prior to March 1, 2009, and meet the design criteria that was in effect when the engineering design began."

§217.2

Comment

An individual commented that "annual average flow" should be "annual average daily flow."

Response

The commission disagrees with this comment. This term and definition are the same as the ones used in the TPDES permits.

Comment

An individual commented that the definition for "building lateral" is confusing and suggested a definition. Another individual commented that a building lateral connects to an "off-site component," not an "on-site component."

Response

The commission agrees in part with these comments. The definition of "building lateral" has been amended to read: "A pipe that conveys raw wastewater and connects the plumbing of a structure to an on-site component or a collection system pipe. A building lateral is privately owned and is not a part of a wastewater collection system." The rule rightly refers to an on-site component. The on-site component most frequently located at the terminus of a building lateral is a grinder pump.

Comment

An individual suggested substituting "If a sample of filter media is analyzed, effective diameter D10 is the diameter of the particle size at 10% finer-by-weight as plotted on a semi-log grain

size distribution curve." for the first sentence in the definition of "effective size".

Response

The commission agrees that the definition of "effective size" is unclear. The first sentence of the definition has been changed to read: "The result of an analysis of a sample of filter media equals the effective diameter, D10, which is the diameter of the particle size at 10% finer-by-weight as plotted on a semi-log grain size distribution curve."

Comment

An individual suggested that the words "the terminus of" be deleted from the definition of grinder pump.

Response

The commission agrees with this comment and the change was made.

Comment

WEAT and an individual commented that the definition of "lift station" effectively excludes many current and future lift stations. The static head at a lift station does not always exceed frictional headlosses.

Response

The commission disagrees with these comments. The highest head a pump may provide is at the no flow (static head) point of the pump curve. If the overall system head requirements are higher than the static head, no flow can occur.

Comment

An individual suggested that the definition for "minimum grade effluent sewer" be moved to the alternative collection system subchapter since it only applies to that subchapter.

Response

The commission agrees in part with this comment. The definition has been clarified so that the term applies to alternative collection systems only but was not moved.

Comment

An individual commented that the phrase "a prolonged period of wet weather" is vague. The individual suggested defining it as "three or more consecutive days of wet weather with average rainfall intensity of at least 0.5 inches per hour" or a similar description that allows for calculation.

Response

The commission disagrees with this comment. What constitutes a prolonged period of wet weather is different for east and west Texas. Near the Louisiana border, average rainfall exceeds 56 inches annually, while in parts of extreme West Texas, rainfall averages less than 8 inches. Average annual precipitation in Dallas (1971 - 2000) was 34.7 inches; in El Paso, 9.4 inches; and in Houston, 47.8 inches.

Comment

An individual commented that the word "and" should be eliminated from the title "Final Engineering Design and Report."

Response

The commission agrees and the change was made.

§217.4(e) and §217.10(d)

Comment

An individual commented changing "variance request sealed by an engineer" to a more definitive term such as "design engineer" or "the design engineer or an engineer employed by the owner."

Response

The commission finds the wording is clear and accurate. The Texas Engineering Act and the Texas Board of Professional Engineers govern the actions of licensed professional engineers. The commission declines to limit an owner's choice of engineers who may seal a variance request. The design engineer may be unavailable. An engineer other than the design engineer may review the design and seal the variance request.

§217.5(a)

Comment

An individual stated that although this subsection clearly required submittal of plans and specification for collection systems, the rest of the section was unclear because of the referral to "facility," which is defined in this chapter as the wastewater treatment facility. The individual suggested editing this section by specifying which items for collection systems, lift stations, and treatment works must be submitted for plan and specification review.

Response

The commission agrees with this comment. Clarifications that specify which plans and specifications are required were added to §§217.5, 217.6, and 217.7.

Comment

An individual stated that there is an inconsistency in terms regarding plans and specification approval in §217.5(a), §217.6(e), and §217.11(a) & (b). The individual suggested adding "or the plans and specifications granted tacit approval in accordance with §217.6(e)" to §217.11(a) & (b).

Response

There is no inconsistency because the commission provides a general rule, §217.5(a), which states that an owner must build a wastewater collection system or treatment facility according to plans and specifications approved by the executive director. The commission also provides specific rules, §217.6(e) and §217.11(a) & (b), that apply in certain circumstances. Section 217.11(a) states that the executive director must issue a wastewater permit before an owner of a facility with approved plans and specifications may begin construction. Section 217.11(b) states that an owner must obtain plans and specifications approval for a particular permit phase prior to construction or operation under that phase. The approval in §217.6(e) is conditional and does not apply when in conflict with any other rule in the chapter that requires affirmative executive director approval.

§217.6(e)

Comment

An individual suggested adding "by fax or letter" after "notify an owner."

The commission agrees. The change was made.

§217.6(f)

Comment

An individual suggested revising the requirement to say "submit the following within 30 days after receipt of notification."

Response

The commission agrees. The change was made. An additional change was made to add "by fax or letter," as suggested in the comment regarding §217.6(e).

§217.7(b)(1)

Comment

An individual stated that this requirement does not specify whether an owner is required to wait for confirmation or if the 30 day approval (as in §§217.6(e)) applies when more information is requested on a project with no variances.

Response

The commission agrees that this requirement is not clear. The commission's position is that a confirmation is not required and §217.6(e) applies when there are no requested variances and the project complies with all other applicable sections of Chapter 217. However, in order to clarify a situation where more information is requested, the commission included an additional provision, §217.6(g), which states: "If the executive director does not notify an owner of any insufficiency within 30 days after receipt of any additionally requested information, the project is approved."

§217.7(b)(2)

Comment

An individual suggested revising the requirement by adding (A) Innovative and nonconforming technologies may be approved as a variance in accordance with §217.4 of this title (relating to Variances)." Existing (A) through (F) would then need to be renumbered.

Response

The commission agrees that this clarification is needed. However, it was added to §217.7(b)(2) rather than creating a new (A).

§217.7(b)(2)(A)

Comment

An individual commented that the reference in this requirement should be §217.6(c).

Response

The commission agrees and the change was made.

§217.7(b)(2)(E)

Comment

An individual suggested renumbering this section or revising this requirement to say "The performance bond required in §217.7(b)(2)(D) must cover:".

Response

The commission agrees with the suggestion and revised the requirement as suggested.

§217.7(b)(3)(A)

Comment

An individual commented that "of" was omitted from "for a specific set [of] operating conditions."

Response

The commission agrees and the change was made.

§217.8(a)

Comment

An individual suggested revising this requirement to say "The executive director may grant approval authority to a municipality that requests. . . ."

Response

The commission agrees and the change was made. The word "director" was added and "request" was changed to "requests".

§217.8(b)

Comment

Two individuals commented that this requirement seems to require concurrent submittals to TCEQ and to a municipality that has approval authority. It is unclear who the approval would come from.

Response

The commission disagrees with the comment, but will clarify the requirement. The rules do not intend to require concurrent submittals to TCEQ and to a municipality that has approval authority. Owners may submit plans to the state if they choose. TWC, §26.034(e) states that "if the commission finds that a municipality's review and approval process does not provide for substantial compliance with commission standards, the commission shall require all plans and specifications reviewed by the municipality under Subsection (d) to be submitted to the commission for review and approval." No concurrent submittal is required unless the commission has revoked a municipality's approval authority. The word "shall" will replace the word "may" in §217.8(b) to clarify the intent of the rule.

§217.8(i)

Comment

An individual asked how this requirement applies to completed projects or projects under construction at the time the commission revokes a municipality's review authority.

Response

Section 217.8(i) states: "If the municipality does not achieve the required compliance within the timeframe established by the executive director, the commission may revoke the review authority of a municipality and require that all plans and specifications reviewed by the municipality under these rules be submitted to the executive director for review and approval." Section 217.8(k) states that if the authority of a municipality is revoked, all new projects proposed to be constructed within that municipality's jurisdiction must be submitted to the executive director in accordance with §217.6(a). Section 217.8(l) states that after revocation of authority, the municipality shall return all subsequently submitted plans and specification projects in its jurisdiction and notify any applicants of the requirement to seek approval from the commission. Completed projects or projects under construction are excluded from the mandatory language in §217.8(k) and §217.8(l).

In order to clarify the exclusion, the commission adds subsection (m) and changes the language in §217.8(i) to read: "If the municipality does not achieve the required compliance within the timeframe established by the executive director, the commission

may revoke the review authority of a municipality. If the commission revokes the authority, subsections (j), (k), (l), and (m) apply." Subsection (m) reads: "If the commission revokes the authority of a municipality, owners of any completed projects or projects under construction whose plans and specifications were approved prior to revocation are not required to seek approval from the commission."

§217.8(k)

Comment

An individual commented that the reference in this subsection should be §217.6.

Response

The commission agrees with this comment. The reference was corrected.

§217.9

Comment

An individual stated that it is unclear whether a copy of another state agency's project approval is a courtesy copy and whether the TCEQ will honor the other agency's approval or whether TCEQ will still review the project.

Response

Section 217.9 requires the owner of a wastewater collection system or treatment or disposal facility to send a copy of approval from the TWDB to the executive director. Under TWC, §17.276(d), the TWDB "shall review and approve or disapprove plans and specifications . . . in a manner that will satisfy commission requirements for design and criteria and permit conditions. . ." and TWC, §17.276(e) states that ". . . decisions, and other actions of the board under this subchapter do not require the concurrence or approval of any other governmental agency, board, commission,. . . or other governmental entity." Therefore, TCEQ will honor an approval by the TWDB and will not review the project. Although TWDB copies the commission on all of their approvals, it is the owner's responsibility to make sure the commission has copies of all of its approvals. Sometimes TWDB does not include enough identifying information to match the approval with the appropriate TCEQ permit.

§217.10(a)

Comment

An individual stated that this requirement is inconsistent with §217.6(f)(2) regarding when a Report must be submitted. She suggested adding "If requested by the ED" to this requirement.

Response

The commission disagrees with this comment. These requirements are consistent. Section 217.5(f)(2) refers to the action the owner must take when the executive director notifies an owner of the intent to review a facility's design. Section 217.10(a) outlines the owner's required steps in submitting a final engineering design report.

§217.11

Comment

WEAT asked if the commission has considered how this requirement will be applied in "design-build projects."

Response

The commission has not yet been asked to review a design-build project. For the commission to approve a design-build project, the owner of the project would have to assure the commission the project would meet all permitting requirements, minimum design criteria, and buffer zone rules. The project's as-built plans would be subject to commission review prior to operation and could result in the commission requiring changes to siting, equipment, or treatment units.

§217.11(e)

Comment

An individual suggested adding "unless granted a variance in accordance with §217.1(c)."

Response

The commission agrees with the comment. The phrase was added to the requirement.

§217.13(c)(2)

Comment

An individual suggested un-capitalizing all but the first word in this subtitle to be consistent with other subtitles.

Response

The commission agrees with this comment. The initial letters of the words "construction drawings and technical specifications" were changed to lower case.

§217.13

Comment

An individual asked if the final plans and specification required by this section are "as-built" or "construction" plans and specifications.

Response

The commission is asking for the final construction plan in this section.

§217.13(c)(1)(C)

Comment

An individual stated that separation distances are rarely known prior to excavation and construction. This requirement will unnecessarily increase the cost of designing collection system installations, replacements or rehabilitations.

Response

The commission disagrees with the comment and declines to eliminate the requirement. The commission agrees it may be costly to determine the location of other utilities, but expects it will be more costly to relocate a collection system that does not meet the separation distances. Separation distances are necessary to protect human health.

§217.13(c)(2)(A)

Comment

An individual suggested requiring a piping and instrumentation diagram. They are very useful drawings and provide a great deal of information about a treatment plant in one location.

Response

The commission agrees that the piping and instrumentation diagrams (P&IDs) are useful. The commission is not requiring them

since electrical drawings generally provide the necessary information. Although optional, P&IDs for projects that have complex configurations and/or control systems would simplify the commission's review of the project.

§217.13(c)(4)

Comment

An individual suggested revising the requirement to say "submit additional information relating to the plans and specifications within 30 days after receipt of notification."

Response

The commission agrees. The requirement was changed from "30 days after the date of the request" to "30 days after receipt of notification."

§217.16(b)(1)(E)

Comment

Harris County requested that the sample daily activity report include a section to document instances of noncompliance with notification requirements in paragraph (7) of the *Definitions and Standard Permit Conditions* section of TPDES permits. Harris County is not directly notified of releases that adversely impact human health and the environment. This results in underreporting to Harris County. Adding this requirement would greatly enhance Harris County's ability to monitor the operations of a treatment facility and collection system and assist with unauthorized discharge and unintentional bypass investigations.

Response

The commission agrees that recording noncompliant activities in the operator's daily log may have merit, but declines to address it in this chapter. It would be more properly addressed in Chapter 305, Consolidated Permits.

§217.16(b)(3)

Comment

An individual stated that the requirements for safety in the operation and maintenance are not covered in Subchapter M. The individual suggested adding a new item, "(C) other information in accordance with sections §§217.247(q), 217.299, 217.323(b), and 217.324;" changing current item (C) to "(D) evacuation, shelter, and shelter-in-place plans;" adding new item: "(E) first aid precautions, location of first aid supplies, and description of appropriate emergency medical treatment;" renumbering (F) through (H); and adding new item: "(I) safety training curriculum for new staff."

Response

The commission agrees with the suggested changes. Although the format of the changes made is somewhat different, the information contained in the changes is essentially the same.

§217.16(b)(3)(E)

Comment

Harris County requested that this requirement specifically include pre- and post-hurricane preparedness and response plans. Harris County stated that mitigating the adverse environmental impact from storm-compromised wastewater treatment facilities in coastal counties is critical for protecting human health.

Response

The commission disagrees with this comment. The phrase "other site specific emergency situations that may develop" requires coastal facilities to address hurricane preparedness and facilities in the Panhandle to address blizzard conditions. It is the commission's position that the Texas climate is too varied to require the same emergency planning of all wastewater facilities.

§217.17

Comment

An individual commented that the first paragraph of this requirement is missing its "(a)" paragraph number.

Response

The commission disagrees. According to *Texas Register* formatting guidelines, there can be no subsection (a) without a subsection (b). Implied (a) is any text that follows a section title but precedes a designated subdivision of the section.

SUBCHAPTER B

§217.32(a)

Comment

PEECO requested that the commission reconsider the minimum peak factor of 4.0 for treatment facilities with no flow records. A 4.0 peak factor indicates that 33% of the total design daily flow is expected to occur within a 2-hour period. A 3.0 peak factor indicates that 25% of the total design daily flow is expected to occur within a 2-hour period. For a new treatment plant with a new collection system in a housing subdivision, a 3.0 to 3.5 peak factor should be sufficient. Unnecessarily high peak flow factors result in long clarifier retention times, which can result in difficulty maintaining dissolved oxygen and can cause problems for nitrifying bacteria. Excessive peak flow factors can also cause problems with the calibration and operation of instruments and chemical feed equipment. A 4.0 peak factor means that instruments would be operating at 25% of full range when the flow is at design average daily flow and at time may be operating in the lower 10% to 20% of full range. PEECO requested a peak factor minimum of 3.0.

Response

The commission disagrees with the comment. The commission anticipates that very few facilities will have to use the default peaking factor. The peak factor should be based on existing flow data for an existing facility. The peaking factor for a new facility should be based on the design and the location of the facility or on a similar facility in a similar location.

§217.32(a)(1)(B)

Comment

PEECO asked that the difference between "design" and "permitted" flow and loadings be clarified.

Response

Treatment facilities are sometimes designed for a higher hydraulic or nutrient load than what is currently permitted. This is typically done when an owner anticipates adding additional connections or an increased flow in the foreseeable future.

§217.35

Comment

An individual suggested strengthening this section by requiring that a detailed hydrologic and hydraulic analysis be done for any treatment facility in the 100-year flood plain. The individual also suggested a requirement to comply with FEMA criteria or a FEMA Letter of Map Revision (LOMR).

Response

The commission disagrees with this comment. A detailed hydrologic and hydraulic analysis would be cost prohibitive for many small businesses and local governments. FEMA maps are prima facie evidence of flood plain designations.

§217.35(a)

Comment

An individual suggested clarifying the first sentence: "If the 100 year flood plain is within 1,000 feet of. . . ."

Response

The commission agrees with the comment. The words "the 100-year flood plain is" were inserted.

§217.36(d)(1)

Comment

An individual stated that this section allows a treatment plant to be virtually without back up power. The individual stated that the rules are more stringent for lift stations than for treatment plants.

Response

The commission disagrees with this comment. The exceptions to the auxiliary power generator requirement are specific and based on whether a facility will have sufficient storage to hold the peak flow during the longest period of outage on record. The same requirement applies to lift stations.

§217.36(d)(2)(A)

Comment

An individual recommended deleting this requirement since lift stations that pump less than 100 gallons per minute (gpm) were not allowed under the previous rule.

Response

The commission disagrees with this comment. Lift stations that pump less than 100 gpm are allowed by this rule. At times, there are few options to installing small volume lift stations in remote sections of a collection system.

§217.38(a)

Comment

An individual asked if this requirement is meant to restrict construction of laboratory and office facilities within the 150 foot buffer zone.

Response

The requirement was not intended to restrict the siting of laboratory or office facilities. The commission revised this requirement to clarify that it is only the treatment units in a facility that are subject to the buffer zone requirements.

§217.39(a)

Comment

An individual commented that the preamble states that the use of reclaimed water at the treatment facility is optional for "any other suitable use" and that the rule actually requires the use of reclaimed water for "any other appropriate use."

Response

The commission agrees with this comment. A treatment facility owner is required to use reclaimed water for "any other appropriate use" but has the latitude to determine appropriate uses. The preamble has been edited to reflect the correction.

§217.40

Comment

Harris County requested adding a new section: "All wastewater treatment facilities shall have instruments installed to monitor required operator attendance; effluent chlorine residual, if applicable; and effluent turbidity at the last process unit prior to discharge. These instruments shall notify the operator of potential TPDES effluent excursions via a telemetry system."

Harris County requires homeowners to use a similar system for on-site sewage facilities and this had lead to great improvements in compliance. Given the advancement of technology, associated costs are very minimal and compliance with state regulations has been greatly enhanced. Implementation of similar technology to WWTPs would greatly improve the ability to monitor WWTPs. Historically, the majority of violations observed by Harris County's Water Surveillance Program relates to insufficient chlorine residual and elevated bacteria levels. While Harris County acknowledges that turbidity is not a permit parameter, increases in turbidity levels can provide advanced notice of potential upset conditions.

Response

The commission disagrees with the comment. This requirement would be cost prohibitive for a small wastewater treatment facility. Mid-size and large facilities already monitor most of these parameters.

SUBCHAPTER C

§217.53(c)(2)(C)

Comment

An individual suggested that "high compression polyurethane" was a typographical error and what was intended was "high density polyethylene compression joints."

Response

The commission agrees and has corrected the requirement.

§217.53(d)(4)(B)

Comment

An individual stated that a nine-foot separation cannot be applied between manholes and water mains. The individual suggested that the requirement specify a minimum of 6-inch clearance between water mains and manholes when the water main is cased or sleeved and the backfill around the manhole is cement stabilized.

Response

The commission disagrees with this comment. The commission requires a variance request for a manhole that cannot meet the separation distance requirement. The commission will review these plans on a case-by case basis.

§217.53(e)

Comment

An individual stated that laterals are not defined in the rule. The individual also suggested that there should be minimum separation distance established between laterals and water mains.

Response

The commission agrees in part with this comment. Laterals are not defined in the rule, but building laterals are. This subsection was edited to refer to "building laterals" instead of "laterals."

§217.53(j)(3)

Comment

WEAT commented that the calculation for expected peak flow in a pipe should be referenced in this requirement.

Response

The commission disagrees with the comment. The peak flow is defined in §217.2(38) and the term is used extensively throughout the rule.

§217.53(j)(7)(B)

Comment

An individual stated that the rule appears to require piping to be sized according to average flow but that industry practice has been to size piping for peak flow plus an allowance for inflow and infiltration.

WEAT commented that daily average sewer flow and the expected peak flow should be applied in this requirement.

Response

The commission agrees in part with these comments. The language in the rule has been changed to require piping to be sized for peak flow based on the daily average sewer flow. The owner may, but is not required to, include a factor for inflow and infiltration based on how water-tight the collection system is designed to be at the end of the life of the collection system. An owner may choose to build a tighter collection system rather than a larger one.

§217.54(c)

Comment

An individual stated that the rules should set a minimum design for pipes less than 12 inches in diameter while allowing the design engineer to design the bedding, haunching, and backfill.

Response

The commission disagrees with the comment. The requirement for an adequate envelope ensures that pipe will not be damaged during installation and will perform as designed and for the expected lifespan. An alternate plan that provides equivalent safeguards may be submitted as a variance request.

§217.54(c)(1)

Comment

An individual stated that it is impossible for the rules to address all situations adequately and that this provision is too prescriptive and will have the effect of compromising designs rather than promoting the best design for the conditions.

Response

The commission disagrees with the comment. The requirement sets a minimum for clearance around a pipe in an installation trench. The requirement for an adequate envelope ensures that pipe will not be damaged during installation and will perform as designed and for the expected lifespan. An alternate plan that provides equivalent safeguards may be submitted as a variance request.

§217.54(l)(2)(G) and (H)

Comment

An individual stated that these two requirements conflict.

Response

The commission disagrees with this comment. The invert is needed to keep the bottom of the manhole free of solids. A well-designed drop pipe has a 90-degree bend at the base of the manhole that is anchored to the wall and directed along the invert toward the effluent pipe.

§217.55(l)(1)(A)

Comment

Garland commented that requiring a 30-inch diameter manhole opening should be based on the depth of the manhole and not be subjective to anticipation of future personnel entry. A manhole 3 feet deep does not need a 30 inch lid. A manhole 20 feet deep may need a larger opening.

Garland also commented that the rule should require ductile iron for manhole covers because ductile iron is stronger, lighter, and safer than cast iron.

Response

The commission disagrees with the comments. The rule states that if personnel entry is not planned, the manhole does not need to meet the 30-inch clear opening. The 30 inches requirement is the minimum opening if personnel entry is anticipated. A 3-foot deep manhole may require getting repair or rescue equipment into the manhole.

The criteria does not state what the manhole cover be made of but does require the manhole meets the American Association of State Highways and Transportation Official Standard for load bearing. Collection system owners may choose the cover material as long it meets this standard. In practice, the commission sees very little use of cast iron covers for new or renovated manholes.

§217.55(c) and (p)

Comment

Garland commented that cleanouts should be prohibited in collection systems. The City states that cleanouts have no operational or maintenance value. The cost of a manhole is insignificant over 50 years or longer and offers better access to the collection system.

Response

The commission disagrees with the comment. Cleanouts with an opening size suitable for cleaning equipment can be an economical option, in conjunction with manholes, in the design of collection systems.

§217.56(a)

Comment

WEAT commented that there are more current trenchless technologies that should be included: horizontal auger boring; pipe jacking; and horizontal directional drilling.

Response

The commission disagrees with the comment and has included terms generally describing the three techniques above in §217.56(a)(4) - (6). The commission will review requests for variances for any technologies not included in this rule.

Horizontal Auger Boring Machines are used to bore horizontally through soil or rock with a cutting head and auger. The majority of ABMs are used to install pipe casing under railroads, highways, airport runways, creeks or any area of the surface ground that cannot be open cut or disturbed in any way. This technology is described in §217.56(a)(4).

Horizontal Directional Drilling process is a steerable trenchless method of installing underground pipes, conduits and cables in a shallow arc along a prescribed bore path by using a surface launched drilling rig, with minimal impact on the surrounding area. There are three main stages, including piloting (drilling of a pilot hole), reaming (pilot hole enlargement in stages), and pullback (installation of the carrier pipe and/or utilities). This technology is described in §217.56(a)(5).

Pipe Jacking is a method of tunnel construction where hydraulic jacks are used to push specially made pipes through the ground behind a tunnel boring machine or shield. This technique is commonly used to create tunnels under existing structures, such as roads or railways. This technology is described in §217.56(a)(6).

§217.56(g)

Comment

An individual stated that this requirement is not compatible with most trenchless construction methods.

Response

The commission agrees that the rule is overly restrictive. The requirement was changed to require the method dealing with building laterals be included in the report, as required in §217.56(f)(6).

§217.57(a)(2)(C)

Comment

An individual stated that it is impossible to meet this requirement. The only water level available for infiltration testing is the groundwater level and this requirement requires a water level of two feet above the ground water level.

Response

The commission agrees in part with the comment. The commission will change the word "infiltration" to "exfiltration" based on this comment. The test described is an exfiltration test and the water level [head] in the pipe is set at 2 feet above the crown of the pipe at the uphill manhole by parameters in §217.57(a)(2)(C).

§217.58(b)(2)(D)

Comment

An individual commented that this requirement is overly prescriptive and should be performance based.

Response

The commission agrees with the comment. The requirement was changed to state, "An owner shall ensure that the cover is secured to the top of a manhole."

§217.59(b)(3)

Comment

An individual stated that other 30 TAC rules define intruder-resistant fencing as being six feet tall with three strands of barbed wire or eight feet tall.

The commission agrees in part with this comment. All instances of intruder resistant fence in this rule have been edited to read "6.0-feet high chain link, masonry, or board fence with at least three strands of barbed wire or 8.0-feet high chain link, masonry, or board fence with at least one strand of barbed wire."

§217.60(a)(5)

Comment

An individual stated that this requirement is too prescriptive but should require that motor control centers be mounted above grade to prevent water intrusion and corrosion from standing water in contact with the bottom of the enclosure.

Response

The commission agrees and will reword the rule to say "motor control centers shall be mounted at least 4.0 inches above grade to prevent water intrusion and corrosion from standing water in the enclosure."

§217.60(a)(6)

Comment

An individual stated that the prior rules required explosion-proof construction in wet wells and allowed conventional construction in dry wells. The individual suggested that the rules incorporate a reference to design for hazardous location in the National Electric Code to clarify and simplify the requirement.

Response

The commission agrees in part with the comment because the rule already references the National Electric Code. The reference was clarified as the National Fire Prevention Association (NFPA) 70 National Electric Code.

§217.60(b)(4)

Comment

An individual asked if this requirement applies to all pumps or just the lead pump.

Response

All influent gravity lines into a wet well must be located where the invert is above the "off" setting liquid level of all the pumps, and should be located above "on" setting of the lead pump.

§217.60(b)(6)

Comment

An individual asked if valves could be installed above grade in an enclosure rather than in a vault or dry well.

Response

All operating equipment and valves should be secured and tamper proof whether in a sumpor building, below or above ground.

§217.60(b)(7)

Comment

An individual suggested that a requirement be added to the table of minimum pump cycle times that required the cycle time to be longer if recommended by the manufacturer.

Response

The commission disagrees with the comment. The requirement is a minimum cycle time and the cycle time may be increased, based on manufacturer's recommendations or the engineer's best professional judgment.

§217.60(d)(1)(B)

Comment

An individual stated that this requirement is vague and would be better if it referred to the NEC hazardous environment requirements.

Response

The commission agrees with the comment and will add a reference to hazardous environment requirements in NFPA 70, *National Electrical Code*, and NFPA 820, *Standard for Fire Protection in Wastewater Treatment and Collection Facilities*, to this section. Hazardous environment requirements are contained in these references.

§217.60(d)(2)(B)

Comment

An individual stated that mechanical ventilation of wet wells may not be necessary in all circumstances.

Response

The commission agrees with the comment. Section 217.60(d)(1) allows for passive ventilation of wet wells.

§217.60(h)(2)(A)

Comment

An individual suggested the following rewording: "Sump pumps must use separate pipes that discharge above the maximum liquid level of the associated wet well."

Response

The commission declines to reword the requirement. Using the word "above" is ambiguous. "Above" can mean at a higher elevation or at a greater capacity. The rule uses "more than" because it is referring to the volume that the pipes must be able to discharge.

§217.61(j)

Comment

An individual asked why the rules allow lift stations that pump less than 100 gallons per minute.

Response

The commission allows lift stations that pump less than 100 gpm because portions of a collection system may serve a limited number of equivalent dwelling units and require a small lift station to transfer wastewater to the collection system main.

§217.63

Comment

Harris County requested that the commission add the following requirement: "The engineer must include sufficient capability in the lift station system controls to prevent over-pumping from the lift stations upon resumption of normal power after a power failure. Backup or standby units must be electrically interlocked to prevent them from running at the same time that other lift stations pumps are operating only on the resumption of normal power after a power failure."

Harris County reported seeing many cases in which once power is restored, the lift station control system causes all the pumps, including standby units, to come on at once. When this happens, the design hydraulic capacity of the lift station and the treatment plant can be exceeded. Results can be hydraulic overload and incomplete treatment and wastewater or mixed liquor in the plant will overtop the structure walls and spill on the ground. This section would require sufficient control logic to prevent all pumps from starting simultaneously following a power outage.

Response

The commission agrees with the comment. A requirement, §217.63(g), will be added to ensure that lift station pumps do not operate at the same time that back-up or standby units are operating. New subsection (g) states, "Lift station system controls must prevent over-pumping upon resumption of normal power after a power failure. Backup or standby units must be electrically interlocked to prevent operation at the same time that other lift stations pumps are operating only on the resumption of normal power after a power failure."

§217.63(b)

Comment

An individual requested that lift stations equipped with telemetered monitoring be prohibited from having a light and alarm bell. The individual stated that the alarms disturb residents in a wide area and do nothing to alert sewer system staff.

Response

The commission disagrees with the comment. In the event of a lift station overflow, lights and alarm bells alert nearby residents to call the owner of the collection system. The rule has provided for an exception to the audiovisual alarms by providing a Supervisory Control and Data Acquisition (SCADA) system that is connected to a continuously monitored location.

§217.63(e)(1)

Comment

An individual suggested the word "sole" be inserted between "a" and "means."

Response

The commission agrees with this comment. The change has been made.

§217.67(f)(1)

Comment

An individual stated that any restriction to pool water in the manhole to reduce odor will cause solids deposition and result in increased odors due to septic conditions that will develop when the force main is not flowing.

Response

The commission agrees with the comment. The requirement is to reduce odor and not cause new problems. The design must include odor reduction equipment or processes. Section 217.67(f)(1)&(2) requires a forced main to terminate in a way that the pipe is facing the outlet along the invert. The water level at maximum design flow would be the top of the outlet pipe plus any head required to deal with turbulence in the manhole.

§217.69(h)(1)(B)

Comment

An individual stated that this requirement is too prescriptive but should require that motor control centers be mounted above grade to prevent water intrusion and corrosion from standing water in contact with the bottom of the enclosure.

Response

The commission agrees with the comment. The language has been changed to require motor control centers to be mounted "at least 4.0 inches above grade to prevent water intrusion and corrosion from standing water in the enclosure."

SUBCHAPTER E

§217.121(g)(3)

Comment

An individual stated that this section is overly prescriptive and wanted to know the rationale for the requirement. The individual also stated that the rule is not clear.

Response

The commission disagrees with this comment. The maximum depth of the inlet channel to the coarse screen maintains sufficient velocity to suspend the settleable solids and wash them into the grit chamber rather than letting solids accumulate in the bottom of the coarse screen's inlet flow channel.

§217.122(a)

Comment

An individual stated that this requirement conflicts with §217.122(g).The individual suggested the following: "When the manufacturer of the fine screen recommends prescreening before the fine screen, a coarse screening device must be provided ahead of the fine screen."

Response

The commission agrees in part with this comment. Although the two subsections are not in conflict, §217.122(g) was edited to require the manufacturer's recommendations be followed regarding prescreening.

§217.122(h)

Comment

An individual stated that it is impossible to remove all fats, oils, and greases before the fine screen. The individual recommended deleting the requirement.

Response

The commission has clarified the requirement. The commission agrees that it may be impractical to eliminate all fats, oils, and grease, but they quickly foul a fine screen, rendering it ineffective. A concerted effort, including a pretreatment program for restaurant and industrial dischargers, should be made to prevent fats, oils, and grease from reaching a treatment system's fine screen. The subsection now says, "(h) Collection system equipment prior to the fine screen must be designed to minimize fats, oils, and grease in the wastewater before the wastewater reaches the headworks if fine or micro screens are used."

§217.125(e)(3)

Comment

An individual stated that this section is overly prescriptive and wanted to know the rationale for the requirement. The individual stated that this requirement would limit the ability of equipment manufacturers to innovate and design more efficient grit chambers.

Response

The commission disagrees with this comment. A vortex grit chamber design is common for this type of equipment. Section 217.125(d) allows for cyclonic grit chambers. Innovative designs will be reviewed on a case-by-case basis in accordance with the variance provisions in §217.7(b)(2) and (3).

§217.129(d)(3)(A) & (B)

Comment

An individual asked if it was intended that (B) override (A). The individual recommended removing the words "overflow rate and" from (B)(iii).

Response

The commission disagrees with comment and finds both (A) and (B) are worded correctly. Surface loadings must meet both requirements.

SUBCHAPTER F

§217.152(e)

Comment

PEECO requested that "design flow of 10,000 gpd" be changed to "design average daily flow of 25,000 gpd." PEECO stated that it has supplied more than 100 treatment systems with design daily flow ranging from 3,000 to 35,000 gpd that use tanks with a nominal capacity of 5,000 each. They state that for plants up to about 15,000 gpd, they use one of these tanks as a clarifier. They use two 5.5 ft square (top), 3.75 ft deep hoppers than mount below the bottom of the tank. The tank has an 8.58 ft straight side wall depth down to the two 60 degree hoppers. For plants between 15,000 and 30,000 gpd, they provide two clarifiers. They state that they have not experienced operator problems or complaints with these systems and operating results have been good.

Response

The commission disagrees with the comment. The ability to clean a clarifier or make repairs while continuing to provide wastewater treatment is essential. The executive director would consider a variance request submitted with actual operation data showing that the design of the proposed equipment is capable of removing the sludge from the clarifier without an interruption of service.

§217.152(c)(6)

Comment

An individual stated that this requirement eliminates some very good peripheral-feed clarifier designs from being used as final

clarifiers. The individual suggested removing this requirement because it will stifle innovation.

Response

The commission agrees with the comment. The requirement has been changed to reflect that it applies to center-feed clarifiers. Most circular clarifiers in the state are center-feed and the requirement was intended for a center-feed clarifier. A peripheral-feed clarifier is subject to the effluent weir overflow rate.

§217.152(c)(7)

Comment

An individual asked why the maximum weir overflow rates do not apply to circular clarifiers. The individual recommended removing this requirement.

Response

The commission agrees to remove this requirement. Because center-feed circular clarifiers will meet the effluent weir overflow rate by design, it is a redundant requirement.

§217.152(h)

Comment

Harris County requested that hopper bottom clarifiers not be allowed. Although the existing and proposed Design Criteria requires steeply sloped hopper walls, sludge settles on the sides of the hoppers and will not fall to the bottom without being physically pushed with a squeegee. If a squeegee is used, it stirs the solids and causes a significant loss of solids over the clarifier weirs. If on the other hand it is not squeegeed and allowed to settle, denitrification and the resulting nitrogen gas bubbles will lift mats of settled sludge to the surface of the clarifier, again causing loss of solids over the weirs. Because hopper bottom clarifiers have poorly functioning skimming systems (consisting of a small overflow pipe), the floating sludge and any accumulated sum escapes under the scum baffle and over the effluent weirs. Therefore, Harris County has found that hopper bottom clarifiers are not capable of producing effluent quality better than 20 mg/l TSS when at design capacity, particularly for smaller plants. Limiting the use of this design to the smaller plants of 10,000 gpd or less makes it even more difficult for them to function properly.

PEECO requested that this requirement be changed to "A hopper bottom clarifier without mechanical sludge collection equipment is prohibited for design average flow rates of more than 15,000 gpd." This change would require the addition of a scraper mechanism if an individual clarifier unit is designed for 15,000 gpd or more.

Response

The commission declines to change the requirement. The commission has found that hopper bottom clarifiers are often not operated correctly and have a poor compliance history. The adopted rule reduces the maximum size treatment facility that can have a hopper bottom clarifier from 25,000 gpd to 10,000 gpd. The commission will continue to monitor the performance of treatment facilities with hopper bottom clarifier to evaluate if they should be allowed in the future.

§217.152(j)(3)

Comment

An individual stated that the range for sludge pumping capacity is too narrow and should be widened.

Response

The commission disagrees with the comment. The range of 200 - 400 gpd/square foot is sufficient for most return sludge systems. A variance may be requested if a system needs a capacity out of the stated range.

§217.152(j)(4)

Comment

An individual requested that the requirement for controlling pumping capacity be strengthened by requiring variable pumping capacity be provided through the use of variable speed drives or other reliable methods.

Response

The commission disagrees with the comment. The commission finds that throttling, variable speed drives, or multiple pump operation are all reliable methods of varying pumping capacity.

§217.153(c)(1)

Comment

An individual requests that redundant aeration basins and clarifiers for plants larger than 0.4 MGD not be required in the initial phase of a plant's construction, but allowed to be added later as the plant expands.

Response

The commission disagrees with the comment. Redundancy is necessary throughout the life of a treatment facility. Maintenance and repairs may necessitate shutting down a treatment train. If there is no redundant train to treat the incoming wastewater, there may be a threat to human health or the environment. A permittee is under no obligation to complete any part of a permitted treatment facility. In practice, many planned expansions are delayed or cancelled.

§217.155(b)(2)(A)(i)

Comment

PEECO recommend that the word "clean" be replaced with the word "wastewater." 30 TAC §317.4(g)(4)(i) and other published data suggests that this minimum "clean" water efficiency should be 6%, and that the minimum "wastewater" transfer efficiency should by 4%. PEECO has used these minimum values successfully for more than 30 years.

Response

The commission disagrees with changing from clean water to wastewater, but agrees to change the minimum clean water efficiency from 4% to 6%. The clean water efficiency test has been the standard in Texas and has proven effective. The commission agreed to change the minimum efficiency to 6% to provide a greater margin of error.

§217.155(b)(2)(C) and (D)

Comment

PEECO commented that these two paragraphs are specific to diffusers that have been tested at 12 feet submergence. A diffuser tested at 8 or 10 feet should be able to use the test results without being subject to these paragraphs and Table F.5. If they are forced to use the values in Table F. 5, the blowers fur-

nished would have to be 83% larger in capacity, which is directly proportional to the power requirement. Capitol and replacement cost would increase by approximately 35% and operating cost by 40%.

Response

The commission declines to change the requirement, but will accept variance requests supported by actual equipment data in place of the minimum design standard in accordance with §217.7(b)(2).

SUBCHAPTER J

§217.248(a)(1)

Comment

WEAT commented on the requirement that a sludge thickener must be capable of operating at the peak flow rate. WEAT suggested that the design basis for sludge thickeners be changed to the maximum monthly sludge production.

Response

The commission agrees with the comment and language was changed. A sludge thickener does not have to be able function at the peak flow rate.

§217.250(e)(7)

Comment

WEAT suggested that the requirement to have a duplicate belt press available if a single unit operates for more than 60 hours in a five day period be removed. WEAT stated that the redundancy requirements in §217.250(c)(3)(B) addresses all dewatering facilities.

Response

The commission agrees with the comment. The language was removed.

§217.271(a) and (b)

Comment

TPWD requested that this section include a requirement for redundancy for dechlorination systems. Chlorine can be toxic to aquatic animals at very low concentrations. A short term excursion of chlorinated water could wipe a reach of stream completely free of chlorine-sensitive species. Department staff have attributed several fish kills to lack of dechlorination.

Response

The commission agrees with the recommendation. The Environmental Protection Agency also considers chlorine a toxic pollutant. A new subsection (f) was added to this section requiring emergency power for both chlorination and dechlorination systems. It has always been the intention of the commission that emergency power be available to the chlorination system. The commission has now included the dechlorination system in the emergency power requirement.

§217.272(c)

Comment

An individual stated that most systems use only about half as much sulfur dioxide as chlorine but the rule requires a facility owner to have equal amounts of the chemicals on site.

Response

The commission disagrees with this comment. The actual amount necessary to fully dechlorinate 1.0 pound of chlorine is 0.9 pound of sulfur dioxide. The one to one ratio is appropriate.

§217.281(b)(4)

Comment

Harris County requested the addition of a new requirement: "The disinfection contact basin or chamber must include mechanical sludge collection equipment." Harris County has found even under normal (non-upset) operating conditions, a facility operating within its permit parameters will discharge enough solids to form a sludge bank in the receiving stream. Additionally, some of the solids settle to the bottom of the chlorine contact basin to create sludge deposits, which can turn septic. The associated gas bubbles will resuspend the sludge, allowing it to discharge over the weir. The requirement for mechanical sludge collection equipment will help to protect the water quality of receiving streams.

Response

The commission declines to add a new requirement. The contact basin design must include a method of sludge removal but it does not have to be mechanical.

SUBCHAPTER L

Comment

UltraTech suggested that the results of bioassays be made public. The advantage of making the bioassay public is to invite review and comments by other experts and peers. Actions and procedures that could compromise the results would have less chance of going unnoticed and this closer scrutiny would ensure fair and accurate methodology. This procedure would not give one manufacturer an advantage over any other.

Response

The commission agrees with the comment. No change in the rule is necessary. All information submitted to the agency is public information and subject to a public information request. Therefore, the results of bioassays will be public information and available for review at any time and available for comment during the permit process.

Comment

UltraTech stated that the rule requires proper redundancy. Full scale equipment must be capable of treating the maximum flow with one bank out of service. It is crucial that this requirement remain because it provides the important safety margin necessary in equipment responsible for disinfection. A bank of UV lamps can only be interpreted as lamps capable of providing treatment across the entire width of the contact channel.

Response

The commission agrees with this comment. The full cross-section of the channel must provide treatment at all times. Minimum outage for cleaning of horizontal design systems is one row of lamps for a maximum of 30 minutes.

§217.293(b)

Comment

Trojan recommends that unless a UV system is designed to treat to a reuse standard, the wording of this section be changed to: "A UV light disinfection system must be designed so that the dosage requirements determined in §217.295 are met under one of the following two conditions depending on system design: a)

if the system employs mechanical chemical in-situ cleaning, one spare UV module be provided in the design; or b) if the system does not employ mechanical chemical in-situ cleaning, one additional UV bank must be provided in the design." Trojan states that system design now allows removal of one module at a time as modules are now electrically independent, which reduces the requirement for a redundant bank. Trojan subsequently clarified the spare modules and banks need to be on-site and not part of the operating system.

Response

The commission agrees in part with this comment. The requirement was divided into two subsections and changed to be performance-based. A UV system must be able to meet permitted limits under all operating conditions. An owner must maintain a readily available supply of spare parts sufficient to repair a UV system that is malfunctioning for any reason.

§217.294

Comment

Trojan recommends that the second sentence be changed to: "A telemetry system must notify a facility operator in the event of a major UV alarm." A major UV alarm is defined as one that may jeopardize disinfection performance and a minor UV alarm does not jeopardize disinfection or require immediate attention.

Response

The commission disagrees with the comment. Proper operation of the system is dependent on operator awareness of the condition of the UV disinfection system. A minor alarm may not require immediate response by an operator, but the operator should be aware of minor problems. Telemetry should include minor alarms because a series of minor events may indicate a pending major alarm condition.

§217.295

Comment

Trojan recommends using the scale-up recommendations specified in the NWRI 2003 *Ultraviolet Disinfection Guidelines for Drinking Water and Water Reuse*, which states, "the scale-up factor for a given reactor shall be limited to 10 times the number of lamps used in the test reactor."

An individual commented that allowing a bioassay with less than 80 lamps might be a problem due to boundary layers (wall effects can be more pronounced in smaller units). The NWRI UV guidelines allow for a scale up factor of 10.

Response

The commission agrees with Trojan's comment and the recommendations of the NWRI 2003 *Ultraviolet Disinfection Guidelines for Drinking Water and Water Reuse*, except for the paragraph for reuse water that recommends larger reactors. These guidelines may be used as bioassay standards if all hydraulic profiles are the same. The commission will require any proposed scale-up factor above 10 be reviewed through the variance procedure. A variance approval may include a requirement for a commissioning bioassay of the treatment unit before putting the unit into service and/or a performance bond.

The commission disagrees with the individual's comment that a bioassay with less than 80 lamps could cause a problem due to boundary layers. As long as the scale-up factor is not more than 10, the bioassay will provide a reliable prediction of the operation of the UV system.

§217.295(a)(3)

Comment

UltraTech suggested that a minimum number of UV lamps tested be reduced to 10 or 20, but the existing 10 to 1 maximum scale up requirement be retained.

Trojan commented that validating a system using 80 lamps has historically been considered impractical because of the scale-up factors contained in the NWRI guidelines. Trojan subsequently clarified this comment and requested that the minimum number of bulbs be set at two.

Response

The commission agrees in part with the comments. After a search of the relevant literature, the commission set the minimum number of lamps in a bioassay at four. This is the minimum in the bioassay protocol of the *NSF International 40CFR35.6450 Environmental Technology Verification Protocol* (October 2002). The commission requires four lamps as the minimum because there are no scientific standards for scaling down a bioassay for an operating unit smaller than the test unit. There are small treatment facilities in Texas that have a total four lamps in their UV disinfection system.

§217.295(b)

Comment

UltraTech recommended that in the event that energy conservation is to be accomplished by reducing the power to the UV lamps at diminished flows, additional bioassay certification must be provided to confirm what UV dose is provided at specific flow reductions and the corresponding reduced electrical input to the UV lamps. Bioassay verification must be provided for each electrical reduction proposed.

Response

The commission agrees with the intent of this comment. The rule was not changed. The requirement is sufficient to certify the UV dose at specific flow reductions and corresponding reduced electrical input to the UV lamps.

§217.296

Comment

An individual commented that the requirements in this rule for the collimated bioassay would reduce variability and uncertainty leading to narrower bioassay boundaries. The requirements are: suspension prepared in buffered sterile saline, Petri dish depth limited to one centimeter, reasonable rate for revolving stir bar to prevent spatter, and Petri dish sized the same as the collimated beam.

Response

The commission agrees that the collimated bioassay would reduce variability and uncertainty leading to narrower bioassay boundaries. The commission disagrees with the term "saline" because it is not specific. The protocol has been changed to require a buffered sterile solution with a single total dissolved solids concentration within the range of the expected effluent concentration.

§217.296(a)

Comment

Trojan recommended that this section be revised as follows:

The UV system will be designed to deliver the required UV dose at peak flow, in effluent with a UV transmission stated at end of lamp life (EOLL) after reductions for quartz sleeve fouling. The basis for evaluating the UV dose delivered by the UV system will be the independent third party bioassay without exception. Bioassay validation methodology to follow protocols described in *NWRI Ultraviolet Disinfection Guidelines for Drinking Water and Water Reuse* (May 2003) and/or applicable section of the US EPA Design Manual - Municipal Wastewater Disinfection (EPA/625/1-86/021).

The UV dose will be adjusted using an EOLL factor of 0.5 to compensate for lamp output reduction over the time period corresponding to the manufacturer's lamp warranty. The use of a higher lamp aging factor will be considered only upon review and approval of independent third-party verified data that has been collected and analyzed in accordance with protocols described in *NWRI Ultraviolet Disinfection Guidelines for Drinking Water and Water Reuse* (May 2003).

The UV dose will be adjusted using a quartz sleeve fouling factor of 0.8 when sizing the UV system in order to compensate for attenuation of the minimum dose due to sleeve fouling during operation. The use of a higher quartz sleeve fouling factor will be considered only upon review and approval of independently verified data that has been collected and analyzed in accordance with protocols described in *NWRI Ultraviolet Disinfection Guidelines for Drinking Water and Water Reuse* (May 2003).

Trojan states that the majority of the section dealing with collimated beam dose response curves imposes restrictions that are not necessary. Many of the restrictions could be considered good guidance and good practice, but there is no reason to set restrictions. A peer-reviewed paper, *Standardization of Methods for Fluence (UVT Dose) Determination in Bench-Scale UV Experiments*, by Bolton and Linden (2003) details the most recent industry standard best practices for performing collimated beam testing and should be the basis for this section.

Trojan subsequently requested that subsection (a) be revised to say: "A bioassay procedure must conform to the applicable sections of publications USEPA (1986) *Design Manual: Municipal Wastewater Disinfection*, EPA/625/1-86/021 and/or NWRI *Ultraviolet Disinfection Guidelines for Drinking Water and Water Reuse* (May 2003) and/or NSF International 40CFR35.6450 (October 2002) *Environmental Technology Verification Protocol, Water Quality Protection Center, Verification Protocol for Secondary Effluent and Water Reuse Disinfection Applications.*"

Response

The commission agrees in part with the comments. The requirement has been edited to allow an owner to choose to base a bioassay on any of the three protocols, but not to mix and match sections of the protocols. For example, if an owner chooses to base a bioassay on the EPA 1986 protocol, each of the parameters of that protocol must be met. The rule is the same for the other two protocols. The commission does not allow a piecemeal approach because the commission does not have the resources to evaluate a bioassay based on a protocol that has not previously been proven valid.

§217.296(a)(1) - (12)

Comment

An individual stated that the following UV bioassay minimum protocol should be used to ensure that the bioassay results are reliable, fairly correlate to performance, provide disinfection, and protect public health and the environment.

The concentration of MS-2 (or any bio-tracer) should be at least 1,000,000 organisms per milliliter to allow a clear enumeration of a three log reduction in kill for the bioassay.

The suspension should be prepared using buffered, sterile saline.

The depth of the Petri dish should be 1 cm.

The speed of the mixing bar should be such that the solution does not spatter, is not too depressed in the center from mixing cavitationreu, move at a reasonable rate, and if possible, be reported.

The collimating tube should be about the same diameter as the Petri dish and the sides of the lamp shielded.

Since there are UV lamps that have a variable output, the analyst should demonstrate that the lamps are being operated at 100%. The UV equipment manufacturer's data should not be used to meet this requirement. Instead the lamp manufacturer should provide the electrical input needed for 100% output and evidence of monitoring these operating parameters should be recorded during the test.

With variable output UV lamp systems, energy conservation goals can be achieved by reducing the output of the lamps rather than turning lamps on and off in relation to flow.

There should also be a requirement that bioassay data is conducted to indicate the delivered UV dose under reduced output conditions.

Trojan objected to items (1) through (11) because they are unclear or overly restrictive. Trojan subsequently commented that paragraphs (3) regarding organism density and (11) regarding mixing bar speed were acceptable; paragraphs (1) regarding the bioassay solution, (6) regarding triplicate solutions and (8) regarding the diameters of the Petri dish and the collimating tube are overly restrictive; and paragraph (12) regarding lamp intensity measurements is unclear.

An individual commented that UV units should be bioassayed under the same conditions in which they would operate. If units are operated with variable output, they should be bioassayed under a range of UV outputs and flow conditions. If lamps are to be turned off for energy conservation, the unit should be bioassayed with those same lamps off.

Response

The commission agrees that the requirements in this section need to be edited to be clearer and more equitable to all UV systems. This section was changed in response to these comments and a further search of the relevant literature.

Subsection (a)(1) - (12) were moved to subsection (b). Paragraph (1) now states, "The test organism must be introduced into buffered sterile solution with a single total dissolved solids concentration within the range of the expected effluent concentration." Paragraph (2) was not changed. Paragraph (3) now states, "The organism density must be 10^5 to 10^7 plaque forming units or colony forming units per milliliter." Paragraph (4) was not changed. Paragraph (5) now states, "Runs must be in at least triplicate, each from a separate dilution of the stock suspension." Paragraph (6) was deleted. Paragraphs (7) - (12) were

renumbered to (6-11). The content in new paragraphs (6) - (9) was not changed. New paragraph (10) was changed to a performance-based standard and now states, "The speed of the mixing bar must not cause spatter or cavitation." New paragraph (11) states, "Any difference between the velocity profile in the bioassay and the velocity profile in the full-scale unit must be justified." The new paragraph (12) states, "Any difference between the gallons per minute per inch of UV lamp in the bioassay and the gallons per minute per inch of UV lamp the full-scale unit must be justified." New paragraph (13) states, "The lamp intensity data obtained in the bioassay must be used to set the operating parameters of the lamps."

The requirements in subsection (b) edited and was moved to new paragraphs (a)(14) - (16) to better organize the requirements for a bioassay. Paragraph (14) states, "Lamp intensity used in the flow through test reactor shall be set after a 100-hour burn in and stabilization period." Paragraph (15) states, "Electrical input for 100% lamp output must be recorded and verified." Paragraph (16) states, "Lamp intensity in the bioassay must be measured at the exact height of the surface of the suspension." Paragraph (17) states, "No operating condition may be used that has not been proven effective by the bioassay." Paragraphs (18) through (19) were added. Paragraph (18) states that if the procedures in this subsection are not met, an owner may request a variance. The executive director will review the variance and its supporting documentation using industry best practices as a guideline. Paragraph (19) requires that a bioassay be signed and sealed by a licensed professional engineer.

§217.296(a)(3)

Comment

An individual commented that a concentration of 1,000,000 (10^6) organisms per milliliter is sufficient to demonstrate four logs of inactivation.

Response

The commission agrees with the comment. The rule was changed to require a range of 10^5 - 10^7 plaque forming colonies per milliliter. The one-million organisms per milliliter level suggested in the comment is within the range that meets quality assurance requirements for reproducibility. The commission adopted the range of concentration that EPA uses in its *Environmental Technology Verification*, ETV publications.

§217.296(b)

Comment

Trojan requested subsection (b) be revised to say: "The UV system will be designed to deliver the required UV dose at peak flow, in effluent with a UV transmission stated at end of lamp life (EOLL) after reductions for quartz sleeve fouling. The basis for evaluating the UB dose delivered by the UV system will be the independent third party bioassay, without exception. Bioassay validation methodology to follow protocols described in NWRI Ultraviolet Disinfection Guidelines for Drinking Water and Water Reuse (May 2003) and/or applicable sections of the US EPA Design Manual-Municipal Wastewater Disinfection (EPA/625/1-86/021).

UltraTech suggested the rule retain the requirement for testing for end of lamp life at 75% output. The desired protection to guarantee proper treatment after lamp depreciation can be accomplished by increasing the required UV dosage by 10% at the 100% lamp output.

Response

The commission agrees in part with Trojan's comment. The commission disagrees with UltraTech's comment. The requirement was changed to allow operational parameters be set by the bioassay results. An owner has the flexibility to verify disinfection with the percent output at which the lamps would be replaced. For example, if an owner tests lamps at 65% in the bioassay, lamps in the operating system would have to be replaced when they reached 65% maximum output. The percent output parameter would determine the number of lamps necessary to provide disinfection in the UV system.

§217.298

Comment

Trojan recommends that one spare module for all UV systems that employ in-situ mechanical chemical cleaning for all non-reuse applications. One spare bank should be provided for UV systems that do not employ in-situ mechanical chemical cleaning.

Response

The commission agrees with this comment. The requirement was changed to be performance based. A UV unit must have the necessary spare parts to provide continuous disinfection based on the maintenance schedule and failure scenarios likely within the unit.

SUBCHAPTER M

§217.321(e)

Comment

An individual commented that the references in this requirement should be §217.322 and §217.323.

Response

The commission agrees with the comment and corrected the references.

§217.322 and §217.323

Comment

An individual suggested that the rule grandfathers no portion of a treatment facility in relation to the requirements of these two sections, *Safety and Security Audits*, and *Hazardous Operation and Maintenance*.

Response

The commission disagrees with the comment. Facilities will be brought into compliance with §§217.321, 217.322, and 217.323 requirements as owners expand or materially alter existing facilities. Requiring all facilities statewide to meet these requirements would cause a burden on the facilities and could exceed the availability of consultants qualified to perform the work. Owners are encouraged to implement these requirements voluntarily, as they add benefit to operations and compliance through risk identification and management.

§217.322(b)

Comment

An individual suggested putting everything after (b) Security audit into subsection (1) to be consistent with the structure of (a) Safety audit. The individual also asked if it is intentional that security audits are optional.

Response

The commission agrees with the comment. The change was made. The commission corrected the preamble to clarify that security audits are optional. The subsection reflects that security audits are currently recommended but not required by the US Department of Homeland Security.

§217.323(c)

Comment

An individual suggested changing this requirement to read, "The owner shall provide the necessary items identified in §217.323(b) above in such quantity and at such locations as to be sufficient to: . . ."

Response

The commission disagrees with this comment. Section 217.323(c) is intended to cover all tool requirements at a wastewater facility, not only those needed for the hazardous tasks discussed in §217.323(b).

§§217.326 and 217.329(e)(9)

Comment

An individual commented that "National Electric Code" should be changed to "NFPA 70 National Electrical Code."

Response

The commission agrees with the comment. The change was made.

§§217.327, 217.328(b), and 217.329(d)

Comment

An individual suggested that warning signs be both in English and Spanish.

Response

The commission agrees with the comment. The change was made. The change is consistent with other commission rules that require warning signs in Spanish and English.

§217.328(b) and (c)

Comment

An individual asked if levees and walls are considered solid material fencing and suggested that the requirement needs clarification.

Response

The commission agrees in part with this comment. Section 217.328(b) was edited to remove the reference to levees and clarify that the signs must be within sight of each other and on each gate. Section 217.328(c) was edited to standardize the intruder resistant fence requirement throughout the rule.

§217.329(a), (d), and (e)(10)

Comment

An individual commented that these requirements are inconsistent with 30 TAC §210.25(g).

Response

The commission disagrees with this comment. Section 217.329(a), (d), and (e)(10) are applicable to new or modified domestic wastewater systems. The exemption in §210.25(g) is for existing facilities and does not apply to new or modified facilities. The commission will clarify this requirement in Chapter 210 when it is opened for other changes

SUBCHAPTER A. ADMINISTRATIVE REQUIREMENTS

30 TAC §§217.1 - 217.17

STATUTORY AUTHORITY

The new rules are adopted under the authority of Texas Water Code (TWC), §5.013, which provides the commission's general jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted new rules implement TWC, §§5.013, 5.103, 5.105, 5.120, 26.027, 26.034, and 26.121.

§217.1. Applicability.

(a) This chapter applies to any person who proposes to construct, renovate, or re-rate a wastewater collection system or commission permitted wastewater treatment facility that will collect, transport, treat, or dispose of wastewater that retains the characteristics of domestic wastewater although it may contain industrial wastewater, except those systems regulated by Chapter 285 of this title (relating to On-Site Sewage Facilities).

(b) This chapter does not apply to a person who proposes to construct a collection system or commission permitted treatment facility that will collect, transport, treat, or dispose of wastewater that does not have the characteristics of domestic wastewater although it may contain domestic wastewater.

(c) The executive director will grant variances from the requirements of this chapter to a person who proposes to construct, materially alter, expand, or re-rate a collection system or treatment facility, if the plans and specifications for the project are submitted prior to March 1, 2009 and meet the design criteria that was in effect when the engineering design began.

§217.2. Definitions.

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

(1) Advanced nutrient removal--A process to remove phosphorus and/or nitrogen and produce effluent of higher quality than normally achieved by secondary treatment processes.

(2) Alternative collection system--A system or combination of systems that collects wastewater and incorporates any of the following: pressure sewer, small diameter gravity sewer, or vacuum sewer that is not a conventional gravity collection system. An alternative collection system is comprised of both on-site and off-site components.

(3) Annual average flow--The arithmetic average of all daily flow determinations taken within a period of 12 consecutive months.

(4) Biotower--A biological filtration system that involves biological film on a plastic media that reduces the biological oxygen demand of the effluent.

(5) Building lateral--A pipe that conveys raw wastewater and connects the plumbing of a structure to an on-site component or a collection system pipe. A building lateral is privately owned and is not a part of a wastewater collection system.

(6) Bypass--The intentional diversion of a waste stream from any portion of a treatment facility.

(7) Collection system--Pipes, conduits, lift stations, force mains, and all other constructions, devices, and appurtenant appliances used to transport wastewater.

(8) Constructed Wetland--A water treatment facility built to duplicate the processes occurring in natural wetlands, which are complex, integrated systems in which water, plants, animals, microorganisms and the environment (sun, soil, and air) interact to improve water quality.

(9) Design flow--The average daily flow rate for a treatment facility permitted by the commission.

(10) Diurnal Flow--The daily cycle of high and low influent flows to a wastewater treatment system.

(11) Domestic Wastewater--Sewage that is characterized as residential wastewater, not produced by commercial or industrial activity, and which originates primarily from kitchen, bathroom, and laundry sources, including waste from food preparation, dishwashing, garbage grinding, toilets, baths, showers, and sinks of a residential dwelling.

(12) Effective size--The result of an analysis of a sample of filter media that equals the effective diameter, D10, which is the diameter of the particle size at 10% finer-by-weight as plotted on a semi-log grain size distribution curve. In other words, 10% of the sample particles are finer and 90% are larger than the effective size.

(13) Engineer--A professional engineer with expertise in wastewater design and construction licensed by the Texas Board of Professional Engineers.

(14) Equivalent dwelling unit--Any building or section of a building that produces wastewater of a composition and quantity comparable to that discharged by a single, private residence.

(15) Facility--All land, structures, operational units, or appurtenances used jointly to process, treat, and dispose of wastewater.

(16) Filter media--The material placed in a filter containment structure to perform the filtering action.

(17) Firm pumping capacity--The maximum flowrate under design conditions with the largest pumping unit out of service.

(18) Flat plate system--A membrane bioreactor that arranges membranes into rectangular cartridges with a porous backing material sandwiched between two membranes for structural support.

(19) Force main--A pressure-rated conduit that conveys wastewater from a pump station to a discharge point.

(20) Free water system--A constructed wetlands designed to have the water surface above the wetland bed or substrate.

(21) Grinder pump--A component that receives raw wastewater through a building lateral, grinds the solids in the wastewater into a slurry, and provides the motive force for transporting the raw wastewater to a lift station or a collection system.

(22) Gross flux rate--The volume of water that passes through a membrane measured in gallons per day per square-foot of membrane area at a standard temperature of 20 degrees Centigrade.

(23) Headworks--The location where wastewater enters a facility and the first chance to treat the flow, typically by removing large solids and grit.

(24) Hollow fiber system--A membrane bioreactor composed of bundles of very fine membrane fibers, approximately 0.5-2 millimeter diameter, held in place at the ends with hardened plastic potting material, and supported on stainless steel frames or rack assemblies. The outer surface of each fiber is exposed to the mixed liquor with filtrate flow from outside to inside through membrane pores.

(25) Innovative technology--A process not addressed in this chapter or a process specifically identified as innovative by this chapter.

(26) Interceptor tank--A component that receives raw wastewater from a building lateral, removes floatable and settleable solids, stores the removed solids, and provides flow attenuation.

(27) Lift station--A belowground structure that collects wastewater and utilizes pumps to raise it to a higher elevation. The term lift station applies to a structure in which the static head exceeds the frictional headlosses.

(28) Material alteration--a change to a collection system or treatment facility that changes efficiency of the collection system or treatment facility.

(29) Membrane bioreactor system--An activated sludge biological treatment system that uses membrane filtration rather than secondary clarification for solids separation and conventional filtration.

(30) Minimum grade effluent sewer--An alternative wastewater collection system pipeline with a constant downward slope.

(31) Multiple equivalent dwelling unit :

(A) a group of residences served by a common service connection; or

(B) a commercial, industrial, institutional, or other non-residential establishment that produces wastewater:

(i) in excess of 1,500 gallons per day; or

(ii) not comparable in composition to that discharged by a single private residence.

(32) Net flux rate--The gross flux rate adjusted for production lost during backwash, relaxation, and cleaning.

(33) Nonconforming technology--Technology or a process that does not conform to the design criteria of this chapter or a technology or process specifically identified as nonconforming by this chapter.

(34) Off-site component--A wastewater collection system component that includes collection system pipes, force mains, pump stations, lift stations, vacuum stations, and related appurtenances located outside a wastewater treatment facility's site boundary.

(35) On-site component--Equipment, structure, or pipe located within a wastewater treatment facility's site boundary.

(36) Overflow--A flow over the weir of a treatment unit.

(37) Owner--A person who owns a collection system or a treatment facility or part of a system or facility.

(38) Peak flow--The highest two-hour flow expected under any operational conditions, including times of high rainfall based on a two-year 24-hour storm or a prolonged period of wet weather.

(39) Pressure sewer--A wastewater collection system that is pressurized by pumps at each service connection.

(40) Project--A TCEQ permitted wastewater collection system or treatment facility on which construction has begun but that is not yet complete.

(41) Proposed facility--A TCEQ permitted wastewater treatment facility on which construction has not begun.

(42) Pump--A device that raises, transfers, or compresses fluids by suction, pressure, or both.

(43) Report--The final engineering design report prepared, signed, sealed by the design engineer that contains calculations and written descriptions of processes, equipment, and structures that demonstrate compliance with this chapter, as described in §217.10 of this title (relating to Final Engineering Design Report).

(44) Sequencing Batch Reactor (SBR)--A fill and draw activated sludge treatment system that is identical to conventional activated sludge systems, except the processes are carried out sequentially in the same tank. An SBR system has the following five steps that are carried out in the following sequence:

(A) Fill--The basin is filled with the influent;

(B) React--The influent in the basin is aerated;

(C) Settle--The mixed liquor within the basin is settled (clarification);

(D) Draw--The basin is decanted; and

(E) Idle--The sludge is removed from the basin.

(45) Small diameter effluent sewer--A collection system that receives effluent from an interceptor tank, transports the flow by gravity, and may include minimum grade effluent sewers and variable grade effluent sewers.

(46) Transmembrane pressure--The difference between the average pressure on the feed side of a membrane and the average pressure on the permeate side of a membrane or the driving force associated with any given flux rate.

(47) Tubular system--A system in which sludge is pumped from an aeration basin to a pressure driven membrane system outside of a bioreactor where the suspended solids are retained and recycled back into the bioreactor while the effluent passes through a membrane.

(48) Variable grade effluent sewer--A small diameter gravity wastewater collection system that does not require a uniform gradient, but will allow inflective gradients where sections of the collection system are below the hydraulic grade line. May be used with septic tank effluent pumps.

(49) Variance--A deviation from a specific requirement of this chapter.

(50) Wastewater--A waterborne industrial waste, recreational waste, domestic waste, or combination of these wastes.

(51) Wasting--The practice of removing excess or old sludge from a wastewater treatment process.

§217.3. Purpose.

(a) The purpose of this chapter is to establish the minimum design criteria for the comprehensive design of domestic sewage collection systems and treatment and disposal facilities. The minimum design criteria are not sufficient for all situations. A design must protect the public health and meet water quality standards established by the commission.

(b) The executive director may require more stringent design criteria of a collection system or treatment facility if the executive director determines it is necessary to protect public health or to meet water quality standards established by the commission.

§217.4. Variances.

(a) The report must include all requested variances from the requirements of this chapter.

(b) The report must include a technical justification for each variance requested.

(c) If the executive director determines that a variance may potentially endanger public health or the environment, the executive director may deny the variance or require compensatory measures be taken.

(d) The executive director shall not grant or approve a variance that would violate any expressed prohibition in this chapter.

(e) If the executive director does not notify an owner by facsimile or letter that additional information is requested or that a variance is denied within 30 days after receiving a signed and dated variance request that has been sealed by an engineer, the variance is approved.

(f) A variance request from any rule in this chapter that requires affirmative executive director approval is not eligible for the approval process in subsection (e) of this section.

§217.5. Plans and Specifications General Requirements.

(a) An owner is required to build a wastewater collection system or treatment facility according to the plans and specifications approved by the executive director.

(b) The executive director's approval of plans and specifications of a facility does not relieve an owner of the responsibility to obtain a wastewater permit or other authorization in accordance with Texas Water Code, Chapter 26.

(c) The executive director's approval of a wastewater permit does not relieve an owner of the responsibility to obtain a plans and specifications approval for a facility in accordance with this chapter.

(d) An owner must ensure that its facility plans and specifications meet all design requirements in the associated wastewater permit.

§217.6. Submittal Requirements and Review Process.

(a) An owner is not required to submit collection system or treatment facility plans and specifications for approval prior to the commission issuing the facility's wastewater permit.

(b) A treatment facility's plans and specifications must be based on a design that will produce effluent that will at least meet the requirements and effluent limits in the associated wastewater permit.

(c) An owner shall submit to the executive director and the appropriate regional office a summary transmittal letter for each collection system and treatment facility that includes the following requirements, except as provided by §217.8 of this title (relating to Municipality Reviews):

(1) the name and address of the design firm;

(2) the name, phone number, and facsimile number of the design engineer;

(3) the county(s) where the project will be located;

(4) an identifying name for the project;

(5) the name(s) of the person(s) that proposes to operate the collection system or treatment facility;

(6) the collection system or treatment facility owner's name, and if applicable, the treatment facility permit number, and facility name;

(7) a statement certifying that the plans and specifications are in substantial compliance with all requirements of this chapter, with the exception of any listed variance requests;

(8) a statement certifying that any variances from the requirements will not threaten public health or environment, based on the best professional judgment of the engineer who prepared the report and the project plans and specifications;

(9) a brief description of the project scope that includes:

(A) a brief engineering summary of the collection system or treatment facility;

(B) a description of variances from the requirements of this chapter, including the use of nonconforming or innovative technology; and

(C) an explanation of the reasons for such variances in accordance with §217.4 of this title (relating to Variances); and

(10) the signature and seal of the engineer responsible for the design of the collection system or treatment facility.

(d) The executive director may review the plans and specifications for any collection system or treatment facility.

(e) If the executive director does not notify an owner by fax or letter within 30 days after the receipt of a summary transmittal letter that a review will occur, the project is approved. However, such approval is conditional, subject to an executive director determination under §217.4(c) or (d) of this title. Additionally, if this provision conflicts with any other rule in this chapter that requires affirmative executive director approval, then this provision does not apply.

(f) If the executive director notifies an owner by fax or letter of the intent to review a collection system or facility's design, the owner shall submit the following within 30 days after receiving notice:

(1) a complete set of plans and specifications;

(2) a complete report;

(3) any requested variances; and

(4) sufficient information to satisfy the executive director that a project is in substantial compliance with this chapter.

(g) If the executive director does not notify an owner of any insufficiency within 30 days after receipt of any additionally requested information, the project is approved.

§217.7. Types of Plans and Specifications Approvals.

(a) Approval given by the executive director or other authorized review authority does not relieve an owner of any liability or responsibility with respect to designing, constructing, or operating a collection system or treatment facility in accordance with applicable commission rules and the associated wastewater permit.

(b) The executive director or other authorized review authority may grant the following types of approvals:

(1) Standard approval. The executive director may grant a standard approval for plans and specifications that do not include any requested variances and comply with all applicable parts of this chapter.

(2) Approval of innovative and nonconforming technologies in accordance with §217.4 of this title (relating to Variances).

(A) An owner who requests approval for an innovative or nonconforming technology must submit a summary transmittal letter in accordance with §217.6(c) of this title (relating to Submittal Requirements and Review Process) and must describe the technology and give the reason(s) for selecting the engineering proposal for a process, equipment, and construction material.

(B) An owner must receive written approval from the executive director before constructing, installing, or operating any innovative or nonconforming technology.

(C) The executive director may require a request to use a nonconforming or innovative technology to be supported by a pilot or demonstration study. Performance data from a similarly designed full-scale process that has operated for a reasonable period under conditions similar to those of a proposed design may be submitted in addition to or in lieu of pilot or demonstration study.

(D) The executive director may require an owner to submit evidence that the owner, the manufacturer, or the supplier of the nonconforming equipment has provided a performance bond that:

(i) is acceptable to the executive director;

(ii) is from a surety company listed on the United States Treasury Department's current *Listing of Certified Companies*; and

(iii) insures the performance of the innovative or nonconforming equipment or process.

(E) The performance bond required in §217.7(b)(2)(D) of this section must cover:

(i) the full cost of removing equipment and closing the collection system or the treatment facility;

(ii) the replacement of all failing processes and equipment with corresponding processes and equipment that conforms to these rules;

(iii) all associated engineering costs necessary for the removal and replacement of any failing process or equipment; and

(iv) at least two years from the date the facility or equipment is put into service.

(F) The executive director may require an owner to submit a separate report on the performance of a nonconforming or innovative technology after a collection system or treatment facility is built and operating.

(3) Conditional approval.

(A) The executive director may grant conditional approval for a specific set of operating conditions.

(B) If a conditional approval is granted, an owner is responsible for ensuring that the conditions, stipulations, and restrictions outlined by the executive director are met. Operating outside the conditions, stipulations, or restrictions in a conditional approval is a violation of this section.

§217.8. Municipality Reviews.

(a) The executive director may grant approval authority to a municipality that requests approval authority and meets the requirements in Texas Water Code, §26.034(d).

(b) The executive director shall not require plans and specifications for a wastewater collection system that transports primarily domestic waste to be submitted for approval from:

(1) a municipality, if the plans and specifications subject to review are prepared by a private engineering consultant and a review is conducted by an engineer who is an employee of or consultant to the municipality separate from the private engineering consultant charged with the design of the plans and specifications under review; or

(2) an entity that is required by local ordinance to submit the plans and specifications to a municipality for review and approval.

(c) If a municipality seeks to perform technical reviews of wastewater collection systems, the municipality shall submit a map or maps to the executive director delineating the municipality's jurisdictional boundaries for the area it is seeking responsibility for review of plans and specifications at least 30 days before commencing to review plans and specifications in accordance with subsection (b) of this section.

(d) The municipality shall submit a revised map or maps to the executive director identifying jurisdictional boundary changes at least 30 days prior to any proposed change.

(e) If a municipality ends its review authority, the municipality shall provide written notice to the executive director at least 30 days prior to ending municipal reviews.

(f) A municipality's review program must incorporate the following requirements:

(1) The municipality's review and approval process shall ensure compliance with all the applicable rules of this chapter.

(2) A municipality may review and approve engineering reports and plans and specifications only for projects that transport primarily domestic waste within the boundaries of jurisdiction of that municipality.

(3) The municipality shall issue a document that approves and details each project approved for construction.

(4) The municipality shall maintain complete files of all review and approval activities.

(g) The executive director may perform periodic audits of the review and approval process of a municipality with review authority to ensure that the review process and approved projects comply with this chapter.

(1) The executive director shall provide a municipality with written notice of a pending audit a minimum of five working days prior to beginning review of municipal files related to an audit.

(2) The municipality shall provide to the executive director an opportunity to review any existing project files relating to its review and approval activities under this chapter.

(3) The municipality shall provide to the executive director an opportunity to review documentation of all agreements between a private consultant or consultants and the municipality that relate to its review and approval activities under this chapter.

(h) If the executive director finds through review of specific projects or through audit of a municipality's review and approval process that a municipality's review and approval process does not provide for compliance with the minimum design and installation requirements detailed in this chapter, the municipality must achieve compliance within a time frame established by the executive director.

(i) If the municipality does not achieve the required compliance within the timeframe established by the executive director, the commission may revoke the review authority of a municipality. If the commission revokes the authority, subsections (j), (k), (l), and (m) apply.

(j) The executive director shall notify a municipality in writing of the intention to revoke the municipality's authority and shall include a justification for revoking the authority.

(k) If the authority of a municipality is revoked, all new projects proposed to be constructed within that municipality's jurisdiction must be submitted to the executive director in accordance with §217.6 of this title (relating to Submittal Requirements and Review Process).

(l) If the authority of a municipality is revoked, the municipality shall return all subsequently submitted plans and specification projects in its jurisdiction and notify any applicants of the requirement to seek approval from the commission.

(m) If the commission revokes the authority of a municipality, owners of any completed projects or projects under construction whose plans and specifications were approved prior to revocation are not required to seek approval from the commission.

§217.9. Texas Water Development Board Reviews.

If the Texas Water Development Board reviews plans and specifications for a wastewater collection systemor treatment or disposal facility in accordance with Texas Water Code, §17.276(d), the owner shall send a copy of the approval to the executive director.

§217.10. Final Engineering Design Report.

(a) An owner shall submit the report for any proposed collection system or treatment facility or proposed material alteration or expansion to an existing collection system or treatment facility.

(b) The report must include the signed and dated seal of the engineer responsible for the report.

(c) The report must demonstrate compliance with this chapter or justify variances from this chapter in accordance with §217.4 of this title (relating to Variances) by including all pertinent calculations, analyses, graphs, formulas, constants, tables, geologic information, hydraulic and hydrological information, historical data, and technical assumptions.

(d) If the executive director requests additional information for the report, an owner shall submit the requested information prepared, signed, and sealed by an engineer, within 30 days after receiving a request.

(e) The report for a wastewater collection system must include the following:

(1) a map showing the current service area, the proposed service area, and any area proposed for future expansion;

(2) the topographical features of the current, the proposed, and any future service areas;

(3) a description of how the design flow was determined;

(4) the minimum and maximum grades for each size and type of pipe;

(5) calculations of expected minimum and maximum velocities in the system for each size and type of pipe;

(6) the proposed system's effect on an associated existing system's capacity;

(7) the existing and anticipated inflow and infiltration, the hydraulic effect of the inflow and infiltration on the proposed and existing systems, any inflow and infiltration flow rate monitoring, and any inflow and infiltration abatement measures;

(8) a description of the ability of the existing and proposed trunk and interceptor wastewater collection systems and lift stations to handle the peak flow;

(9) the capability of the receiving treatment facility to receive and adequately treat the anticipated peak flow;

(10) an engineering analysis showing compliance with structural design, minimization of odor-causing conditions, and the pipe design requirements of §217.55 of this title (relating to Manholes and Related Structures);

(11) a description of the areas not initially served by a project, and the projected means of providing service to these areas, including special provisions incorporated in the present plans for future expansion;

(12) the calculations and curves showing the operating characteristics of all system lift stations at minimum, maximum, and design flows during both present and future conditions; and

(13) the safety considerations incorporated into a project design, including ventilation, entrances, working areas, and explosion prevention.

(f) The report for a wastewater treatment facility must include the following:

(1) The quantity and characteristics of any existing wastewater influent, any proposed changes, and any anticipated changes.

(2) If adequate records are not available, analyses must be made of the existing conditions, and the results included in the report, including:

(A) a map of the proposed facility and the area surrounding the facility, the area included in the facility site, the area that makes up the buffer zone, any 100-year flood event floodway or floodplain, and the discharge route or land application unit;

(B) a description of the surrounding area that includes prevailing winds, water treatment facilities, water supply wells, surface water intakes, present and proposed housing developments, present and proposed industrial sites, present and proposed highways and streets, present and proposed parks, present and proposed schools, present and proposed recreational areas, and present and proposed shopping centers;

(C) documentation of compliance with the buffer zone criteria and the 100-year floodplain restrictions specified in §309.13 of this title (relating to Unsuitable Site Characteristics);

(D) a sludge management plan, including:

(i) the estimated quantity and quality of sludge that will be generated, including future sludge loads based on flow projections;

(ii) the sludge treatment requirements for ultimate disposal, and the sludge storage requirements for each alternative;

(iii) a method of sludge transport, use, storage, and disposal; and

(iv) the alternatives, contingencies, and mitigation plans that ensure reliable capacity and operational flexibility.

(E) The methods to control bypassing, including:

(i) information and data describing features to prevent bypassing such as auxiliary power, standby and duplicate units, holding tanks, storm water clarifiers, or flow equalization basins; and

(ii) operational arrangements such as flexibility of pipes and valves to control flow through the treatment units and reliability of power sources to prevent unauthorized discharges of untreated or partially treated wastewater.

(F) information and calculations demonstrating the facility's compliance with the design requirements of this chapter, including:

(i) the types of units proposed and their capacities;

(ii) the detention times, surface loadings, and weir loadings pertinent to each wastewater treatment unit; and

(iii) hydraulic profiles for wastewater and sewage sludge that include:

(I) a plot of the hydraulic gradient at peak flow conditions for all gravity lines;

(II) the anticipated operation mode of the facility;

(III) organic and volumetric loadings pertinent to each unit; and

(IV) aeration demands and how those demands will be supplied.

§217.11. Construction of an Approved Facility.

(a) An owner may not begin construction of a facility with approved plans and specifications until the executive director issues a wastewater permit for the facility, unless the commission issues the owner an authorization to construct under Texas Water Code, §26.027(c).

(b) An owner must obtain a plans and specifications approval of a particular permit phase before beginning to construct or operate under that permit phase.

(c) An owner must phase the construction of a facility as required by the associated wastewater permit, unless a variance is granted under §217.4 of this title (relating to Variances).

(d) A person is prohibited from allowing a bypass of untreated or partially treated wastewater during construction without a commission order for such discharge.

(e) An owner that materially alters or expands an existing collection system or treatment facility or builds a new facility must comply with the requirements of this chapter that are in effect on the date the plans and specifications are submitted for approval unless granted a variance in accordance with §217.1(c).

(f) A treatment facility owner that must apply for a new permit or that never received a plans and specifications approval for an existing facility must comply with the requirements of this chapter that are in effect at the time the new permit application is submitted or the lack of plans and specifications approval is discovered.

(g) A collection system owner that never received a plans and specifications approval for an existing collection system must meet the design criteria in effect at the time the lack of the plans and specifications approval is discovered.

§217.12. Substantial Design Changes.

(a) A substantial design change is a change to the approved plans and specifications or an approved variance of a process, equipment, or design that has the potential to alter the way a wastewater treatment facility or collection system functions.

(b) A substantial design change request must include the signed and dated seal of an engineer.

(c) If the executive director determines that a substantial design change may potentially endanger public health or environment, the executive director may deny the design change or require compensatory measures to be taken.

(d) The executive director shall not grant or approve a substantial design change that would violate any expressed prohibition in this chapter.

(e) If the executive director does not notify an owner by fax or letter that additional information is requested or that a substantial design change is denied within 30 days after receiving a signed and dated substantial design change request that has been sealed by an engineer, the substantial design change is approved. However, such approval is conditional subject to an executive director determination under subsection (c) or (d) of this section. Additionally, if this provision conflicts with any other rule in this chapter that requires affirmative executive director approval, then this provision does not apply.

(f) A substantial design change must be approved by the executive director before it can be built, installed, or put into service.

§217.13. Final Construction Drawings and Technical Specifications.

(a) If requested by the executive director, an owner shall submit construction drawings and technical specifications for a constructed collection system or treatment facility within 30 days after receiving the request.

(b) The signed and dated seal of the engineer who is responsible for the facility design must be on each sheet of the construction drawings and on the title page of the bound technical specifications.

(c) The final construction drawings and technical specifications must include all items in the following paragraphs that are applicable to a project.

(1) Construction drawings for a wastewater collection system.

(A) The drawings for a wastewater collection system must include plan and profile drawings for both gravity pipes and pressure pipes, and the drawings must specify the size, grade, and type of pipe materials.

(B) The drawings must also specify the location of any structural features of a collection system, including manholes, waterway crossings, bridge crossings, siphons, lift stations, and air release valves.

(C) The drawings must locate all potable water distribution lines that are 9.0 feet or closer to any portion of a wastewater collection system and indicate the actual separation distances.

(D) The drawings must include dimensional section details of manholes, manhole covers, and any other collection pipe appurtenances.

(E) The drawings for a lift station must show the location of the following:

(i) all pumps, valves, pumping control equipment, safety equipment, and ventilation equipment;

(ii) points that may be accessed by operational staff, such as manholes and cleanout ports;

(iii) hatches and hoisting equipment for installing and removing equipment;

(iv) slope and location of any wet well, floor grouting, valve vaults, valve vault pipes, and gas migration prevention measures used between a wet well and a valve vault;

(v) pipe entrances and exits;

(vi) sump pumps;

(vii) elevations of level control switches; and

(viii) any other lift station-related appurtenances.

(2) Construction drawings for a wastewater treatment facility.

(A) The drawings for a wastewater treatment facility show a vertical and horizontal scale and must include:

(i) plan drawings of all pipes;

(ii) plan and profile drawings of each treatment unit;

(iii) the dimensions of each wastewater treatment unit;

(iv) all mechanical, electrical, and construction details; and

(v) a hydraulic profile of a treatment facility at both design and peak flows.

(B) The construction drawings may include plans for future expansion of a facility.

(C) The construction drawings may include a clarification of any complex details of pipe systems by including an isometric flow diagram.

(3) The specifications for a material alteration or expansion of an existing collection system or treatment facility must include technical descriptions of all equipment including:

(A) the quantity and sizes of any equipment;

(B) any applicable materials specifications;

(C) testing requirements; and

(D) national standards citations.

(4) If requested by the executive director, an owner must submit additional information relating to the plans and specifications within 30 days after receiving a request.

§217.16. Treatment Facility Operation and Maintenance Manual.

(a) An owner of a treatment facility is responsible for developing an operation and maintenance manual with the assistance of an engineer.

(b) An owner must ensure that the operation and maintenance manual includes all information specific to the facility that is necessary to ensure efficient and safe operation, maintenance, monitoring, and reporting by a facility operator. The operation and maintenance manual must include the following items:

(1) administrative and recordkeeping items, including:

(A) a table of contents;

(B) a copy of the wastewater permit;

(C) names and telephone numbers for contacts with the appropriate state and federal regulatory agencies;

(D) a sample of each type of Discharge Monitoring Report or Monthly Effluent Report an owner is required to submit for the facility;

(E) a sample daily activity report for documenting internal monitoring done in association with internal process control, including flow rates from various units, dissolved oxygen levels, pH, solids concentrations, sludge settling, clarifier sludge blanket depths, sludge age or retention time, and disinfection residuals; and

(F) a description of the quality assurance and quality control recordkeeping requirements for all laboratory analyses performed.

(2) operation and maintenance items, including:

(A) expected flow patterns, size, and capacity of all units within the facility;

(B) start-up procedures, routine operational procedures, emergency operations procedures, and shut down procedures for all units;

(C) the manner and expected volumes in which solids return to aeration or waste;

(D) expected solids concentrations in each unit;

(E) expected clarifier overflow rates;

(F) expected disinfectant and dechlorination usage and dosage amounts during normal and emergency operating conditions;

(G) descriptions and frequencies of routine in-situ and laboratory analyses to be performed and a list of references to standard testing procedures literature;

(H) description and schedule of routine maintenance activities to be performed, including lubrication and inspection of all pumps, motors, and other equipment; and

(I) a recommended spare parts inventory with source information.

(3) safety requirements, including:

(A) all known potential or actual safety hazards within a facility;

(B) the location and method of use for all personal safety equipment in accordance with §217.324(a);

(C) evacuation, shelter, and shelter-in-place plans;

(D) the names and phone numbers of entities and individuals to be contacted during emergencies;

(E) emergency operation plans for power outages, flooding, and other site specific emergency situations that may develop;

(F) annual safety training curriculum and schedule for all facility staff;

(G) first aid precautions, location of first aid supplies and description of appropriate emergency medical treatment;

(H) chemical disposal in accordance with §217.247(q), if applicable;

(I) ultraviolet light in accordance with §217.299, if applicable; and

(J) hazardous tasks in accordance with §217.323(b), if applicable.

(c) An owner shall keep a copy of a current operation and maintenance manual at the facility site.

(d) An owner shall submit a copy of the operation and maintenance manual to the executive director within 30 days after receiving a request.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2008.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: March 14, 2008
For further information, please call: (512) 239-0177

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SUBCHAPTER B. TREATMENT FACILITY DESIGN REQUIREMENTS

30 TAC §§217.31 - 217.39

STATUTORY AUTHORITY

The new rules are adopted under the authority of Texas Water Code (TWC), §5.013, which provides the commission's general jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted new rules implement TWC, §§5.013, 5.103, 5.105, 5.120, 26.027, 26.034, and 26.121.

§217.31. Applicability.

This subchapter details the design values that an owner shall use when determining the size of any wastewater treatment facility component. This subchapter applies to the treatment design for a new facility, material alteration or expansion an existing facility, and the re-rating of an existing facility.

§217.32. Organic Loadings and Flows.

(a) The design of a new facility must be based on the flows and loadings in paragraphs (1) - (3) of this subsection, unless subsection (b) of this section applies.

(1) Design flow.

(A) For a facility equal to or greater than 1.0 million gallons per day (mgd), the permitted flow is the average annual flow value determined by multiplying the per capita flow in Table B.1. in paragraph (3) of this subsection by the number of people in the service area.

(B) For a facility less than 1.0 mgd, the permitted flow is the maximum 30-day average flow estimated by multiplying the average annual flow by a factor of at least 1.5.

(2) Peak flow. When site-specific data is unavailable, the instantaneous two-hour peak flow must be estimated by multiplying the permitted flow by a factor of 4.0.

(A) If a facility experiences unusual periodic flow variations, a higher multiplier may be used to calculate the peak flow.

(B) In a facility with flow equalization, the facility may be designed for a lower estimated peak flow, if supporting data included in the report supports the estimate.

(C) A treatment unit, pipe, weir, flume, disinfection unit, or any other treatment unit that is flow limited must be sized to transport or treat the estimated peak flow.

(D) A facility must use a totalizing flow meter for flow measurement.

(3) Design organic loading. If available, actual organic loading data must be used as the basis for design. If actual data is not available, the design organic load must be used as the basis for design. The design organic load is determined by multiplying the projected uses by annual average flow determined from the following table and by using the appropriate influent concentration from the following table:

Figure: 30 TAC §217.32(a)(3)

(b) For an owner constructing a new system to serve the same service area as an existing facility with sufficient historical data, the data from §217.34 of this title (relating to Re-Rating, Expanding, or Materially Altering an Existing Facility), may be used to design a wastewater treatment facility if justified in the report.

§217.34. Re-Rating, Expanding, or Materially Altering an Existing Facility.

An owner who proposes to materially alter, expand, or re-rate an existing facility in order to meet an amended permit condition is required to use the facility's current operating data as the design basis for sizing the proposed wastewater treatment equipment and processes. The compiled data must meet the criteria outlined in paragraphs (1) and (2) of this section.

(1) Flows.

(A) The volume of existing flow shall be determined when an existing treatment facility is to be re-rated, expanded, or upgraded.

(B) An existing facility's data for the latest five years must be used to determine the annual average flow, the maximum monthly average flow, the peak flow, the ratio of maximum monthly average flow to annual average flow, and the ratio of the peak flow to the annual average flow. If the facility is less than five years old, all data must be used. All calculations and assumptions must be included in the report.

(C) All flow data for these analyses must be collected by a totalizing meter.

(D) An analysis of the peak flow must be based on a frequency distribution analysis using flow charts for each individual day to determine the maximum sustained flow rate over any two-hour period.

(E) The projected peak flow must be the result of collection system monitoring or modeling based on a two-year, 24-hour storm event for the service area.

(2) Organic loadings.

(A) When an owner seeks to have an existing facility re-rated or to expand or upgrade an existing facility, the design organic loading must be calculated based on the average daily organic load that the facility is required to treat during the design life. A calculation of the average daily organic loading must use the facility's actual data plus one standard deviation. The data must conform at a minimum to the following:

(i) The data must document a minimum of one year, consisting of three samples per week taken during days with a representative flow. If a sampling program is for a frequency of less than three times per week or less than a three-part grab sample, an owner shall document how the proposed sampling program is representative of actual conditions at the facility.

(ii) The samples must be representative of the peak loading.

(iii) Sampling data must include a minimum of five-day carbonaceous biochemical oxygen demand or five-day biochemical oxygen demand, total suspended solids, and ammonia-nitrogen, unless justified because of specific treatment requirements.

(iv) An engineering analysis for the minimum sampling period must include:

(I) a summary of the monthly data;

(II) annual-average monthly load; and

(III) the standard deviation of the monthly data.

(v) An analysis may use a linear regression or other appropriate statistical method for predicting the design organic load when significant data exists.

(B) A design must be based future loading and future flow calculated from the anticipated changes from the existing loading and flow.

(C) The report must justify the design organic loading.

(i) A design organic loading must account for both dry weather and wet weather conditions.

(ii) An owner shall use the design organic loading to determine the size of any treatment unit that provides treatment of organic waste.

§217.35. One Hundred-Year Flood Plain Requirements.

(a) If a 100-year flood plain is within 1,000 feet of the site of a proposed facility, the owner must show the 100-year flood plain on the site plan. A flood plain determination must be based on a superimposition of the 100-year flood elevation on the most accurate available topography and elevation of a proposed site.

(1) A 100-year flood plain must be based on the Federal Emergency Management Agency (FEMA) Flood Insurance Study (FIS) in effect at the time the plans and specifications are submitted to the executive director. FEMA maps are prima facie evidence of flood plain locations.

(2) An appropriate flood insurance rate map or FIS profile adjusted to the project's vertical data determines flood elevations.

(3) If a site is adjacent to a FEMA 100-year flood delineation but has no flood elevation published, a 100-year flood elevation may be determined by overlaying the effective FEMA delineation over a United States Geological Survey Quadrangle Map and interpolating a flood elevation.

(4) If FEMA flood plain information is not available, the report shall include a 100-year flood elevation based on the best information available.

(b) One hundred-year flood plain must be shown on profile.

(1) The FEMA 100-year water surface elevation must be marked on a hydraulic profile of a facility in accordance with the vertical scale of the drawing.

(2) If a proposed facility will occupy less than 1,000 feet of shoreline along a flood plain, the profile must show a single line coincident with the elevation of the centerline of any outfall pipe.

(3) When a proposed facility will occupy 1,000 feet or more of shoreline along a flood plain, the profile must show the water surface elevation at both the upstream and downstream limits of any protective structure for the proposed facility.

(c) The executive director will not approve a design of a proposed treatment unit within a 100-year flood plain, unless the design provides protection for all open process tanks and electric units from inundation during a 100-year flood event.

§217.38. Buffer Zones and Odor Abatement.

(a) The buffer zone requirements in §309.13 of this title (relating to Unsuitable Site Characteristics), apply to all treatment units in a facility.

(b) The report must include the design of any odor abatement measures intended to comply with §309.13(e) - (g) of this title.

(c) An odor abatement measure that is used in lieu of buffer zone requirements is subject to review in accordance with §217.7(b)(2) of this title (relating to Types of Plans and Specifications Approvals).

§217.39. Facility Use of Reclaimed Water.

(a) A facility that is designed after the effective date of this chapter must use reclaimed water in place of potable water used for wash down water, irrigating the grounds, and any other appropriate use.

(b) A facility that is designed after the effective date of this chapter must include a meter to measure reclaimed water use at the facility.

(c) An owner must reclaim water after it has been disinfected, if disinfection is part of the treatment. A reclaimed water system must provide for screening or filtration, pumping backup with controls, and a pressure-sustaining device such as a hydro-pneumatic tank.

(d) An owner may use only reclaimed water that meets the requirements for Type I or Type II water, in accordance with §210.33 of this title (relating to Quality Standards for Using Reclaimed Water) for wash down water, disinfection system operation, chemical mixing, irrigating the grounds, and any other appropriate use.

(e) An owner may use reclaimed water on a facility site with no further authorization from the executive director.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2008.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER C. CONVENTIONAL COLLECTION SYSTEMS

30 TAC §§217.51 - 217.70

STATUTORY AUTHORITY

The new rules are adopted under the authority of Texas Water Code (TWC), §5.013, which provides the commission's general jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted new rules implement TWC, §§5.013, 5.103, 5.105, 5.120, 26.027, 26.034, and 26.121.

§217.53. Pipe Design.

(a) Flow Design Basis. An owner must use the requirements of this section to design a gravity collection system.

(1) An owner must design a wastewater collection system to handle the transport of the peak dry weather flow from the service area, plus infiltration and inflow.

(2) The flow calculations must include the details of the average dry weather flow, the dry weather flow peaking factor, and the infiltration and inflow.

(3) The flow calculations must include the flow expected in the facility immediately upon completion of construction and at the end of its 50-year life.

(b) Gravity Pipe Materials.

(1) An owner must identify in the report the proposed gravity collection system pipe with its appropriate American Society for Testing and Materials (ASTM), American National Standards Institute (ANSI), or American Water Works Association (AWWA) standard numbers for both quality control (dimensions, tolerances, etc.) and installation (bedding, backfill, etc.).

(2) The selection of gravity collection system pipe must be based on:

(A) the characteristics of the wastewater conveyed;

(B) the character of industrial wastes;

(C) the possibility of septic conditions;

(D) the exclusion of inflow and infiltration;

(E) any external forces;

(F) any groundwater;

(G) the internal pressures; and

(H) the abrasion and corrosion resistance of the pipe material.

(c) Joints for Gravity Pipe.

(1) The technical specifications for joints for gravity pipe must include the materials and methods used in making joints.

(2) Materials used for gravity pipe joints must prevent infiltration and root entrance. A joint must:

(A) include rubber gaskets;

(B) include polyvinyl chloride (PVC) compression joints;

(C) include high density polyethylene compression joints

(D) be welded;

(E) be heat fused; or

(F) include other types of factory-made joints.

(3) The technical specifications must include ASTM, AWWA, ANSI, or other appropriate national reference standards for the joints.

(d) Separation distances between public water supply pipes and wastewater collection system pipes or manholes.

(1) Collection system pipes must be installed in trenches separate from public water supply trenches.

(2) Collection system pipes must be no closer than nine feet in any direction to a public water supply line.

(3) If a nine-foot separation distance cannot be achieved, the following guidelines will apply.

(A) If a collection system parallels a public water supply pipe the following requirements apply.

(i) A collection system pipe must be constructed of cast iron, ductile iron, or PVC meeting ASTM specifications with at least a 150 pounds per square inch (psi) pressure rating for both the pipe and joints.

(ii) A vertical separation must be at least two feet between the outside diameters of the pipes.

(iii) A horizontal separation must be at least four feet between outside diameters of the pipes.

(iv) A collection system pipe must be below a public water supply pipe.

(B) If a collection system pipe crosses a public water supply pipe, the following requirements apply:

(i) If a collection system is constructed of cast iron, ductile iron, or PVC with a minimum pressure rating of 150 psi, the following requirements apply:

(I) A minimum separation distance is six inches between outside diameters of the pipes.

(II) A collection system pipe must be below a public water supply pipe.

(III) Collection system pipe joints must be located as far as possible from an intersection with a public water supply line.

(ii) If a collection system pipe crosses under a public water supply pipe and the collection system pipe is constructed of acrylonitrile butadiene styrene (ABS) truss pipe, similar semi-rigid plastic composite pipe, clay pipe, or concrete pipe with gasketed joints, the following requirements apply:

(I) A minimum separation distance is two feet.

(II) If a collection system pipe is within nine feet of a public water supply pipe, the initial backfill around the collection system pipe must be:

(-a-) sand stabilized with two or more 80 pound bags of cement per cubic yard of sand for any section of collection system pipe within nine feet of a public water supply pipe.

(-b-) installed from one quarter of the diameter of the collection system pipe below the centerline of the collection system pipe to one pipe diameter (but not less than 12 inches) above the top of the collection system pipe.

(iii) If a collection system crosses over a public water supply pipe, one of the following procedures must be followed:

(I) Each portion of a collection system pipe within nine feet of a public water supply pipe must be constructed of cast iron, ductile iron, or PVC pipe with at least a 150 psi pressure rating using appropriate adapters.

(II) A collection system pipe must be encased in a joint of at least 150 psi pressure class pipe that is:

(-a-) centered on the crossing;

(-b-) sealed at both ends with cement grout or manufactured seal;

(-c-) at least 18 feet long;

(-d-) at least two nominal sizes larger than the wastewater collection pipe; and

(-e-) supported by spacers between the collection system pipe and the encasing pipe at a maximum of five-foot intervals.

(4) Public water supply pipe and collection system manhole separation.

(A) Unless collection system manholes and the connecting collection system pipe are watertight, as supported by leakage tests showing no leakage, they must be installed a minimum of nine feet of horizontal clearance from an existing or proposed public water supply pipe.

(B) If a nine-foot separation distance cannot be achieved, the requirements in paragraph (3) of this subsection apply.

(e) Building laterals and taps. Building laterals and taps on an installation must:

(1) include a manufactured fitting that limits infiltration;

(2) prevent protruding service lines; and

(3) protect the mechanical and structural integrity of a wastewater collection system.

(f) Bore or tunnel for crossings. The spacing of supports for carrier pipe through casings must maintain the grade, slope, and structural integrity of a pipe as required by subsection (k) of this section.

(g) Corrosion potential.

(1) If a pipe or an integral structural component of a pipe will deteriorate when subjected to corrosive internal conditions or if a pipe or component does not have a corrosive resistant liner installed by the pipe manufacturer, the report must demonstrate the structural integrity of a pipe during the minimum 50-year design life cycle.

(2) A pipe must have an appropriate lining if the corrosion analysis indicates that corrosion will reduce the functional life of the pipe to less than 50 years.

(h) Odor Control.

(1) An owner shall determine if odor control measures are necessary to prevent a wastewater collection system from becoming a nuisance, based upon the potential of the wastewater collection system to generate hydrogen sulfide.

(2) A potential odor determination must include the estimated flows immediately following construction and throughout a system's 50-year expected life cycle.

(i) Active Geologic Faults.

(1) An owner shall identify any active faults within the area of a collection system and minimize the number of collection system lines crossing faults.

(A) Where an active fault crossing is unavoidable, the report must specify design features that protect the integrity of a wastewater collection system in the event of movement of the fault.

(B) If a collection system line cross an active fault line, the design must specify:

(i) joints that provide maximum deflection, as required in subsection (m) of this section; and

(ii) manholes on each side of the fault so that a portable pump may be used in the event of a wastewater collection system failure.

(2) An owner shall not install a collection system service connection within 50 feet of an active fault.

(j) Capacity Analysis.

(1) An owner must ensure that a wastewater collection system's capacity is sufficient to serve the estimated future population, including institutional, industrial, and commercial flows.

(2) An owner must include in the report the calculations that demonstrate that the hydraulic capacity of a collection system includes the peak flow of domestic sewage, peak flow of waste from industrial sites, and maximum infiltration rates.

(3) A collection system must be designed to prevent a surcharge in any pipe at the expected peak flow.

(4) The minimum diameter allowed for a gravity pipe is 6.0 inches.

(5) Connecting storm water drains to a collection system is prohibited.

(6) An owner may use the data from an existing collection system. In the absence of existing data, a design must use data from a similar system or as described in paragraph (7) of this subsection.

(7) New collection systems.

(A) The sizing of pipe for a new collection system must be based on an engineering analysis of initial and future flows.

(B) A new collection system design must be sized for the peak flow, which is based on the estimated daily sewage flow contribution as shown in Figure: 30 TAC §217.32(a)(3), Table B.1 of this title (relating to Organic Loadings and Flows).

(k) Structural Analysis.

(1) An owner must ensure that a collection system is designed to have a minimum structural life of 50 years.

(2) For flexible pipe, which is pipe that will deflect at least 2% without structural distress, used in a collection system, the report must include:

(A) live load calculations;

(B) allowable buckling pressure determinations;

(C) prism load calculations;

(D) wall crushing determinations;

(E) strain prediction calculations;

(F) calculations that quantify long term pipe deflection; and

(G) all information pertinent to a determination of an adequate design including, but not limited to:

(i) the method of determining the modulus of soil reaction for bedding material and in-situ material;

(ii) pipe diameter and material with reference to appropriate standards;

(iii) modulus of elasticity,

(iv) tensile strength,

(v) pipe stiffness or ring stiffness constant converted to pipe stiffness;

(vi) Leonhardt's zeta factor;

(vii) trench width;

(viii) depth of cover;

(ix) water table elevation; and

(x) unit weight of soil.

(3) The design procedure dictates a minimum pipe stiffness. For trench installations, the design must specify a minimum stiffness requirement to ensure ease of handling, transportation, and construction. Pipe stiffness must be related to ring stiffness constant by the following equation:
Figure: 30 TAC §217.53(k)(3)

(4) Pipe that meet all the requirements in this paragraph are not required to perform the structural calculations in paragraph (3) of this subsection, provided that a pipe is installed and tested in accordance with all other requirements of this subchapter:

(A) open trench design;

(B) flexible pipe with a pipe stiffness of 46 psi or greater;

(C) buried 17 feet or less;

(D) diameter of 12 inches or less;

(E) modulus of soil reaction for the in-situ soil of 200 psi or greater;

(F) no effects on a pipe due to live loads;

(G) a unit weight of soil of 120 pounds per cubic foot or less; or

(H) a pipe trench width of 36 inches or greater.

(5) A design analysis for rigid pipe installations must be included in the report, including a structural analysis and any details nec-

essary to verify that the structural strength is sufficient to withstand the expected stresses. For rigid conduits, the minimum strength for each class of pipe material and the appropriate standard must be included.

(l) Minimum and Maximum Slopes.

(1) All wastewater collection systems must contain slopes sufficient to allow a velocity when flowing full of not less than 2.0 feet per second.

(2) Absent site-specific data, a collection system must be designed in accordance with the minimum and maximum slopes specified in this paragraph.

(A) The grades shown in the following table are based on Manning's formula with an assumed "n factor" of 0.013 and are the minimum acceptable slopes.
Figure: 30 TAC §217.53(l)(2)(A)

(i) The minimum acceptable "n" value for design and construction is 0.013.

(ii) The "n" value must take into consideration the slime, grit, and grease layers that will affect hydraulics or hinder flow as a pipe ages.

(B) If a velocity greater than 10 feet per second will occur when a pipe flows full, based on Manning's formula, shown in the following figure, and an "n" value of 0.013, special provisions must protect against pipe and bedding displacement.
Figure: 30 TAC §217.53(l)(2)(B)

(m) Alignment.

(1) A gravity collection system must be laid with a uniform grade between manholes.

(2) The report must justify any deviation from straight alignment by complying with the requirements of this section.

(3) Deviation from uniform grade (e.g., grade breaks or vertical curves) without manholes and with open cut construction is prohibited.

(4) The calculations for horizontal pipe curvature and the detail of the proposed curvature on the plans must be included in the report.

(5) A construction method that flexes a pipe joint is prohibited, unless a joint deflection meets the least of the following:

(A) equal to 5 degrees;

(B) less than or equal to 80% of the manufacturer's recommended maximum deflection; or

(C) 80% of the appropriate ASTM, AWWA, ANSI, or other nationally established standard for joint deflection.

(6) The maximum allowable manhole spacing for collection systems with horizontal curvature is 300 feet. A manhole must be at the point of curvature and the point of termination of a curve.

(n) Inverted Siphons and Sag Pipes.

(1) A sag pipe must include:

(A) two or more barrels;

(B) a minimum pipe diameter of 6.0 inches; and

(C) the necessary appurtenances for convenient flushing and maintenance.

(2) A manhole must include adequate clearance for rodding and cleaning.

(3) Sag pipes must be sized and designed with sufficient head to achieve a velocity of at least 3.0 feet per second at initial and design flows.

(4) The arrangement of inlet and outlet details must divert the normal flow to one barrel.

(5) A system must allow any barrel to be taken out of service for cleaning.

(6) Provisions must be made to allow cleaning across each bend with equipment available to the entity operating the collection system.

(7) Sag pipe must be designed to minimize nuisance odors.

(8) Inverted siphons and sag pipes must be pressure tested according to the requirement of §217.57 of this title (relating to Testing Requirements for Installation of Gravity Collection System Pipes).

(o) Bridged Sections.

(1) Pipe with restrained joints or monolithic pipe across a bridged section requires a manhole on each end.

(2) A bridged section must withstand the hydraulic forces applied by the occurrence of a 100-year flood event for a collection system site, including buoyancy.

(3) A bridged section must be capable of withstanding impacts from debris.

(4) Bank sections must be stabilized to prevent erosion.

(5) Bridge supports must be designed to ensure that a pipe has adequate grade, slope, and structural integrity.

§217.56. Trenchless Pipe Installation.

(a) The following trenchless technologies may be used for installation of new wastewater collection system pipe:

(1) impact moling, which is technique that launches a percussive soil displacement hammer (mole) from an excavation to displace soil and form a bore. The new pipe is drawn behind the mole or pulled into the bore using the hammer's reverse action. A pneumatically driven mole displaces the soil by the action of a percussive piston;

(2) pipe ramming, which is a simple technique using a pneumatic hammer to drive steel casings through the ground from one pit to another; or

(3) microtunneling, which is a remotely controlled mechanical tunneling system where the spoil is removed from the cutting head within the new pipeline, which is advanced by pipe jacking. The cutting head must have the appropriate cutting tools and crushing devices for the range of gravels, sands, silts, and clays that may be found at the collection system site.

(b) The following trenchless technologies may be used for replacement of wastewater collection system pipe:

(1) pipe bursting, which is a method of on-line replacement of fracturable pipe. An expanding device, either pneumatic or hydraulic, is introduced into the defective pipeline, shattering the pipe and drawing in the new pipe behind it. Insertion of short lengths may be made from pits but this involves jointing of the pipeline within the pit;

(2) pipe splitting, which is similar in technique to pipe bursting but is used on non-fragmental pipes such as steel, ductile iron or polyethylene. The system uses specialized splitting heads designed to cut through the pipe wall and joints and expand the existing pipe into the surrounding ground; or

(3) pipe eating, which is an on-line microtunneled replacement technique. The existing defective pipeline is crushed (or eaten), by the tunneling machine and removed through the new pipeline. It is used predominantly on concrete sewer installations. This system allows for size replacement and upsizing.

(c) The following trenchless technologies may be used for lining of existing wastewater collection system pipe, which reduces the inside diameter of the pipe:

(1) cement mortar lining, which is the application of a cement mortar (typically about four millimeters thick) to the inside of a pipe to protect against corrosion;

(2) epoxy spray lining, which is a method of lining pipes with a thin lining of resin (typically about one millimeter thick) that is sprayed onto the interior surface of a cleaned collection system pipe to isolate the pipe from the wastewater and possibly reinforce the structural capabilities of the pipe;

(3) cure in place pipe, which is method of lining existing pipe with a flexible tube impregnated with a resin that produces a pipe after the resin cures. The resin may be set by the use of heat or ultraviolet light; or

(4) sliplining, by which continuous or discreet pipes are inserted within existing pipes.

(d) Any other trenchless method of installing, replacing, or repairing collection system pipe is nonconforming technology and subject to the requirements of §217.7(b) of this title (relating to Types of Plans and Specifications Approvals).

(e) A wastewater collection system using a trenchless technology must be designed, installed, and constructed in accordance with American Society for Testing and Materials (ASTM) or American Water Works Association (AWWA) standards with reference to materials used and construction procedures. In the absence of ASTM or AWWA standards, executive director review may be based upon other recognized standards utilized by industry engineers.

(f) The report must include the following;

(1) the trenchless method;

(2) the type of pipe;

(3) the type(s) of soil;

(4) the pipe length and diameter;

(5) pipe slope;

(6) the method for disconnecting and reconnecting lateral and service connections;

(7) the provisions for flow bypass for existing system; and

(8) the pipe standard.

(g) The method for disconnecting and reconnecting lateral and service connections must be included in the report.

(h) Pipe installed by a trenchless technology is subject to the testing requirements in §217.57 of this title (relating to Testing Requirements for Installation of Gravity Collection System Pipes) and §217.68 of this title (relating to Force Main Testing).

§217.57. Testing Requirements for Installation of Gravity Collection System Pipes.

(a) For a collection system pipe that will transport wastewater by gravity flow, the design must specify an infiltration and exfiltration test or a low-pressure air test. A test must conform to the following requirements:

(1) Low Pressure Air Test.

(A) A low pressure air test must follow the procedures described in American Society For Testing And Materials (ASTM) C-828, ASTM C-924, or ASTM F-1417 or other procedure approved by the executive director, except as to testing times as required in Table C.3 in subparagraph (B)(ii) of this paragraph or Equation 3.c in subparagraph (C) of this paragraph.

(B) For sections of collection system pipe less than 36 inch average inside diameter, the following procedure must apply, unless a pipe is to be tested as required by paragraph (2) of this subsection.

(i) A pipe must be pressurized to 3.5 pounds per square inch (psi) greater than the pressure exerted by groundwater above the pipe.

(ii) Once the pressure is stabilized, the minimum time allowable for the pressure to drop from 3.5 psi gauge to 2.5 psi gauge is computed from the following equation:
Figure: 30 TAC§217.57(a)(1)(B)(ii)

(C) Since a K value of less than 1.0 may not be used, the minimum testing time for each pipe diameter is shown in the following table:
Figure: 30 TAC §217.57(a)(1)(C)

(D) An owner may stop a test if no pressure loss has occurred during the first 25% of the calculated testing time.

(E) If any pressure loss or leakage has occurred during the first 25% of a testing period, then the test must continue for the entire test duration as outlined above or until failure.

(F) Wastewater collection system pipes with a 27 inch or larger average inside diameter may be air tested at each joint instead of following the procedure outlined in this section.

(G) A testing procedure for pipe with an inside diameter greater than 33 inches must be approved by the executive director.

(2) Infiltration/Exfiltration Test.

(A) The total exfiltration, as determined by a hydrostatic head test, must not exceed 50 gallons per inch of diameter per mile of pipe per 24 hours at a minimum test head of 2.0 feet above the crown of a pipe at an upstream manhole.

(B) An owner shall use an infiltration test in lieu of an exfiltration test when pipes are installed below the groundwater level.

(C) The total exfiltration, as determined by a hydrostatic head test, must not exceed 50 gallons per inch diameter per mile of pipe per 24 hours at a minimum test head of two feet above the crown of a pipe at an upstream manhole, or at least two feet above existing groundwater level, whichever is greater.

(D) For construction within a 25-year flood plain, the infiltration or exfiltration must not exceed 10 gallons per inch diameter per mile of pipe per 24 hours at the same minimum test head as in subparagraph (C) of this paragraph.

(E) If the quantity of infiltration or exfiltration exceeds the maximum quantity specified, an owner shall undertake remedial action in order to reduce the infiltration or exfiltration to an amount within the limits specified. An owner shall retest a pipe following a remediation action.

(b) If a gravity collection pipe is composed of flexible pipe, deflection testing is also required. The following procedures must be followed:

(1) For a collection pipe with inside diameter less than 27 inches, deflection measurement requires a rigid mandrel.

(A) Mandrel Sizing.

(i) A rigid mandrel must have an outside diameter (OD) not less than 95% of the base inside diameter (ID) or average ID of a pipe, as specified in the appropriate standard by the ASTMs, American Water Works Association, UNI-BELL, or American National Standards Institute, or any related appendix.

(ii) If a mandrel sizing diameter is not specified in the appropriate standard, the mandrel must have an OD equal to 95% of the ID of a pipe. In this case, the ID of the pipe, for the purpose of determining the OD of the mandrel, must equal be the average outside diameter minus two minimum wall thicknesses for OD controlled pipe and the average inside diameter for ID controlled pipe.

(iii) All dimensions must meet the appropriate standard.

(B) Mandrel Design.

(i) A rigid mandrel must be constructed of a metal or a rigid plastic material that can withstand 200 psi without being deformed.

(ii) A mandrel must have nine or more odd number of runners or legs.

(iii) A barrel section length must equal at least 75% of the inside diameter of a pipe.

(iv) Each size mandrel must use a separate proving ring.

(C) Method Options.

(i) An adjustable or flexible mandrel is prohibited.

(ii) A test may not use television inspection as a substitute for a deflection test.

(iii) If requested, the executive director may approve the use of a deflectometer or a mandrel with removable legs or runners on a case-by-case basis.

(2) For a gravity collection system pipe with an inside diameter 27 inches and greater, other test methods may be used to determine vertical deflection.

(3) A deflection test method must be accurate to within plus or minus 0.2% deflection.

(4) An owner shall not conduct a deflection test until at least 30 days after the final backfill.

(5) Gravity collection system pipe deflection must not exceed five percent (5%).

(6) If a pipe section fails a deflection test, an owner shall correct the problem and conduct a second test after the final backfill has been in place at least 30 days.

(7) An owner shall not use any mechanical pulling devices during testing.

(8) An owner shall include a certification in the construction report or the notice of completion required in §217.14 of this title (relating to Completion Notice), that the wastewater collection system passed the deflection tests.

(c) An owner of a collection system must inspect the structural analysis of collection system under the direction of an engineer during the construction and testing phases of the project.

§217.58. Testing Requirements for Manholes.

(a) All manholes must pass a leakage test.

(b) An owner shall test each manhole (after assembly and backfilling) for leakage, separate and independent of the collection system pipes, by hydrostatic exfiltration testing, vacuum testing, or other method approved by the executive director.

(1) Hydrostatic Testing.

(A) The maximum leakage for hydrostatic testing or any alternative test methods is 0.025 gallons per foot diameter per foot of manhole depth per hour.

(B) To perform a hydrostatic exfiltration test, an owner shall seal all wastewater pipes coming into a manhole with an internal pipe plug, fill the manhole with water, and maintain the test for at least one hour.

(C) A test for concrete manholes may use a 24-hour wetting period before testing to allow saturation of the concrete.

(2) Vacuum Testing.

(A) To perform a vacuum test, an owner shall plug all lift holes and exterior joints with a non-shrink grout and plug all pipes entering a manhole.

(B) No grout must be placed in horizontal joints before testing.

(C) Stub-outs, manhole boots, and pipe plugs must be secured to prevent movement while a vacuum is drawn.

(D) An owner shall use a minimum 60 inch/lb torque wrench to tighten the external clamps that secure a test cover to the top of a manhole.

(E) A test head must be placed at the inside of the top of a cone section, and the seal inflated in accordance with the manufacturer's recommendations.

(F) There must be a vacuum of 10 inches of mercury inside a manhole to perform a valid test.

(G) A test does not begin until after the vacuum pump is off.

(H) A manhole passes the test if after 2.0 minutes and with all valves closed, the vacuum is at least 9.0 inches of mercury.

§217.59. Lift Station Site Requirements.

(a) Site access.

(1) A lift station design must include an access road located in a dedicated right-of-way or a permanent easement.

(2) A road surface must have a minimum width of 12 feet and must be constructed for use in all weather conditions.

(3) A road surface must be above the water level caused by a 25-year rainfall event.

(b) Security.

(1) The design of a lift station, including all mechanical and electrical equipment, must restrict access by an unauthorized person.

(2) A lift station must include an intruder-resistant fence, enclosure, or a lockable structure.

(3) An intruder-resistant fence must use a minimum of a 6.0 feet high chain link, masonry, or board fence with at least three strands of barbed wire or 8.0 feet high chain link, masonry, or board fence with at least one strand of barbed wire.

(c) Flood Protection. The design of a lift station, including all electrical and mechanical equipment, must be designed to withstand and operate during a 100-year flood event, including wave action.

(d) Odor Control. The design of a lift station must minimize potential odor. An owner shall include any design for odor control in the report.

§217.60. Lift Station, Wet Well, and Dry Well Designs.

(a) Pump Controls.

(1) A lift station pump must operate automatically, based on the water level in a wet well.

(2) The location of a wet well level mechanism must ensure that the mechanism is unaffected by currents, rags, grease, or other floating materials.

(3) A level mechanism must be accessible without entering the wet well.

(4) Wet well controls with a bubbler system require dual air supply and dual controls.

(5) Motor control centers must be mounted at least 4.0 inches above grade to prevent water intrusion and corrosion from standing water in the enclosure.

(6) Electrical equipment and electrical connections in a wet well or a dry well must meet National Fire Prevention Association 70 National Electric Code explosion prevention requirements, unless continuous ventilation is provided.

(b) Wet Wells.

(1) A wet well must be enclosed by watertight and gas tight walls.

(2) A penetration through a wall of a wet well must be gas tight.

(3) A wet well must not contain equipment requiring regular or routine inspection or maintenance, unless inspection and maintenance can be done without staff entering the wet well.

(4) A gravity pipe discharging to a wet well must be located so that the invert elevation is above the liquid level of a pump's "on" setting.

(5) Gate valves and check valves are prohibited in a wet well.

(6) Gate valves and check valves may be located in a valve vault next to a wet well or in a dry well.

(7) Pump cycle time, based on peak flow, must equal or exceed those in the following table:
Figure: 30 TAC §217.60(b)(7)

(8) An evaluation of minimum wet well volume requires the following formula:
Figure: 30 TAC §217.60(b)(8)

(c) Dry well access.

(1) An underground dry well must be accessible.

(2) A stairway in a dry well must use non-slip steps and conform to Occupational Safety and Health Administration regulations with respect to rise and run.

(3) A ladder in a dry well must made of non-conductive material and rated for the load necessary for staff and equipment to descend and ascend.

(d) Lift Station Ventilation.

(1) Passive Ventilation for Wet Wells.

(A) Passive ventilation structures must include screening to prevent the entry of birds and insects to a wet well.

(B) All mechanical and electrical equipment in a wet well with passive ventilation must be constructed in compliance with explosion requirements in the National Fire Protection Association 70 National Electric Code.

(C) A passive ventilation system must be sized to vent at a rate equal to the maximum pumping rate of a lift station, but not to exceed 600 feet per minute through a vent pipe.

(D) The minimum acceptable diameter for an air vent is 4.0 inches.

(E) A vent outlet must be at least 1.0 foot above a 100-year flood plain elevation.

(2) Mechanical Ventilation in Lift Stations.

(A) Dry Wells.

(i) A dry well must use mechanical ventilation.

(ii) Ventilation equipment under continuous operation must have a minimum capacity of six air exchanges per hour.

(iii) Ventilation equipment under intermittent operations must have a minimum capacity of 30 air exchanges per hour and be connected to a lift station's lighting system.

(B) Wet Wells.

(i) A wet well must use continuous mechanical ventilation.

(ii) The ventilation equipment must have a minimum capacity of 12 air exchanges per hour and be constructed of corrosion resistant material.

(iii) The design of a wet well must reduce odor potential in a populated area.

(e) Wet Well Slopes.

(1) A wet well floor must have a smooth finish and minimum slope of 10% to a pump intake.

(2) A wet well design must prevent deposition of solids under normal operating conditions.

(3) A lift station with greater than 5.0 million gallons per day firm pumping capacity must have anti-vortex baffling.

(f) Hoisting Equipment. A lift station must have permanent hoisting equipment or be accessible to portable hoisting equipment for removal of pumps, motors, valves, pipes, and other similar equipment.

(g) Valve Vault Drains. A floor drain from a valve vault to a wet well must prevent gas from entering a valve vault by including flap valves, "P" traps, submerged outlets, or a combination of these devices.

(h) Dry Well Sump Pumps.

(1) Pumps.

(A) A dry well must use dual sump pumps, each with a minimum capacity of 1,000 gallons per hour and capable of handling the volume of liquid generated during peak operations.

(B) A pump must have a submersible motor and watertight wiring.

(C) A dry well floor must slope toward a sump sized for proper drainage.

(D) The minimum sump depth is 6.0 inches and must prevent standing water on a dry well floor under normal operation.

(E) A sump pump must operate automatically by use of a float switch or other level-detecting device.

(2) Pipes.

(A) A sump pump must use separate pipes capable of discharging more than the maximum liquid level of an associated wet well.

(B) A sump pump outlet pipe must be at least 1.5 inches in diameter and have at least two check valves in series.

§217.63. Emergency Provisions for Lift Stations.

(a) A collection system lift station must be equipped with a tested quick-connect mechanism or a transfer switch properly sized to connect to a portable generator, if not equipped with an onsite generator.

(b) Lift stations must include an audiovisual alarm system and the system must transmit all alarm conditions through use of an autodialer system, Supervisory Control and Data Acquisition system, or telemetering system connected to a continuously monitored location.

(c) An alarm system must self-activate for a power outage, pump failure, or a high wet well water level.

(d) A lift station constructed to pump raw wastewater must have service reliability based on:

(1) Retention Capacity.

(A) The retention capacity in a lift station's wet well and incoming gravity pipes must prevent discharges of untreated wastewater at the lift station or any point upstream for a period of time equal to the longest electrical outage recorded during the past 24 months, but not less than 20 minutes.

(B) For calculation purposes, the outage period begins when a lift station pump finished its last normal cycle, excluding a standby pump.

(2) On-Site Generators. A lift station may be provided emergency power by on-site, automatic electrical generators sized to operate the lift station at its firm pumping capacity or at the average daily flow, if the peak flow can be stored in the collection system.

(3) Portable Generators and Pumps.

(A) A lift station may use portable generators and pumps to guarantee service if the report includes:

(i) the storage location of each generator and pump;

(ii) the amount of time that will be needed to transport each generator or pump to a lift station;

(iii) the number of lift stations for which each generator or pump is dedicated as a backup; and

(iv) the type of routine maintenance and upkeep planned for each portable generator and pump to ensure that they will be operational when needed.

(B) An operator that is knowledgeable in operation of the portable generators and pumps shall be on call 24 hours per day every day.

(C) The size of a portable generator must handle the firm pumping capacity of the lift station.

(e) Spill Containment Structures.

(1) The use of a spill containment structure as a sole means of providing service reliability is prohibited.

(2) A lift station may use a spill containment structure in addition to one of the service reliability options detailed in this in subsection (a) of this section.

(3) The report must include a detailed management plan for cleaning and maintaining each spill containment structure.

(4) A spill containment structure must have a locked gate and be surrounded an intruder resistant fence that is 6.0 feet high chain link, masonry, or board fence with at least three strands of barbed wire or 8.0 feet high chain link, masonry, or board fence with at least one strand of barbed wire.

(f) A lift station must be fully accessible during a 25-year 24-hour rainfall event.

(g) Lift station system controls must prevent over-pumping upon resumption of normal power after a power failure. Backup or standby units must be electrically interlocked to prevent operation at the same time that other lift stations pumps are operating only on the resumption of normal power after a power failure.

§217.69. Reclaimed Water Facilities.

(a) In accordance with §217.6 of this title (relating to Submittal Requirements and Review Process), the design of a distribution system that will convey reclaimed water to a user must be submitted, reviewed, and approved by the executive director before the distribution system may be used.

(b) A municipality may be the review authority in accordance with §217.8 of this title (relating to Municipality Reviews), and may approve a reclaimed water distribution system.

(c) A distribution system designed to transport Type II reclaimed water, as defined by §210.33(2) of this title (relating to Quality Standards for Using Reclaimed Water), must comply with Subchapter C of this chapter (relating to Conventional Collection Systems), as applicable to the project.

(d) A distribution system designed to transport Type I reclaimed water, as defined by §210.33 of this title must meet the following requirements:

(1) Type I reclaimed water gravity pipes must comply with §§217.53 - 217.55, 217.58, and 217.59 of this title (relating to Pipe Design; Criteria for Laying Pipe; Manholes and Related Structures; Testing Requirements for Manholes; and Lift Station Site Requirements).

(2) A design must prevent pipe and bedding displacement.

(3) The design of a pipe must prevent the deposition of solids in a gravity pipe.

(e) Each appurtenance designed to handle reclaimed water must be identified.

(1) An above-ground hose bib, spigot, or other hand-operated connection is prohibited, excepted in secured areas of a facility that only trained staff has access to.

(2) An underground hose bib must be:

(A) located in locked, below-grade vaults, and clearly labeled "NON-POTABLE WATER"; or

(B) operated only by a special tool in non-lockable, underground service boxes clearly labeled as non-potable water;

(C) purple; and

(D) designed to prevent a connection to a standard water hose.

(3) Storage areas, hose bibs, and faucets must include signs in both English and Spanish reading "NON-POTABLE WATER, DO NOT DRINK" and "El AGUA NO-POTABLE, NO BEBE."

(f) Cross Connection Control and Separation Distances.

(1) A type I reclaimed water pipe must be at least 4.0 feet from a potable water pipe, as measured from the outside surface of each of the respective pipes.

(2) A physical connection between a potable water pipe and a reclaimed water pipe is prohibited.

(3) An appurtenance must prevent any possibility of reclaimed water entering a drinking water system.

(4) Where a 4.0 foot separation distance cannot be achieved, a reclaimed water pipe must meet the following requirements:

(A) If a new Type I reclaimed water pipe is installed parallel to an existing potable water pipe, the reclaimed water pipe must:

(i) maintain a horizontal separation distance of no less than 3.0 feet with a potable water pipe at the same level or above a reclaimed water pipe;

(ii) have a minimum pipe stiffness of 115 pounds per square inch (psi) with compatible joints, or a pressure rating of 150 psi for both pipe and joints;

(iii) is embedded in cement stabilized sand, if parallel to a potable water pipe, is placed in the same benched trench as a reclaimed water pipe; and

(iv) if cement-stabilized sand is used, the sand must:

(I) have a minimum of 10% cement, based on loose dry weight volume;

(II) be a minimum of 6.0 inches above and one quarter of the pipe diameter on either side and below a reclaimed water pipe.

(B) New Type I Reclaimed Water Pipe - Crossing Pipes.

(i) If a new Type I reclaimed water pipe is installed crossing an existing potable water pipe, one segment of a Type I reclaimed water pipe must be centered on a potable water pipe such that the joints of the reclaimed water pipe are equidistant from the center point of the potable water pipe.

(ii) A crossing of the two pipes must be centered between the joints of the potable water pipe.

(C) A Type I reclaimed water pipe must have either a pressure rating of 150 psi for both pipe and joints or a pipe stiffness of at least 115 psi with compatible joints for a minimum distance of 4.0 feet in each direction, as measured perpendicularly from any point on the potable water pipe to the Type I reclaimed water pipe.

(D) The minimum distance between a reclaimed water pipe and any potable water pipe is 6.0 inches.

(E) Any portions of reclaimed water pipe within 4.0 feet of a potable water pipe must be embedded in cement stabilized sand.

(F) The cement stabilized sand must comply with the requirements listed in subparagraph (A) of this paragraph.

(g) Site Selection of Type I Reclaimed Water Pump Stations. A design must comply with §217.59(a) - (c) of this title.

(h) Design of Type I Reclaimed Water Pump Stations. A design must comply with §§217.60(d) and (g), 217.61(d), and 217.62(a) and (c) of this title (relating to Lift Station, Wet Well, and Dry Well Designs; Lift Station Pumps; and Lift Station Pipes), and paragraphs (1) - (3) of this subsection.

(1) Pump Controls.

(A) All electrical equipment must be operable during a 100-year flood event and be protected from potential flooding from a wet well.

(B) Motor control centers must be mounted at least 4.0 inches above grade to prevent water intrusion and corrosion from standing water in the enclosure.

(2) Pumps.

(A) A pump support must prevent movement or vibration during operation.

(B) A submersible pump must use a rail-type pump support incorporating manufacturer-approved mechanisms designed to allow an operator to remove and replace any single pump without first entering or dewatering the wet well.

(C) Submersible pump rails and lifting chains must be made of a material that is equivalent to Series 300 stainless steel at minimum.

(3) Pump Station Valves.

(A) The discharge side of each pump must include a check valve followed by a full-closing isolation valve.

(B) Check valves must be swing type with an external lever.

(C) All valve types other than rising stem gate valves must include a position indicator to show their open or closed position.

(i) Force Main Pipe for Type I Reclaimed Water. A force main pipe for Type I reclaimed water must comply with sections §§217.54, 217.64, 217.65, 217.67(a) - (c) and (e), and 217.68 of this title (relating to Materials for Force Main Pipes; Force Main Joints; Force Main Design; and Force Main Testing) and the following:

(1) A valve casing for an underground isolation valve must include "REUSE" or "NPW" cast into its lid.

(2) A force main pipe must be purple in color or contained in an 8.0 millimeter purple polyethylene sleeve conforming to American Water Works Association C105, Class C and in-line isolation valves for reuse pipes must open clockwise to distinguish them from potable water isolation valves.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. ALTERNATIVE COLLECTION SYSTEMS

30 TAC §§217.91 - 217.100

STATUTORY AUTHORITY

The new rules are adopted under the authority of Texas Water Code (TWC), §5.013, which provides the commission's general jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted new rules implement TWC, §§5.013, 5.103, 5.105, 5.120, 26.027, 26.034, and 26.121.

§217.95. Service Agreements.

(a) An alternative collection system service agreement must be executed between a collection system owner and a property owner that allows for the placement and maintenance of system components located on private property.

(b) The on-site components may be owned by the property owner or the collection system owner. An alternative collection system service agreement must specify which entity is responsible for the proper construction and competent maintenance of the on-site components.

(c) A collection system owner shall submit an alternative collection system service agreement to the executive director with the summary transmittal letter required in §217.6(a) of this title (relating to Submittal Requirements and Review Process).

(d) An alternative collection system service agreement must include the following provisions.

(1) Any existing alternative collection system component or building lateral that is to be incorporated into a new, expanded or materially altered system must be cleaned, inspected, tested, repaired, modified, or replaced, as necessary, to the satisfaction of a collection system owner before connection of the component to the collection system.

(2) A collection system owner shall approve all materials and equipment before incorporating the materials and equipment into any construction or repair of an alternative collection system component.

(3) A collection system owner shall have an engineer inspect and approve the installation of all alternative collection system components before placing the system into service.

(4) A collection system owner shall have access at all reasonable times to inspect on-site alternative collection system components.

(5) A collection system owner has the right to make an emergency repair and perform emergency maintenance to any alternative collection system component, including building laterals and utility-owned on-site collection system components. The cost of any such repair or maintenance may be charged to the owner of the property, as determined in the service agreement.

(6) For an alternative collection system design with any component that uses power, the service agreement must state which entity, the property owner or the collection system owner, is responsible for power costs.

(7) The ownership and responsibility for the operation and maintenance of an alternative collection system must be agreed to by the collection system owner and the property owner.

(A) An agreement must provide:

(i) to whom the cost of any repair or maintenance will be charged;

(ii) a means to determine the cost of any repair or maintenance;

(iii) a schedule of payment; and

(iv) a methodology to recover costs.

(B) An agreement must grant the collection system owner:

(i) a right to inspect and approve the installation of any pre-treatment unit;

(ii) access for inspection and maintenance; and

(iii) a right to make an emergency repair or perform emergency maintenance when required to protect the integrity or operation of the alternative collection system.

(8) Any on-site component owned by the collection system owner must have an upstream isolation valve.

(9) Any on-site component owned by the owner of the property serviced by a collection system must have a service isolation valve located on a service pipe from an on-site component to the collection system.

(10) A service isolation valve must be accessible at all times through an easement granted by the property owner to the collection system owner.

(11) A collection system owner shall have the ability to collect, transport, and dispose of any residual material.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. PRELIMINARY TREATMENT UNITS

30 TAC §§217.121 - 217.129

STATUTORY AUTHORITY

The new rules are adopted under the authority of Texas Water Code (TWC), §5.013, which provides the commission's general

jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted new rules implement TWC, §§5.013, 5.103, 5.105, 5.120, 26.027, 26.034, and 26.121.

§217.121. Coarse Screening Devices.

(a) A facility must use a coarse screening device, unless stated otherwise in this subchapter.

(b) A coarse screening device must include a bypass channel sized to handle the peak flow of the facility.

(c) A coarse screening device must include a means of diverting flow to the bypass channel.

(d) If the primary channel uses a mechanically cleaned coarse screening device, the bypass channel must have a coarse screening device, either manually or mechanically cleaned.

(e) Location Requirements.

(1) Any enclosed structure that houses a coarse screening device and contains other equipment or an office must have an entrance that is separated from the other areas by a gas tight partition.

(2) Each coarse screening device enclosure must have a vent fan capable of providing at least 30 air exchanges per hour if staff entry is allowed.

(3) Each coarse screening device must be readily accessible for maintenance and screenings removal.

(4) Any coarse screening device located 4.0 or more feet below ground level must include equipment capable of lifting the screenings to ground level.

(f) Screen Openings.

(1) For a manually cleaned coarse screen, the bar openings must be at least 0.5 inch but not more than 1.75 inches.

(2) For a mechanically cleaned coarse screen, the bar openings must be at least 0.25 inch but not more than 1.75 inches.

(3) A manually cleaned coarse screen must use a bar rack sloped at least 30 degrees but not more than 60 degrees from horizontal.

(4) A manually cleaned coarse screen must be attached to a horizontal platform that has provisions to drain and temporarily store the screenings.

(g) Hydraulics.

(1) The velocity through the coarse screen bar racks must be at least 1.0 foot per second but not more than 3.0 feet per second at design flow.

(2) The inlet channel for a screening device must minimize deposition of solids.

(3) The flow line of the inlet channel must not exceed 6.0 inches below the invert elevation of the incoming influent.

(h) Corrosion Resistance. A coarse screening device and any related structure must resist the effects of a corrosive environment, including long-term exposure to hydrogen sulfide.

§217.122. Fine Screening Devices.

(a) A fine screen may be used in lieu of a coarse screening device.

(b) A fine screen is any screen with a clear opening less than 0.25 inch.

(c) The use of a fine screen in lieu of a primary sedimentation unit is acceptable only if the design of any downstream treatment unit is based on the amount of five-day biochemical oxygen demand (BOD_5) reduction expected by the fine screen. The BOD_5 reduction percentage must be developed through a study conducted on actual full-scale operation of the proposed fine screen unit.

(d) The report must include the justification for any reduction in the size of any treatment unit based on removal of BOD_5 by the use of a fine screen.

(e) An owner who claims a BOD_5 reduction credit must include a sufficient number of fine screen units so that any BOD_5 reduction claimed may occur with the largest fine screen unit out of service.

(f) A design may include a single fine screen unit if the design includes a bypass channel with a coarse screening device to accept flow when the fine screen is out of service. No BOD_5 removal credit is allowed with a single fine screen design.

(g) A course screening device must be provided ahead of a fine screen when the manufacturer of a fine screen recommends prescreening before the fine screen.

(h) A collection system equipment prior to the fine screen must be operated to minimize fats, oils, and grease in the wastewater before the wastewater reaches the headworks if fine or micro screens are used.

(i) A moving or rotating fine screen must use a continuous cleaning device, such as water jets or wiper blades.

(j) A fine screen unit must automatically convey the screenings to a storage area or processing unit that complies with §217.123 of this title (relating to Screenings and Debris Handling).

(k) A fine screen must meet its manufacturer's recommendation with respect to velocity and head loss through the fine screen.

(l) A fine screen may use a bar rack or perforated plate.

§217.128. Flow Equalization Basins.

(a) A facility must use a flow equalization basin if:

(1) A facility's total daily influent flow volume occurs during a period of time less than or equal to ten hours of a day for any day of any week;

(2) A facility experiences periods of time when it receives an influent flow of less than 10% of its design capacity for a period of time equal to or greater than 48 hours in any one week; or

(3) At any time that flow equalization is necessary to minimize random or cyclic peaking of organic or hydraulic loadings.

(b) A flow equalization basin must have an upstream screening device.

(c) A flow equalization basin must include an aeration system sized to maintain a dissolved oxygen level of at least 1.0 milligram per liter (mg/l) in the flow equalization basin.

(d) A flow equalization basin must include a mixing system sufficient to prevent solids from settling.

(e) The size of a flow equalization basin must be based on diurnal flow variations and the size and capacity of downstream process units. The report must include the calculations justifying the size of a flow equalization basin.

(f) For pumped flow to an equalization basin, the effluent from a basin must be controlled by a flow-regulating device capable of maintaining a flow rate that allows downstream process units to operate properly.

(g) For pumped flow from an equalization basin, a variable-speed pump or multiple pumps are required to deliver a constant flow to downstream processing units.

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SUBCHAPTER F. ACTIVATED SLUDGE SYSTEMS

30 TAC §§217.151 - 217.164

STATUTORY AUTHORITY

The new rules are adopted under the authority of Texas Water Code (TWC), §5.013, which provides the commission's general jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted new rules implement TWC, §§5.013, 5.103, 5.105, 5.120, 26.027, 26.034, and 26.121.

§217.152. Requirements for Clarifiers.

(a) Inlets.

(1) A clarifier must have an inlet valve or gate.

(2) A clarifier inlet must provide uniform flow and stilling.

(3) A transfer pipe must not trap or entrain air.

(4) Vertical flow velocity through an inlet stilling well must not exceed 0.15 feet per second at peak flow.

(5) An inlet distribution channel must prevent the settling of solids in the channel.

(b) Scum removal.

(1) A clarifier must include scum baffles and a means for the collection and disposal of scum.

(2) Scum collected from a clarifier in a facility using an activated sludge process and an aerated lagoon may be discharged to an aeration basin or digester, or may use another disposal method that complies with Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation).

(3) Scum from a clarifier in a facility not using an activated sludge process and an aerated lagoon must be discharged to a sludge digester or may use another disposal method that complies with Chapter 312 of this title.

(4) Discharge of scum to an open drying area is prohibited.

(5) A system with a design flow equal to or greater than 10,000 gallons per day (gpd) must use a mechanical skimmer.

(6) A system with a design flow less than 10,000 gpd may use hydraulic differential skimming if the scum pickup is capable of removing scum from the entire operating surface.

(7) A scum pump must be specifically designed to pump scum.

(c) Effluent weirs.

(1) An effluent weir must prevent turbulence or a localized high vertical flow velocity in a clarifier.

(2) A weir must be located a minimum of 6.0 inches from an outer wall or baffle and must prevent the short-circuiting of flow through a clarifier.

(3) A weir must be adjustable to allow leveling of the weir and to provide for minor changes to the water surface elevation in a clarifier.

(4) For a facility with a design flow of less than 1.0 million gallons per day (mgd), the weir loading must not exceed 20,000 gpd at the peak flow per linear foot of weir length.

(5) For a facility with a design flow equal to or greater than 1.0 mgd, the weir loading must not exceed 30,000 gpd at the peak flow per linear foot of weir length.

(6) A center-feed circular clarifier must have overflow weirs around the entire perimeter of the clarifier.

(d) Sludge Pipes.

(1) Sludge transfer from a clarifier to a subsequent processing unit must not negatively affect treatment efficiency.

(2) A sludge pipe must be a minimum of 4.0 inches in diameter.

(3) The flow velocity in a sludge pipe must be greater than 2.0 feet per second.

(4) Each sludge pipe must have a means to remove any blockage.

(e) Sludge Collection Equipment. A clarifier must include mechanical sludge collecting equipment if it is part of a wastewater treatment facility with a design flow of 10,000 gpd or greater.

(f) Pumped Inflow.

(1) For a facility with pumped inflow, a clarifier must be able to accommodate all anticipated flow without overflow.

(2) A facility must hydraulically accommodate peak flows without adversely affecting the treatment processes.

(g) Side Water Depth (SWD).

(1) The SWD is defined as:

(A) the water depth from the top of the cone in a cone bottom tank to the water surface; or

(B) the water depth from 2.0 feet above the bottom of a flat bottom tank with a hydraulic sludge removal mechanism.

(2) A clarifier with a mechanical sludge collector and a surface area:

(A) equal to or greater than 300 square feet (sf) must have a minimum SWD of 10.0 feet.

(B) less than 300 sf must have a minimum SWD of 8.0 feet.

(3) A clarifier with a hopper bottom must determine the SWD using the following equation:
Figure: 30 TAC §217.152(g)(3)

(4) An SWD computed using Equation F.1 in paragraph (3) of this subsection excludes the hopper portion of a clarifier. The upper third of the hopper portion of a hopper bottom clarifier may be counted as part of the SWD only if the surface area of the hopper bottom clarifier is increased by 15% over the surface area determined from the design surface loading calculated using Figure: 30 TAC §217.154(c)(1), Table F.2 of this title (relating to Aeration Basin and Clarifier Sizing--Traditional Design), and if an activated sludge facility includes a flow equalization basin. The SWD of a hopper bottom clarifier must never be less than 5.0 feet.

(h) Restrictions on Hopper Bottom Clarifiers.

(1) A hopper bottom clarifier without mechanical sludge collection equipment is prohibited for use in a facility with a maximum flow equal to or greater than 10,000 gpd.

(2) Each hopper cell of a hopper bottom clarifier must have individually controlled sludge removal equipment.

(3) A hopper bottom clarifier must have a smooth wall finish.

(4) A hopper bottom clarifier must have an upper hopper slope of not less than 60 degrees from horizontal.

(i) Restrictions on Short Circuiting. The influent stilling baffle and effluent weir must prevent short circuiting.

(j) Return Sludge Pumping Capacity.

(1) The capacity of a return sludge-pumping unit must be calculated based on the area of an activated sludge clarifier(s), including the stilling well area.

(2) The return sludge pumping capacity is the clarifier underflow rate in gallons per day per square foot (gpd/sf).

(3) A return sludge pumping system must be capable of pumping least 200 gpd/sf but not more than 400 gpd/sf.

(4) The pumping capacity may be controlled via throttling, variable speed drives, or multiple pump operation.

§217.155. Aeration Equipment Sizing.

(a) Oxygen Requirements (O_2R) of wastewater.

(1) An aeration system must be designed to provide a minimum dissolved oxygen concentration in the aeration basin of 2.0 milligrams per liter (mg/l).

(2) Mechanical and diffused aeration systems must supply the O_2R calculated by Equation F.2 located in paragraph (3) of this subsection or use the recommended values presented in Table F.3 in paragraph (3) of this subsection.

(3) The O_2R values in Table F.3 in the following figure use concentrations of 200 mg/l five-day biochemical oxygen demand (BOD_5) and 45 mg/l ammonia-nitrogen (NH_3-N) in Equation F.2 in the following figure:
Figure: 30 TAC §217.155(a)(3)

(b) Diffused Aeration System. An airflow design must be based either paragraph (1) or (2) of this subsection.

(1) Design Airflow Requirements - Default Values. A diffused air system may use the following table to determine the airflow for sizing:
Figure: 30 TAC §217.155(b)(1)

(2) Design Airflow Requirements - Equipment and Site Specific Values. A diffused air system may base calculations of the airflow requirements for the diffused air equipment in accordance with subparagraphs (A) - (D) of this paragraph.

(A) Determine Clean Water Oxygen Transfer Efficiency.

(i) A diffused air system may have a clean water oxygen transfer efficiency greater than 4% only if the full scale diffuser performance data from a certified testing laboratory or sealed by an independent licensed professional engineer demonstrates the diffuser's transfer efficiency.

(ii) A testing laboratory or licensed engineer shall use the oxygen transfer testing methodology described in the most current version of the American Society of Civil Engineers (ASCE) publication, *A Standard for the Measurement of Oxygen Transfer in Clean Water*.

(iii) A diffused air system with a clean water transfer efficiency greater than 18% for a coarse bubble system and greater than 26% for a fine bubble system is considered an innovative technology and is subject to §217.7(b)(2) of this title (relating to Types of Plans and Specifications Approvals).

(iv) A design for clean water transfer efficiencies obtained at temperatures other than 20 degrees Celsius must be adjusted for a diffused air system to reflect the approximate transfer efficiencies and air requirements under field conditions by using the following equation:
Figure: 30 TAC §217.155(b)(2)(A)(iv)

(B) Determining Wastewater Oxygen Transfer Efficiency (WOTE).

(i) The WOTE must be determined from clean water test data by multiplying the clean water transfer efficiency by 0.65 for a coarse bubble diffuser and by multiplying the clean water transfer efficiency by 0.45 for a fine bubble diffuser.

(ii) The executive director may require additional testing and data to justify actual WOTE for a facility treating wastewater containing greater than 10% industrial wastes.

(C) Determining Required Airflow (RAF). The RAF must be calculated using the following equation to determine the size needed for a diffuser submergence of 12.0 feet. If the diffuser submergence is other than 12.0 feet, a diffused air system must correct the RAF detailed in subparagraph (D) of this paragraph.
Figure: 30 TAC §217.155(b)(2)(C)

(D) Corrections to RAF based on varying diffuser submergence depths. If the diffuser submergence is not 12.0 feet, the design must specify the adjustment of the minimum airflow rate as calculated in subparagraph (C) of this paragraph by multiplying the calculated values by the factors in the following table:
Figure: 30 TAC §217.155(b)(2)(D)

(3) Mixing Requirements for Diffused Air. The air requirements for mixing must be calculated using:

(A) *Design of Municipal Wastewater Treatment Plants*, Chapter 11, a joint publication of the ASCE and the Water Environment Federation, for mixing requirements; or

(B) provide mixing air at a rate greater than or equal to 20 scfm/1000 cf for a coarse bubble diffuser and greater than or equal to 0.12 scfm /square foot (sf) for a fine bubble diffuser.

(4) Blowers and Air Compressors.

(A) A blower and a compressor must have sufficient capacity to provide the required aeration rate for biological treatment and the air requirements of any supplemental unit.

(B) The report must include blower or compressor calculations that show the actual air requirements for the expected temperature range, including both summer and winter conditions, and the impact of the actual site elevation on the air supply.

(C) A diffused air system must have multiple compressors arranged to provide an adjustable air supply to meet the variable organic load on the facility.

(D) The compressors must be capable of handling the maximum design air requirements with the largest single unit out of service.

(E) A blower unit and a compressor unit must restart automatically after a power outage, or a telemetry system or an autodialer with battery backup must notify an operator of any outage.

(F) A design must specify blowers or air compressors with sufficient capacity to handle air intake temperatures that may exceed 100 degrees Fahrenheit (38 degrees Celsius), and pressures that may be less than standard (14.7 pounds per square inch absolute).

(G) A design must specify the capacity of a motor drive necessary to handle air intake temperatures that may be 20 degrees Fahrenheit (-7 degrees Celsius) or less in a location that experiences temperatures below 20 degrees Fahrenheit (-7 degrees Celsius).

(5) Diffuser Systems - Additional Requirements.

(A) Diffuser Submergence.

(i) A submergence depth for any diffuser must meet the minimum depths in the following table, for a new facility:
Figure: 30 TAC §217.155(b)(5)(A)(i)

(ii) A diffuser submergence depth for any material alteration or expansion of an existing facility may vary from the values in Table F.6 in clause (i) of this subparagraph to match existing air pressure, delivery rate, and hydraulic requirements.

(iii) A submerged depth for a diffuser of less than 7.0 feet is prohibited.

(B) Grit Removal. A facility that uses diffusers and has wastewater with high concentrations of grit must include a grit removal unit upstream of an aeration process or must include multiple trains that may be taken out of service to allow for grit removal.

(C) Aeration System Pipes.

(i) Each diffuser header must include an open/close or throttling type control valve that can withstand the heat of compressed air.

(ii) An air header must be able to withstand temperatures up to 250 degrees F.

(iii) The capacity of an air diffuser system, including pipes and diffusers, must equal 150% of design air requirements.

(iv) The design of an aeration system must minimize head loss. The report must include a hydraulic analysis of the entire air pipe system that quantifies head loss through the pipe system and details the distribution of air from the blowers to the diffusers.

(v) An aeration system may use non-metallic pipes only in the aeration basin, but the pipes must be a minimum of 4.0 feet below the average water surface elevation in the aeration basin.

(c) Mechanical Aeration Systems.

(1) Required Airflow - Equipment and Site Specific Values. The airflow requirements for a mechanical aeration system must be calculated in accordance with subparagraphs (A) and (B) of this paragraph.

(A) Determine Clean Water Oxygen Transfer Efficiency.

(i) The report must include the oxygen transfer efficiency rate for the mechanical equipment.

(ii) Clean water oxygen transfer rate must not exceed 2.0 pounds of oxygen per horsepower-hour, unless justified by full scale performance data conducted by a certified testing laboratory or sealed by an independent, licensed professional engineer using the oxygen transfer testing methodology described in the most current version of the ASCE publication, *A Standard for the Measurement of Oxygen Transfer in Clean Water*.

(iii) A proposed clean water transfer efficiency in excess of 2.0 pounds of oxygen per horsepower-hour is innovative technology and subject to the requirements of §217.7(b)(2) of this title (relating to Types of Plans and Specifications Approvals).

(B) Determine Wastewater Oxygen Transfer Efficiency.

(i) The report must include data to justify actual wastewater transfer efficiency.

(ii) A design must include an estimate of the wastewater transfer efficiency from the clean water transfer efficiency by multiplying the clean water transfer efficiency by 0.65 for all mechanical aeration equipment for a facility treating greater than 10% industrial wastes.

(2) Mixing Requirements.

(A) A mechanical aeration device must provide sufficient mixing to prevent deposition of mixed liquor suspended solids (MLSS) under any flow condition.

(B) A mechanical aeration device must be capable of re-suspending the MLSS after a shutdown period.

(C) Mechanical aeration devices with channel or basin layout must have a minimum of 100 horsepower per million gallons of aeration basin volume or 0.75 horsepower per thousand cubic feet of aeration basin volume.

(3) Mechanical Components.

(A) Process reliability.

(i) Each basin must include a minimum of two mechanical aeration devices.

(ii) A mechanical aeration device must meet the maximum design requirements for oxygen transfer with the largest single unit out of service.

(iii) A mechanical aeration device must automatically restart after a power outage, or a telemetry system with battery backup or an auto-dialer with battery backup must notify a facility operator or owner.

(B) Operation and maintenance.

(i) A mechanical aeration device must have two speed or variable speed drive units, unless another means of varying the output is provided.

(ii) A mechanical aeration device may use single-speed drive units with timer-controlled operation, if the device also includes an independent means of mixing.

(iii) A facility operator must be able to perform routine maintenance on the aeration equipment without the potential of coming into contact with raw or partially treated wastewater.

(iv) Any bearing, drive motor, or gear reducer must be accessible and be equipped with a splash prevention device.

(v) Any gear reducer must have a drainage system to prevent operator contact with mixed liquor.

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SUBCHAPTER G. FIXED FILM AND FILTRATION UNITS

30 TAC §§217.181 - 217.193

STATUTORY AUTHORITY

The new rules are adopted under the authority of Texas Water Code (TWC), §5.013, which provides the commission's general jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted new rules implement TWC, §§5.013, 5.103, 5.105, 5.120, 26.027, 26.034, and 26.121.

§217.182. Trickling Filters--General Requirements.

(a) Trickling filters are classified according to applied hydraulic loading, including recirculation, in million gallons per day (mgd) per acre of filter media surface area and influent organic loadings in pounds of five-day biochemical oxygen demand (BOD_5) per day per 1,000 cubic feet of filter media, The following factors must be the basis for the selection of the design hydraulic and organic loadings:

(1) strength of the influent wastewater;

(2) effectiveness of pretreatment;

(3) type of filter media; and

(4) treatment efficiency required.

(b) A trickling filter is classified as:

(1) a roughing filter, which provides at least 50% but not more than 75% removal of soluble BOD_5;

(2) a secondary treatment filter, which provides the required settled effluent BOD_5 and total suspended solids (TSS);

(3) a combined BOD_5 and nitrifying filter, which provides the required settled effluent BOD_5, ammonia-nitrogen (NH_4-N), and TSS; or

(4) a tertiary nitrifying filter, which provides the required settled effluent NH_4-N, if the influent to a trickling filter is a clarified secondary effluent.

(c) The following table lists the hydraulic and organic loadings for different classes of trickling filters:
Figure: 30 TAC §217.182(c)

(d) Pretreatment.

(1) A trickling filter must have upstream preliminary treatment units that:

(A) remove grit, debris, suspended solids, oil, and grease;

(B) have particles with a diameter greater than three millimeters; and

(C) control the release of hydrogen sulfide.

(2) A primary clarifier equipped with scum and grease removal devices must precede a rock media trickling filter.

(e) Rock Filter Media.

(1) Materials.

(A) Rock media using crushed rock, slag, or similar material containing more than 5% by weight of pieces with their longest dimension three times greater than the least dimension is prohibited.

(B) Rock media must conform to the following size distribution and grading. Mechanical grading over a vibrating screen with square openings must meet the following:

(i) passing 5.0 inch sieve - 100% by weight;

(ii) retained on 3.0 inch sieve - 95-100% by weight;

(iii) passing 2.0 inch sieve - 0.2% by weight;

(iv) passing 1.0 inch sieve - 0.1% by weight; and

(v) the loss of weight by a 20-cycle sodium test, as described in American Society of Civil Engineers' *Manual of Engineering and Engineering Practice No. 13*, must be less than 10%.

(2) Placement.

(A) Rock media must be at least 4.0 feet deep at the shallowest point.

(B) Dumping rock media directly on a filter is prohibited. Rock media must be placed by hand to a depth of 12 inches above the underdrains. The remainder may be placed by belt conveyor or an equivalent mechanical method.

(C) Crushed rock, slag, and other similar media must be washed and screened or forked to remove clay, organic material, and fines prior to placement.

(D) The placement of any material must not damage the underdrains.

(E) Vehicles and equipment are prohibited from driving over the filter media.

(f) Synthetic (Manufactured or Prefabricated) Media Materials.

(1) Any synthetic media material must be used in accordance with all manufacturer's recommendations.

(2) Synthetic media material may be considered innovative or nonconforming technology and may be subject to §217.7(b)(2) of this title (relating to Types of Plans and Specifications Approvals).

(A) Suitability. The suitability of synthetic media material must be evaluated based on experience with an installation treating wastewater under similar hydraulic and organic loading conditions. The report must include a relevant case history involving the use of the synthetic media.

(B) Durability. A synthetic media must be insoluble in wastewater and resistant to flaking, spalling, ultraviolet degradation, disintegration, erosion, aging, common acids and alkalis, organic compounds, and biological attack.

(C) Structural Integrity.

(i) A structural design must support the synthetic media, water flowing through or trapped in voids, and the maximum anticipated thickness of the wetted biofilm.

(ii) The synthetic media must support the weight of a person, unless a separate provision is made for maintenance access to the entire top of the trickling filter media and to the distributor.

(D) Placing of Synthetic Media. Modular synthetic media must be installed with the edges matched as nearly as possible to provide consistent hydraulic conditions within the trickling filter.

(g) Filter Dosing.

(1) Suitable flow characteristics must be used for the application of wastewater to a filter by siphon, pump, or gravity discharge from preceding treatment unit.

(2) A filter must be designed to control instantaneous dosing rates under both normal operating conditions and filter-flushing conditions.

(3) The distributor speed and the recirculation rate must be adjusted for the dosing intensity as a compensatory measure under low-flow conditions. The following table provides design ranges of dosing intensity for normal usage periods and for flushing periods:
Figure: 30 TAC §217.182(g)(3)

(4) A design may be based on instantaneous dosing intensity for rotary distributors using the equation in the following figure:
Figure: 30 TAC §217.182(g)(4)

(h) Distribution Equipment.

(1) A design must include a rotary, horizontal, or traveling wastewater distribution system that distributes wastewater uniformly over the entire surface of a filter at the design and flushing dosing intensities.

(2) A design must include filter distributors that operate properly at all anticipated flow rates.

(3) A design must not deviate from the design dosing intensity by more than 10%.

(4) A new trickling filter or upgrade of an existing trickling filter must include electrically driven, variable speed a filter distributor to allow operation at optimum dosing intensity independent of recirculation pumping.

(5) If an existing rectangular trickling filter is retrofitted with rotary distributors, any media that will not be fully wetted must not be considered part of the required effective treatment area.

(6) The center column of a rotary filter distributor must have adequately sized overflow ports to prevent water from reaching the bearings in the center column.

(7) A filter distributor must include cleanout gates on the ends of the arms and an end spray nozzle to wet the edge of the media.

(8) The filter walls must extend at least 12.0 inches above the top of the ends of the distributor arms.

(9) The use of a mercury seal in a distributor of a trickling filter is prohibited in a new facility. If an existing treatment facility is materially altered, any mercury seal in a trickling filter must be replaced with an oil or mechanical seal.

(10) The minimum clearance between the top of the filter media and the distributing nozzles is 6.0 inches.

(11) Rotary distributors must capable of operating at speeds as low as one revolution per 30 minutes.

(12) A trickling filter with a height or diameter that does not allow distributors to be removed and replaced by a crane must provide jacking columns and pads at the distributor column.

(i) Recirculation.

(1) Low Flow Conditions.

(A) A design must include minimum recirculation during periods of low flow in order to ensure that the biological growth on the filter media remains active at all times.

(B) A design must include the minimum recirculation in the evaluation of the efficiency of a filter, if it is part of a proposed specified continuous recirculation rate.

(C) Minimum flow to the filters must equal to or greater than 1.0 mgd per acre of filter aerial surface and must keep the distribution nozzles properly operating.

(D) The minimum flow rate for a design using hydraulically driven distributors must keep rotary distributors turning at the minimum design rotational velocity.

(E) For a facility designed with a capacity equal to or greater than 0.4 mgd and recirculation for BOD_5 removal, the recirculation system must include variable speed pumps and a method of conveniently measuring the recycle flow rate.

(2) Compensatory Recirculation.

(A) A design must provide recirculation to supplement influent flow if design and flushing dosing intensities are not achieved solely by the control of distributor operation.

(B) Controls for the distributor speed and recycle pumping rate must provide optimum dosing intensity under all anticipated influent flow conditions.

(3) Process Calculations. The report must:

(A) describe a design that propose removal of the remaining organic matter by recirculation;

(B) identify the effect of dilution of the influent on the rate of diffusion of dissolved organic substrates into the biofilm; and

(C) identify the effect of reduced influent concentrations on reaction rates in each section of a filter having first order kinetics.

(4) Maximum Recirculation Rate. A recirculation rate may exceed four times design flow if calculations to justify the higher rate are included in the report.

(5) Configuration.

(A) In a facility with influent that has constant organic loadings, a system must use direct recirculation of unsettled trickling filter effluent.

(B) A design must ensure that the distributor nozzles can handle the recirculated sloughed biofilm.

(C) In a facility with variable influent organic loadings, effluent must recirculate from a final clarifier to either a primary clarifier or a trickling filter to equalize organic loading.

(j) Average Hydraulic Surface Loading.

(1) The report must include calculations of the maximum, design, and minimum area cross-section surface loadings on the filters in terms of million gallons per acre of filter area per day for the initial year and the design year.

(2) The average hydraulic surface loadings of a filter with crushed rock, slag, or similar media must not:

(A) exceed 40 mgd per acre based on design flow, except in roughing applications;

(B) be less than 1.0 mgd per acre; and

(C) be within the ranges specified by the manufacturer.

(k) Underdrain System Design.

(1) A trickling filter must include an underdrain with semicircular inverts that cover the entire floor.

(2) An underdrain must be vitrified clay or pre-cast reinforced concrete.

(3) An underdrain constructed of half tile is prohibited.

(4) Underdrain inlet openings must have a gross cross-sectional area greater than 15% of a filter's surface area.

(5) A modular synthetic media design must be supported above a filter floor by beams and grating with support and clearances in accordance with the media manufacturer's recommendations.

(l) Underdrain Slopes.

(1) An underdrain and filter effluent channel floor must have a minimum slope of 1%.

(2) An effluent channel must produce a minimum velocity of 2.0 feet per second at design flow rate to a trickling filter.

(3) The floor of a new trickling filter using stackable modular or synthetic media must slope toward a drainage channel on slope of at least 1% and not more than 5%, based on filter size and hydraulic loading.

(m) Passive Ventilation.

(1) The effluent channel and effluent pipe of an underdrain system or a synthetic media support structure must permit free passage of air.

(2) Any drain, channel, or effluent pipe must have a cross-sectional area with not more than 50% of the area submerged at peak flow plus recirculation.

(3) The effluent channels must accommodate the specified flushing hydraulic dosing intensity and allow the possibility of increased hydraulic loading.

(4) A ventilation system may include an extension of an underdrain through a filter sidewall, a ventilation opening through a sidewall, and an effluent discharge conduit designed as a partially full flow pipe or an open channel.

(5) A vent opening through a trickling filter walls must include hydraulic closure to allow flooding of a filter for nuisance organism control.

(6) A passive ventilation design must provide at least 2.5 square feet (sf) of ventilating area per 1,000 lbs of primary effluent BOD_5 per day.

(7) An underdrain system for a rock media filter must provide at least 1.0 sf of ventilating area for every 250 sf of plan area.

(8) The minimum required ventilating area for a synthetic media underdrain is the area recommended by the manufacturer.

(9) The ventilating area must be the greater of 1.0 sf per 175 sf of synthetic media area or 2.6 sf per 1,000 cf of media volume.

(n) Forced Ventilation.

(1) Forced ventilation is required for a trickling filter designed for nitrification, for a trickling filter design with a media depth in excess of 6.0 feet, or for any location where seasonal or diurnal temperatures do not provide sufficient difference between the ambient air and wastewater temperatures to sustain passive ventilation.

(2) A design must specify the minimum airflow for forced ventilation and optimized process performance, and the report must include any calculation associated with this determination.

(3) A down-flow forced ventilation system must include a provision for:

(A) the removal of entrained droplets: or

(B) the return of air containing entrained moisture to the top of a trickling filter; and

(C) a reversible fan or other mechanism to reverse the airflow when a wide temperature difference between the ambient air and wastewater create strong updrafts.

(4) A ventilation fan and the associated controls must withstand flooding of a filter without sustaining damage.

(5) The following equation and the values in Table G.3 determine the minimum airflow rate:
Figure: 30 TAC §217.182(n)(5)

(o) Maintenance.

(1) Cleaning and Sloughing.

(A) A flow distribution device, an underdrain, a channel, and a pipe must allow maintenance, flushing, and drainage.

(B) A trickling system must hydraulically accommodate the specified flushing hydraulic dosing intensity and must facilitate cleaning and rodding of the distributor arms.

(C) A trickling filter system must prevent recirculation of sloughed biomass in pieces larger than the distributor nozzle opening or the filter media voids.

(2) Nuisance Organism Control. A trickling filter system must control nuisance organisms by operation of trickling filters at proper design dosing intensities, with periodic flushing at higher dosing intensities.

(A) Filter Flies.

(i) The structural and hydraulic design of a new trickling filter must enable flooding of the trickling filter for fly control.

(ii) The executive director may approve an alternate method of fly control for a filter that exceeds 6.0 feet in height if the effectiveness of the alternate method is verified at a full-scale installation and documented in the report.

(B) Snails. A trickling filter system must minimize areas where sludge may accumulate. The system must include a low-velocity, open channel between a trickling filter and final clarifier for manual removal of snails.

(3) Corrosion Protection. A design must minimize corrosion and use corrosion-resistant materials for all equipment and construction of a trickling filter, including ventilation equipment and covers.

(p) Flow Measurements. A trickling filter system must include a means to measure the flow to a filter and the recirculation flow.

(q) Odor Control. A trickling filter system must use ventilation with periodic flushing at a higher dosing intensity to minimize potential odor.

(1) Covers.

(A) The executive director may require an owner of a facility with a history of odor complaints to install a cover over a new, expanded or materially altered trickling filter.

(B) A cover must allow access to the entire top of the filter media and to the distributor for maintenance and removal.

(C) A covered trickling filter must have a forced ventilation system with a scrubber or an adsorption column for odor control.

(2) Stripping. A trickling filter with high influent organic loading must have forced ventilation in a down-flow mode to minimize odor. Odorous off-gases may be:

(A) recycled through a trickling filter;

(B) used to ventilate a tertiary nitrifying trickling filter in an up-flow mode;

(C) diffused into an aeration basin; or

(D) treated separately for odor control using a scrubber or an adsorption column.

(r) Final Clarifiers. The size of the final clarifiers for a facility with a trickling filter must allow for the required effluent total suspended solids removal at the maximum influent flow and the maximum recirculation with all pumps in operation.

(s) Report Requirements.

(1) The report must specify the filter efficiency formula used in the design calculations.

(2) The report must include the operating data from any existing trickling filter of similar construction and operation at the facility to justify the projected treatment efficiency, kinetic coefficients, and other design parameters.

(3) The report may include more than one set of applicable design equations to allow crosschecking of predicted treatment efficiency.

§217.183. Nitrifying Trickling Filters--Additional Requirements.

(a) Ventilation. A nitrifying trickling filter must include forced ventilation to distribute airflow throughout the underdrain area. Minimum design airflow rate must provide the greater of:

(1) 50 pounds of oxygen provided per pound of oxygen required at average organic loading, based on stoichiometry; or

(2) 30 pounds of oxygen provided per pound of oxygen required at peak organic loading, based on stoichiometry.

(b) Temperature. The report must justify the temperature used in the design equations. A design may include deep towers or other means to minimize recirculation while providing a design hydraulic dosing intensity that lessens the effects of temperature on removal efficiency.

(c) pH. The report must verify that the design recirculation rates are appropriate for dealing with the effects on pH.

(d) Predation. A nitrifying trickling filter must include a means for effective control of biomass predators, such as snails.

(e) Hydraulic Application Rates. A nitrifying trickling filter must operate at a design dosing intensity of at least 1.47 gallons per minute per square foot and provide operational control of dosing intensity.

(f) Media. Cross-flow synthetic media is required for a new tertiary nitrification filter or for the nitrifying section of a new combined nitrification filter.

(g) Tertiary Nitrification Filters. A trickling filter treating influent that has a five-day biochemical oxygen demand (BOD_5) to total Kjeldahl nitrogen (TKN) ratio of equal to or greater than ($\geq$) 1.0 and soluble BOD_5 of less than or equal to ($\leq$) 12 milligrams per liter (mg/l) is a tertiary nitrification filter.

(1) Design Justification. The report must include process design calculations and selection criteria of kinetic coefficients for a tertiary nitrifying filter and must be justified by operating data from any existing trickling filter of similar construction and operation.

(2) Media biotowers. A tertiary nitrifying filter design must minimize pH depression due to recirculation and by control of influent instantaneous application rates, by means other than compensatory recirculation. A tertiary nitrifying filter must use either:

(A) tower $\geq$20 feet; or

(B) a series of towers less than 20 feet operating in series if the design includes provisions to readily switch the operating sequence of the filters.

(h) Combined BOD_5 and Nitrification Filters. A trickling filter intended to perform nitrification and treating influent having a BOD_5 to TKN ratio of $\leq$1.0 or soluble BOD_5 of $\leq$12 mg/l is a combined BOD_5/nitrification filter.

(1) Design Justification. The report must justify the projected treatment efficiency and other design parameters by including operating data from any existing trickling filter of similar construction and operation.

(2) BOD_5 Removal Requirements. A combined BOD_5 and nitrification filter must achieve effluent total BOD_5 of $\geq$15 mg/l. The design must not take credit for nitrification in sections of the filter having soluble BOD_5 of $\leq$20 mg/l.

(3) Recirculation. A combined nitrification filter design must enable a high recirculation rate with turndown capability.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER H. NATURAL TREATMENT FACILITIES

30 TAC §§217.201 - 217.213

STATUTORY AUTHORITY

The new rules are adopted under the authority of Texas Water Code (TWC), §5.013, which provides the commission's general jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted new rules implement TWC, §§5.013, 5.103, 5.105, 5.120, 26.027, 26.034, and 26.121.

§217.203. Design Criteria for Natural Treatment Facilities.

(a) Flow Distribution. This section applies to a constructed wetland, a facultative lagoon, an aerated lagoon, a partially aerated lagoon, a stabilization lagoon, and an overland flow process.

(1) The shape and size of a treatment unit must ensure even distribution of the wastewater flow.

(2) The distribution system for an overland flow process must ensure uniform sheet flow of the wastewater onto and across the overland flow terraces.

(b) Windbreaks and Screening.

(1) If spray irrigation is used in a location where drift presents a risk of contact with the public, a windbreak or vegetative screening must be used.

(2) The use, the type, and the extent of windbreaks or vegetative screening must be approved by the executive director.

(c) Maximum Liner Permeability.

(1) Except as exempted in paragraphs (4) and (5) of this subsection, a constructed wetland, facultative lagoon, earthen aerated lagoon, partially-aerated lagoon, stabilization lagoon, and treated effluent storage lagoon must be constructed with a liner material with a minimum coefficient of permeability of $1x10^{-7}$ centimeters per second (cm/sec) with a thickness of 2.0 feet for water depths less than or equal to 8.0 feet and a thickness of 3.0 feet at water depths greater than 8.0 feet.

(2) A liner must extend from the lowest lagoon elevation or lowest constructed wetland elevation up to an elevation of 2.0 feet above normal water elevation in a lagoon or constructed wetland.

(3) The executive director may grant a variance to the liner requirements, in accordance with §217.4 of this title (relating to Variances).

(4) If a lagoon is constructed to store treated wastewater authorized as reclaimed water under Chapter 210 of this title (relating to Reclaimed Water), the lagoon liner must comply with §210.23 of this title (relating to Storage Requirements for Reclaimed Water).

(5) This subsection does not apply to an evaporative lagoon system or an overland flow system. Liner and permeability requirements for these systems are established in §217.208 of this title (relating to Evaporative Lagoons) and §217.209 of this title (related to Constructed Wetlands).

(d) Compliance with the Liner Permeability Requirements. Paragraph (1)(A) - (D) of this subsection provides the minimum criteria for ensuring that the liner's permeability will not exceed that allowed in paragraph (3) of this subsection. The report must include the results of any test required in this subsection.

(1) Using Unmodified In-Situ Soils. If the soils that naturally exist at a proposed lagoon or constructed wetland site restrict the movement of wastewater to a degree equivalent to a liner placed as described in subsection (c)(1) of this section. A design must meet the requirements in subparagraphs (A) - (E) of this paragraph to certify the permeability of the in-situ soil layer to ensure that groundwater and surface water quality are protected.

(A) A minimum of one core sample is required for each 0.25 acres of bottom area for each lagoon or constructed wetland.

(B) Each core sample must be sampled to determine the coefficient of permeability, the percent passing a 200mesh sieve, the liquid limit value, and the plasticity index value for the soil that is to serve as a liner.

(C) Each core sample test result must show a coefficient of permeability of less than or equal to $1x10^{-7}$ cm/sec, in compliance with subparagraph (B) of this paragraph.

(D) A liner must be constructed in accordance with one of paragraphs (2), (3), or (4) of this subsection if test results indicate that in-situ soils do not exhibit a hydraulic conductivity of $1x10^{-7}$ cm/sec or less.

(E) An in-situ soil may be used as a lagoon liner or constructed wetland liner if the in-situ soil meets all the requirements in

subsection (c)(1) of this section provided that one layer of excavated in-situ material, with the minimum soil characteristic requirements is placed on scarified subgrade in one 8 inch loose lift compacted to no less than 6 inches at 95% standard proctor density in accordance with American Society For Testing And Materials (ASTM) D 698.

(2) Placed Liners. The soil characteristics of the liner material for a placed liner must comply with subparagraphs (A) - (E) of this paragraph. The tests to determine the soil characteristics must conform to standard methods such as ASTM.

(A) At least 30% of the liner material must pass through a 200 mesh sieve;

(B) The liner material must have a liquid limit greater than 30%;

(C) The liner material must have a plastic index of 15 or greater;

(D) The liner material must be placed in four loose lifts that are each a maximum of 8.0 inches in depth and that are compacted to 95% standard proctor density in accordance with ASTM D 698. Each lift must be no less than 6.0 inches thick after compaction resulting in a total vertical thickness of at least 24 inches for a liner; and

(E) An in-situ subgrade must be scarified prior to placement of the lowest lift.

(3) Using Amended In-Situ Soils.

(A) A liner may be constructed from amended soils or blended soils made of imported soils and soils excavated from the proposed lagoon site.

(B) Each sample of amended soil must sufficiently decrease the coefficient of permeability to $1x10^{-7}$ cm/sec.

(C) The following samples are required for each liner:

(i) three representative samples from each 6,700 cubic feet of amended soil:

(ii) one field permeability test; and

(iii) one laboratory permeability test.

(D) Each of the permeability tests must verify that the coefficient of permeability is equal to or less than $1x10^{-7}$ cm/sec.

(E) When soil permeability is decreased by amending in-situ soil, the liner thickness throughout the lagoon may be decreased to 6.0 inches, if the liner is placed on scarified subgrade in one 8.0 inch loose lift compacted to no less than 6.0 inches at 95% standard proctor density in accordance with ASTM D 698.

(4) Use of a synthetic membrane liner.

(A) A synthetic membrane liner must have a minimum thickness of 40 mils.

(B) A lagoon with a membrane liner must include an underdrain with a leachate detection and collection system.

(C) A liner material must be able to withstand constant sunlight without degrading.

(D) The use of a synthetic membrane liner for a constructed wetland is prohibited.

(e) Embankment Design and Construction. This section applies to a constructed wetland, a facultative lagoon, an aerated lagoon, a partially aerated lagoon, a stabilization lagoon, a treated effluent storage lagoon, and an evaporative lagoon.

(1) The top width of an embankment must be a minimum of 10.0 feet.

(2) The report must justify all inner and outer embankment slope steeper than 1.0 foot vertical to 4.0 feet horizontal from the top of an embankment.

(3) Inner and outer embankment slopes steeper than 1.0 foot vertical to 3.0 feet horizontal are prohibited.

(4) All embankments must be protected against erosion by planting grass, paving, riprapping, or other method approved by the executive director.

(5) All embankments must have a minimum cover of 6.0 inches of topsoil if vegetated.

(f) Disinfection. Chemical or ultraviolet disinfection is not required if a detention time of at least 21 days is provided in the entire, free-water surface, natural treatment unit, in accordance with §309.3(g) of this title (relating to Disinfection).

(g) Sampling Point Significance.

(1) Sizing or design of any treatment unit upstream of the permitted sampling point must not be based on any unit downstream of the permitted sampling point.

(2) A wastewater lagoon downstream of the permitted sampling point is a treated effluent storage lagoon and must comply with the requirements of §210.23 of this title (relating to Storage Requirements for Reclaimed Water).

(h) Storm Water Drainage. A natural treatment system must be constructed to prevent storm water from draining into the system.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER J. SLUDGE TREATMENT UNITS

30 TAC §§217.241 - 217.252

STATUTORY AUTHORITY

The new rules are adopted under the authority of Texas Water Code (TWC), §5.013, which provides the commission's general jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; §26.121, which provides the commission's

authority to prohibit unauthorized discharges; and Texas Health and Safety Code (THSC), §361.022, which provides the state's public policy concerning municipal solid waste and sludge.

The adopted new rules implement TWC, §§5.013, 5.103, 5.105, 5.120, 26.027, 26.034, 26.121 and THSC, §361.022.

§217.247. Chemical Pretreatment of Sludge.

(a) A chemical used to treat sludge must be compatible with the operation of the treatment unit and must have no detrimental effect upon receiving waters.

(b) The report must justify appropriate chemicals and feed ranges by including a pilot plant study or data from a treatment unit with characteristics such as organic levels, metal concentrations, and hydraulics that are within 25% of the proposed design.

(c) Each chemical must be stored safely.

(d) A liquid chemical storage tank must include:

(1) a liquid level indicator; and

(2) an overflow receiving basin or drain capable retaining any spill.

(e) Powdered activated carbon must be stored in an isolated fireproof area.

(f) A storage or handling area where potentially volatile chemicals or conditions may occur must have electrical outlets, lights, and motors that meet National Electric Code, including explosion prevention requirements.

(g) Transport, transfer, storage, and use of any volatile chemical must prevent discharge to the atmosphere.

(h) A facility must have at least a 30-day supply of each chemical in dry storage conditions, unless the report justifies a reduced amount.

(i) A solution storage tank or direct-feed day tank must have sufficient capacity for operation at the design flow of the facility.

(j) The procedures for measuring the quantity of each chemical used to prepare each feed solution must be included in the facility's operation and maintenance manual.

(k) The design of a storage tank, pipe, or other equipment must be compatible with the chemical it is designed to handle.

(l) Intermixing of chemicals prior to preparing a feed solution is prohibited.

(m) Concentrated liquid acid must not be stored in an open vessel, but must be pumped in undiluted form from the original container to a point of treatment, a covered day tank, or a storage tank.

(n) Concentrated liquid acid must be kept in a closed, acid-resistant shipping container or storage unit.

(o) The transfer of a toxic material must be controlled by a positive actuating device.

(p) A facility must be designed with one or more of the following control methods to ensure that a transfer of a dry chemical will minimize dust:

(1) Vacuum pneumatic equipment of a closed conveyor system;

(2) A facility for emptying shipping containers in a special enclosure; or

(3) An exhaust fan and dust filter that put a hopper or bin under negative pressure sufficient to eliminate chemical particles in the air.

(q) Disposing of a chemical or an empty chemical container must be done in a manner that minimizes the potential for harmful exposure and in compliance with Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste).

(r) Chemical feed equipment must meet the following requirements:

(1) Structures housing equipment.

(A) A floor surface must be smooth, slip resistant, impervious, and must have a minimum slope of 1/8 inch per foot.

(B) An open basin, tank, or conduit must be protected from a chemical spill or accidental drainage.

(C) An area that houses chemical feed equipment must provide access for servicing, repair, and observation of operations.

(2) Redundancy. A feed system must have at least two feeders and must be able to supply the amount of chemicals needed for process reliability throughout the range of feed. Feed equipment must be able to maintain operation at design flow with the largest operational unit out of service.

(3) Design and Capacity.

(A) A feed system must be able to deliver a proportional amount of chemical feed based on the rate of flow.

(B) A feed system must not use positive displacement type solution feed pumps to feed chemical slurries, unless the report justifies such use.

(C) If using potable water, the water must be protected by at least the equivalent of two backflow preventers, including at least one air gap between a supply pipe and a solution tank.

(D) A feed system component must be resistant to the chemical it is designed to apply.

(E) A dry chemical feed system must:

(i) measure the chemical volumetrically or gravimetrically;

(ii) provide effective mixing and solution of the chemical in a solution pot;

(iii) provide gravity feed from a solution pot;

(iv) completely enclose chemicals; and

(v) prevent emission of dust to the operation room.

(4) Spill Containment. The feed equipment must have protective curbing to contain a chemical spill.

(5) Control Systems.

(A) All feed systems must have an automatic control system that is capable of manual control.

(B) A feed system must have manual starting equipment.

(C) A feed system may be designed with an automatic chemical dose or residual analyzer.

(D) If an automatic chemical dosing or residual analyzer is used, the design must require both recording charts and an alarm for any critical value.

(6) Weighing Scales. A volumetric dry chemical feeder or a non-volumetrically calibrated carboy must have weighing scales that measure in increments of no greater than 0.5% of the load.

(7) Feed System Protection. A feed system must have freeze protection and must be accessible for cleaning.

(8) Water Supply.

(A) A water supply for chemical mixing may be potable water or reclaimed water.

(B) A feed system must protect its water supply from contamination.

(C) A water supply must have sufficient pressure to ensure dependable operations.

(D) A water supply must include a means for measuring solution concentrations.

(E) A water supply design must include sufficient duplicate equipment to ensure process reliability.

(F) A design may include a booster pump to maintain water pressure.

(9) Solution Tanks.

(A) A solution tank must be able to maintain uniform strength of solution consistent with the nature of the chemical solution and must provide continuous agitation.

(B) A feed system must have at least two solution tanks.

(C) The solution tank(s) must provide storage for at least one full day of operation at design flow.

(D) A solution tank must have a drain and a solution level indicator.

(E) An intake point for potable water must have an air gap.

(F) A chemical solution tank must be covered and have an access opening that is curbed and fitted with a tight cover.

(G) Each subsurface solution tank must:

(i) be impermeable;

(ii) be protected against buoyancy;

(iii) include a means to drain groundwater or other accumulated water away from the tank;

(iv) include leak detection; and

(v) allow for containment and remediation of any chemical spill.

(H) An overflow pipe must:

(i) be turned downward;

(ii) have an unobstructed discharge;

(iii) be clearly visible;

(iv) drain to a containment area; and

(v) must not contaminate the wastewater or receiving stream.

(10) Chemical Application.

(A) A chemical application system be efficient and operate safely.

(B) The chemicals application system must prevent backflow or back-siphoning between multiple points of feed through common manifolds.

(C) The application of a pH-affecting chemical to the wastewater must be done before the addition of a coagulant.

§217.248. Sludge Thickening.

(a) If a sludge thickener(s) is used, following criteria are required:

(1) Capacity. The maximum monthly sludge production rate must be used as the basis for sludge thickening system sizing and design.

(2) Flexibility.

(A) A sludge thickening system must have a bypass.

(B) A facility with a design flow greater than 1.0 million gallons per day (mgd) must have:

(i) at least dual sludge thickening units;

(ii) an alternate means of thickening; or

(iii) an alternate disposal method.

(b) Specific Requirements for a Mechanical Gravity Thickener.

(1) Equipment Features.

(A) A mechanical gravity thickener must have:

(i) a low-speed stirring mechanism for continuous mixing and flocculation within the zone of sludge concentration;

(ii) sludge storage, if sufficient storage is unavailable in other external tankage; and

(iii) a means of controlling the rate of sludge withdrawal.

(B) A mechanical thickener may use a chemical addition or dilution water feed system.

(C) A scraper mechanical train must be capable of withstanding any expected torque load. The normal working torque load must not exceed 10% of the manufacturer's recommended torque load.

(2) Design Basis.

(A) A mechanical thickener design must be justified in the report.

(B) The executive director may require data from a pilot study or similar sludge thickening unit operating under similar conditions.

(C) The thickener overflow rate must be at least 400 gallons per day per square foot (gpd/sf) but no more than 800 gpd/sf.

(D) The minimum side water depth for a mechanical thickener is 10 feet.

(E) A circular thickener must have a minimum bottom slope of 1.5 inches per foot.

(F) The peripheral velocity of a scraper must be at least 15 feet per minute but no more than 20 feet per minute.

(G) A mechanical thickener design must minimize the potential for short-circuiting.

(c) Dissolved Air Flotation (DAF) Thickener.

(1) Equipment Features.

(A) A DAF basin must have a bottom scraper that function independently of the surface skimmer.

(B) A recycle pressurization system for a DAF basin must use effluent or secondary effluent instead of potable water.

(C) A DAF basin must have a polymer feed system. A feed system must meet the requirements of §217.247(r) of this title (relating to Chemical Pretreatment of Sludge).

(D) A DAF basin must be located in a covered building with positive air ventilation.

(2) Design Basis.

(A) A DAF basin design must be justified in the report.

(B) The executive director may require data from a pilot study or similar DAF operating under similar conditions.

(C) The hydraulic loading rate must not exceed 2.0 gallons per minute (gpm) per square foot (sf).

(D) The solids loading rate must be at least 1.0 pound but not more than 4.0 pounds per hour per sf.

(E) The air to solids weight ratio must be at least 0.02 but not more than 0.04.

(F) A retention tank system must have a minimum pressure of 40 pounds per square inch gauge.

(G) A skimmer must have multiple or variable speeds that allow an operational range of at least 1.0 foot per minute (fpm) but not more than 25.0 fpm.

(d) Centrifugal Thickener.

(1) A centrifugal thickener design must be justified in the report.

(2) The executive director may require data from a pilot study or similar centrifugal thickener operating under similar conditions.

(3) A centrifugal thickener must be preceded by pretreatment to prevent plugging of a nozzle or excessive wear in the bowl.

(4) The centrate is subject to §217.242 of this title (relating to Control of Sludge and Supernatant Volumes).

(e) Specific Requirements for Gravity Belt Thickeners.

(1) Equipment Features.

(A) Gravity belt thickeners must include a wash water system (60 pounds per square inch minimum) capable of providing 60 gpm per meter of belt width belt. Booster pumps may be employed to achieve design conditions.

(B) Gravity belt thickeners must include a polymer feed system that meets the requirements of §217.247 of this title.

(C) A filtrate drainage system must be sized to remove the full hydraulic capacity of a gravity belt thickener without accumulation or ponding.

(2) Design Basis. Gravity belt thickener sizing must be based upon the following criteria, unless otherwise justified in the report:

(A) maximum solids loading of 1,250 pounds per meter of belt width; or

(B) maximum hydraulic loading 250 gpm per meter of belt width.

(3) Gravity belt thickener filtrate is subject to the requirement in §217.242 of this title.

§217.249. Sludge Stabilization.

(a) Design Requirements. The design requirements for the stabilization processes in this section are based on the assumption that the process is the sole stabilization process employed at the facility.

(b) Variance. An owner must request a variance in accordance with §217.4 of this title (relating to Variances), if a design employs a series of two or more stabilization processes or methods.

(c) Anaerobic Digestion.

(1) A facility with a design flow exceeding 0.4 million gallons per day must have at least two anaerobic digesters.

(2) Each digester may be used as a first stage or primary reactor for treating primary and secondary sludge flows.

(3) Each digester must have a means for transferring a portion of its contents to another digester.

(4) A facility that has been granted a variance to operate without multiple digesters must have an emergency storage basin so the digester may be taken out of service.

(d) Depth. An anaerobic digester must provide a minimum of 6.0 feet of storage depth for supernatant liquor.

(e) Maintenance Provisions. A design must allow access to each unit for maintenance.

(f) Digester Configuration.

(1) The bottom of a digester must slope towards a drainpipe.

(2) A flat-bottomed digestion chamber is prohibited.

(g) Access Manholes.

(1) The top of a digester must have at least two access manholes and a gas dome.

(2) One manhole must have a sufficient diameter to permit the use of mechanical equipment to remove grit and sand.

(3) A digester system must have a separate sidewall manhole at ground level.

(h) Safety.

(1) The facility operation and maintenance manual must require the use of non-sparking tools, rubber soled shoes, a safety harness, and gas detectors for flammable and toxic gases when working in a digester.

(2) At least one self-contained breathing apparatus must be maintained in operational condition and kept on site.

(i) Sludge Inlets and Outlets. To facilitate effective mixing of the digester contents a digester must have:

(1) multiple sludge inlets located to minimize short-circuiting and at least one inlet located in the center of a digester above the liquid level at design flow;

(2) at least three recirculation sections; and

(3) at least three outlets.

(j) Digester Capacity.

(1) The digester capacity must be calculated using the expected volume and character of the sludge. The report must include the calculations used to justify the design.

(2) The total digester volume must based upon:

(A) the volume of sludge added;

(B) the percent solids and character of the sludge;

(C) the temperature to be maintained in the digester;

(D) the degree or extent of mixing to be obtained; and

(E) the size of the installation with appropriate allowance for sludge and supernatant storage.

(3) A digester must able maintain a minimum daily average sludge digestion temperature of 35 degrees Celsius (95 degrees Fahrenheit) and maintain the temperature within a 4 degrees Celsius (+/-) range.

(4) The minimum detention time for sludge undergoing digestion for stabilization is 15 days in the primary digester for sludge to be landfilled, or the period required to achieve the necessary level of pathogen control and vector attraction reduction as required by Chapter 312, Subchapter D of this title (relating to Pathogen and Vector Attraction Reduction), if sludge is to be land applied.

(5) An unheated digester must provide a minimum detention time of 60 days and maintain a temperature of at least 20 degrees Celsius (68 degrees Fahrenheit), or the period required to achieve the necessary level of pathogen control and vector attraction reduction as required by Chapter 312, Subchapter D of this title.

(6) A Completely Mixed System.

(A) A digester must have an average feed loading rate of less than 200 pounds (lbs) of volatile solids per 1,000 cubic feet (cf) of volume per day in the active digestion volume.

(B) Complete mixing in 30 minutes or less is required for:

(i) a confined mixing system if gas or sludge flow is directed through a vertical channel;

(ii) a mechanical stirring or pumping system; and

(iii) an unconfined continuously discharging gas mixing system.

(C) A tank over 60 feet in diameter must have multiple mixing devices.

(D) The minimum gas flow supplied for complete mixing must be 15 cubic feet per minute (cfm) per 1,000 cf of digestion volume.

(E) A complete mixing system must have a flow-measuring device and a throttling valve.

(F) The minimum power supply for a mechanical stirring or pumping complete mixing system is 0.5 horsepower per 1,000 cf of digestion volume.

(7) Moderately Mixed Systems.

(A) A digestion system where mixing is accomplished only by circulating sludge through an external heat exchanger must be loaded at less than 40 lbs of volatile solids per 1,000 cf of volume per day in the active digestion volume. A design must be based on the volatile solids loading in accordance with the degree of mixing.

(B) The report must include a justification for the loading rates, if mixing is accomplished by another method.

(k) Gas Collection, Pipes, Storage, and Appurtenances.

(1) General Requirements. Each portion of a gas system must maintain positive gas pressure under all normal operating conditions, including sludge withdrawal.

(2) Safety Equipment.

(A) A gas system must include a pressure valve, vacuum relief valve, a flame trap, and an automatic safety shut-off valve.

(B) An installation of water seal equipment on a gas pipe is prohibited.

(3) Gas Pipes and Condensate.

(A) The gas pipe system must be designed for the volume of gas expected.

(B) A gas pipe must be pressure tested for leakage at 1.5 times the design pressure before a digester is placed into service.

(C) A gas pipe must slope at least 1/8 inch per foot to drain condensate.

(D) The main gas pipe from a digester must have a sediment trap and a drip trap.

(E) A float controlled condensate trap is prohibited.

(F) A condensation trap must be accessible for daily servicing and draining.

(G) A drip trap must be located at each low point in the pipes.

(H) A gas pipe to each gas outlet must have a flame check or a flame trap.

(I) A burner pilot must use natural or bottled gas.

(J) Each main gas pipe must have a flame trap with a fusible shut-off.

(K) A gas pipe to a waste gas burner must have a pressure valve and a vacuum relief valve.

(4) Electrical Fixtures and Equipment. The electrical equipment near sludge digester pipe containing gas must be designed to prevent potentially explosive conditions.

(l) Waste gas.

(1) A waste gas burner must be accessible and must be located at least 50 feet away from any structure, if placed at ground level.

(2) A waste gas burner may be located on the roof of the control building.

(3) A waste gas burner must not be located on top of a digester.

(4) A discharge of less than 100 cubic feet per hour of digester gas through a return bend screened vent with a flame trap terminating at least 10 feet above a walking surface is allowed.

(m) Ventilation.

(1) An underground enclosure connected to an anaerobic digesters tank, gas pipe, or sludge equipment must have forced ventilation in accordance §217.246 of this title (relating to Ventilation and Odor Control).

(2) An underground enclosure must have a tight-fitting, self-closing door to minimize the spread of gas.

(n) Gas Meter.

(1) A system must have a gas meter to measure total gas production.

(2) A meter must have a bypass.

(o) Manometer.

(1) A gas manometer must have a tight shut-off vent and vent cock.

(2) A vent pipe must be extended from a manometer to the outside of the building.

(3) A vent pipe opening must have a screen and be designed to prevent the entrance of rainwater.

(4) A design must specify all safety devices that are needed for a manometer pipe system and must list the safety items in the report.

(p) Gas Piping. The gas piping for an anaerobic digester must be equipped with gauges that measure the following in inches:

(1) the pressure of the main pipe;

(2) the pressure to gas-utilization equipment; and

(3) pressure to waste burners.

(q) Digestion Temperature Control.

(1) Passive Temperature Control.

(A) A digester must be constructed above the shallowest ground water table.

(B) A digester must be insulated to minimize heat loss.

(2) Heating Facilities.

(A) The sludge must be heated by circulating the sludge through an external heater.

(B) A piping system must allow for the preheating of feed sludge before introduction to the digesters, unless effective mixing is provided within a digester.

(C) A pipe and valve layout must facilitate cleaning.

(D) The size of a heat exchanger sludge pipe must be based on the heat transfer requirements.

(3) Heating Capacity.

(A) A digester system must have the heating capacity to maintain the temperature required for sludge stabilization.

(B) A digester system must be designed to use an alternate source of fuel and have an alternate source of fuel available for emergency use.

(4) Mixing. A digester system must have equipment to mix the sludge.

(5) Location of a Sludge Heating Device. A sludge heating device with an open flame must be located above grade and in an area separate from gas production and any storage area.

(r) Supernatant Withdrawal.

(1) Pipe Size. The minimum diameter for a supernatant pipe is 6.0 inches.

(2) Withdrawal Arrangements.

(A) The supernatant pipes must be arranged to allow withdrawal from three or more levels in a tank.

(B) A supernatant selector must have at least two draw-off levels located in the digester's supernatant zone, in addition to an unvalved emergency supernatant draw-off pipe.

(C) A system must have a positive, unvalved, vented overflow.

(D) A supernatant withdrawal level design must be based on a fixed cover digester design.

(E) Supernatant withdrawal must be by means of interchangeable extensions at the discharge end of a withdrawal pipe.

(F) A supernatant piping system must have high-pressure backwash equipment.

(3) Sampling.

(A) A supernatant pipe must have sampling points at each supernatant draw-off level.

(B) The minimum diameter for a sampling pipe is 1.5 inches.

(4) Supernatant Handling.

(A) The report must include how the treatment units are designed to handle shock organic loads associated with digester supernatant.

(B) Supernatant liquor from an anaerobic digester may be returned directly to the facility for treatment or chemically treated before being returned to the facility for treatment. Any other method of treating supernatant liquor must be approved by the executive director.

(C) If treating the supernatant liquor with lime, each of the following requirements must be met:

(i) Lime must be applied to obtain a pH of at least 11.5 standard units (su).

(ii) A lime feeder must be capable of feeding 2,000 milligrams per liter (mg/l) of hydrated lime or its equivalent.

(iii) Lime must be mixed with the supernatant liquor by a rapid mixer or by agitation with air in a mixing chamber.

(iv) After adequate mixing, the solids must be allowed to settle.

(D) A supernatant liquor treatment system may be a batch or a continuous process.

(i) A batch process may have the mixing and settling processes in the same tank.

(ii) A sedimentation tank for a batch process must have the capacity to hold at least 36 hours of supernatant liquor at design flow, but not less than 1.5 gallons per capita.

(iii) A sedimentation tank for a continuous process must have a detention time of not less than 8.0 hours.

(E) The solids from the supernatant liquor treatment must be returned to a digester or conveyed to a sludge handling unit.

(F) The clarified supernatant liquor must be returned to the head of the treatment works in accordance with §217.242 of this title (relating to Control of Sludge and Supernatant Volumes).

(s) Anaerobic Digester Covers.

(1) An uncovered anaerobic digester is prohibited.

(2) The sludge and supernatant withdrawal pipes for a single-stage or a first-stage digester with a fixed cover must be arranged to

minimize the possibility of air being drawn into a gas chamber above the liquid in a digester.

(3) A digester cover must include a gas chamber.

(4) A digester cover must be gas tight. The specifications must include a test of each digester cover for gas leakage.

(5) A digester cover must be equipped with an air vent with a flame trap, a vacuum breaker, and a pressure relief valve.

(t) Aerobic Sludge Digestion. This subsection applies to the stabilization by aerobic digestion of waste sludge to Class B biosolids as defined in Chapter 312 of this title.

(1) Solids Management. The report must include a solids management plan.

(2) Detention Time. The design temperature of an aerobic digester system must be based the average of the lowest consecutive seven-day low temperature at a similar wastewater treatment facility located within 50 miles of a proposed site must be used.

(3) Mass Balance Requirements. Mass balance calculations must be included in report. The mass balance calculations must take into account design sludge age, wastestream concentration, operational hours, operational volume in tanks, decant or dewatering volumes and characteristics, time needed for decanting or dewatering, and the volume needed for storage and sampling.

(4) Single Stage. Single stage aerobic digestion consists of utilizing one tank operating in continuous-mode-no-supernatant removal, continuous-mode-feeding-batch removal, or other mode detailed in a solids management plan.

(A) The design of the size of an aerobic digester must be based on the minimum total detention time for the water temperature in the table located in subparagraph (B) of this paragraph based on Chapter 312 of this title and 40 Code of Federal Regulations Part 503.

(B) The digester size must be sufficient to provide both the detention time in the following table and to provide for the mass load received by the unit:
Figure: 30 TAC §217.249(t)(4)(B)

(5) Multiple Stage. Multiple stage aerobic digestion consists of two or more completely mixed reactors operating in series.

(6) Field Data.

(A) Any increase in flow or organic loading or change in process requires new testing and verification of time and temperature operating parameters.

(B) An expansion of an existing facility may be designed and operated according to previously established time and temperature operating parameters.

(C) The executive director may re-rate a facility under Subchapter B of this chapter (relating to Treatment Facility Design Requirements), if an owner requests a re-rating and submits sufficient supporting data.

(7) Design Requirements.

(A) The maximum solids concentration used to calculate the total detention time for an aerobic digester that concentrates the waste sludge only in a digester tank must be:

(i) 2.0% solids concentration; unless

(ii) supporting data is submitted in the report to increase the solids concentration to 3.0%; or

(iii) a higher concentration is justified by the use of a sludge thickening unit upstream of a digester.

(B) A diffuser must be designed to minimize clogging.

(C) A diffuser must be designed to permit its removal without dewatering a tank for inspection, maintenance, and replacement.

(D) The volatile solids loading rate must be designed to be at least 100 lb but not more than 200 lb of volatile solids per 1,000 cf per day, unless otherwise justified in the report.

(E) The dissolved oxygen concentration maintained in the liquid must be at least 0.5 mg/l.

(F) The energy input for mixing must be at least 0.5 horsepower per 1,000 cf for mechanical aerators.

(G) The energy input for mixing must be at least 20 standard cf per minute per 1,000 cf per 1,000 cf of aeration tank if diffused air mixing is used.

(H) A unit must be designed for effective separation and withdrawal, or decanting of the supernatant.

(u) Heat Stabilization.

(1) The design of a heat treatment system must be based on the anticipated sludge flow, characteristics, and concentration.

(2) A heat treatment system must operate continuously to minimize the additional heat input necessary to start up the system, unless justified in the report.

(3) A heat treatment system must have multiple units, unless storage or an alternate stabilization method is available.

(4) A single unit heat treatment system must have a standby grinder, fuel pump, air compressor, if applicable, and dual sludge pumps.

(5) The report must identify the expected downtime for maintenance and repair, based on data from a comparable facility.

(6) The report must include a design for adequate storage for process feed and downtime.

(7) A heat treatment system must provide heat stabilization in a reaction vessel:

(A) at a minimum of 175 degrees Celsius (350 degrees Fahrenheit) for 40 minutes but not more than 205 degrees Celsius (400 degrees Fahrenheit) for 20 minutes and at a pressure of not less than 250 lbs per square inch gauge (psig) but not more than 400 lbs/psig; or

(B) provide for pasteurization at temperatures of 30 degrees Celsius (85 degrees Fahrenheit) or more and gage pressure of more than 1.0 standard atmosphere (14.7 pounds per square inch) for a period of at least 25 days.

(8) A heat treatment system must have a sludge grinder to protect a heat exchanger from rag fouling.

(9) A heat treatment system must include an acid wash or high-pressure water wash system to remove scale from heat exchangers and reactors.

(10) A decant tank must have a sludge scraper mechanism and must be covered.

(11) A heat exchanger must be constructed of corrosion resistant material.

(12) A heat treatment system must have a continuous temperature recorder.

(v) Recycle Loads.

(1) The report must identify a method of treatment for the recycle stream from heat treatment.

(2) A recycle stream must not impact effluent quality or the facility's treatment processes.

(w) Alkaline Stabilization.

(1) Design Basis.

(A) Alkaline Dosage. The report must include the calculation of the alkaline dosage required to stabilize sludge based on the type of sludge, chemical composition of sludge, and the solids concentration. Performance data taken from a pilot test program or from a comparable facility must be used to determine the proper dosage.

(B) Temperature, pH, and Contact Time. An alkaline stabilization system must uniformly mix an alkaline additive-sludge mixture to maintain the pH, temperature, and contact time, as specified in §312.82 of this title (relating to Pathogen Reduction) and §312.83 of this title (relating to Vector Attraction Reduction).

(2) Reliability.

(A) An alkaline stabilization system must have multiple units, unless storage or an alternate stabilization method is available to continue operations when a unit is not in service.

(B) A single unit that has adequate storage or an alternate stabilization method must have standby conveyance and mixer, backup heat source, and dual blowers.

(C) A design must include:

(i) the expected downtime for maintenance and repair based on data from a comparable facility; and

(ii) adequate storage for process, feed, and downtime.

(3) Alkaline Stabilization Housing Unit.

(A) A housing unit must meet the requirements in §217.247(u)(1) of this title (relating to Chemical Pretreatment of Sludge).

(B) A housing unit must have mechanical or air agitation to ensure uniform discharge from the storage bins.

(4) Feeding Equipment.

(A) The alkaline additive feeding equipment must meet the requirements of §217.247(u)(1) of this title.

(B) Hydrated lime must be fed as at least 6% calcium hydroxide $Ca(OH)_2$ slurry by weight but not more than 18% $Ca(OH)_2$ slurry by weight, unless otherwise justified in the report.

(C) The report must identify a means for controlling the feed rate of any other dry additive.

(5) Mixing Equipment.

(A) An additive and sludge blending or mixing vessel must be large enough to hold the mixture for a minimum of 30 minutes at maximum feed rate.

(B) A batch process must maintain a pH greater than 12 su in a mixing tank during the blending period.

(C) A continuous flow process must maintain a pH greater than 12 su in an exit pipe.

(D) A continuous flow process must be designed for a detention time that is the tank volume divided by the volumetric input flow rate.

(E) A slurry mixture may be mixed with either a diffused air mixer or a mechanical mixer.

(F) The mixing equipment must maintain an alkaline slurry mixture in complete suspension.

(G) If using a diffused air mixer, the following requirements apply.

(i) A coarse bubble diffuser must have a minimum air supply of 20 standard cubic feet per minute per 1,000 cf of tank volume.

(ii) A mixing tank must be ventilated and include odor control equipment.

(H) If using a mechanical mixer, the following requirements apply.

(i) A mechanical mixer must provide at least 5.0 horse power per 1,000 cf of tank volume but not more than 10 horse power per 1,000 cf of tank volume.

(ii) The impellers must minimize debris fouling in the sludge.

(6) Detention Time. A pasteurization vessel must provide a minimum detention period of 30 minutes.

(7) External Heat. The report must include any supplemental external heat necessary.

§217.250. Sludge Dewatering.

(a) The report must include a justification for the proposed sludge dewatering units, including design calculations, results from any pilot studies, all assumptions, and appropriate references.

(b) The design of a dewatering unit must be based on mass balance principles.

(c) General Requirements.

(1) Centrate or Filtrate Recycle.

(A) The drainage from beds and centrate or filtrate from dewatering units must be returned to the head of the facility for treatment.

(B) The design of a treatment unit downstream from a dewatering unit must be based on the organic load from the centrate or filtrate recycle.

(2) Sludge with Industrial Waste Contributions. A dewatering system must be designed to prevent the release of any constituent (such as a free metal, an organic toxin, or a strong reducing or oxidizing compound) that threatens water quality or compliance with the associated wastewater permit.

(3) Redundancy.

(A) A mechanical dewatering system must have at least two units, unless the report justifies adequate storage or an alternative means of sludge handling.

(B) When performance reliability and sludge management are dependent on production of dewatered sludge, the mechanical dewatering units must be able to dewater the average daily sludge flow with the largest unit out of service.

(4) Storage Requirements.

(A) A mechanical dewatering system must have separate storage if the equipment will not operate on a continuous basis and the treatment system has no digesters with built-in short-term storage.

(B) In-line storage of stabilized or unstabilized sludge must not interfere with any treatment unit.

(C) The separate sludge storage from a primary digester must be aerated and mixed to prevent a nuisance odor condition.

(5) Sampling Points. A dewatering system must have sampling stations before and after each dewatering unit and must allow periodic evaluation of the dewatering process.

(6) Maintenance. Each dewatering system unit must have a bypass to allow for maintenance, repair, and replacement.

(d) Sludge Conditioning.

(1) An additive addition point must be located in relation to downstream equipment and in relation to the combined effect of other additives.

(2) A dewatering system must provide adequate mixing time for the reaction between an additive and the sludge. Any subsequent handling must eliminate floc shearing.

(3) The report must include a pilot plant or full-size performance data used to determine the characteristics and design dosage of any sludge additive.

(4) The report must justify the in-stream flocculation and coagulation system design by including comparable performance data or pilot plant data.

(5) The report must include whether the mixers require conditioning tanks.

(6) The report must include calculations for a range of detention times.

(7) Solution storage may be smaller than the design volume required for daily dosage if the equipment is not in continuous operation.

(8) A minimum of eight hours storage must be provided, unless the specific chemical or additive selected is adversely affected by storage.

(9) The storage for a batch operation must be adequate for one batch at maximum chemical demand.

(10) The report must justify any storage volume reduction and any other method used to ensure a continuous supply of chemicals through an operating day or batch.

(e) Sludge Drying Beds.

(1) The sludge drying beds size must be based on data from a similar facility in the same geographical area with the same influent sludge characteristics.

(2) If such data is unavailable, or if the executive director determines that the data is not appropriate for a proposed facility, the design of sludge drying beds must be based on the following:

(A) Open Beds.

(i) A sludge drying bed system must have at least two beds.

(ii) The report must include the calculation of the minimum surface area for a sludge drying bed using the values in the following figure for an area of the state with less than 45 inches annual average rainfall or annual average relative humidity of less than 50%, as determined by National Weather Service data.
Figure: 30 TAC §217.250(e)(2)(A)(ii)

(iii) Another method of sludge dewatering is required in lieu of a sludge drying bed in an area of the state that experiences either greater than 45 inches average annual rainfall or annual average relative humidity of 50% or greater, as determined by National Weather Service data.

(iv) A design must:

(I) provide a method of effectively dewatering sludge;

(II) provide a means for accelerated dewatering;

(III) size the sludge drying beds to store accumulated sludge during periods of extended high humidity and rainfall; and

(IV) provide an alternative dewatering method to effectively dewater the sludge during periods of extended high humidity and rainfall.

(v) The report must provide justification for use of innovative or non-conforming sludge drying beds in high rainfall, high relative humidity areas of the state.

(B) Gravel Media Beds. A gravel media bed must be laid in two or more layers. The gravel around the underdrains must be properly graded and must be at least 12 inches deep, extending at least 6.0 inches above the top of the underdrains. The top layer of a gravel media bed must be at least three inches thick and must consist of gravel 1/8 inch to 1/4 inch in size.

(C) Sand Media Beds. A sand media bed must consist of at least 12 inches of sand with a uniformity coefficient of less than 4.0 and an effective grain size of at least 0.3 millimeters (mm) but not more than 75 mm above the top of an underdrain.

(D) Underdrains.

(i) The underdrains must be at least 4.0 inches in diameter and sloped not less than 1.0% to drain.

(ii) The underdrains must be spaced not more than 20 feet apart.

(E) Decanting. A sludge drying bed may have a method of decanting supernatant installed on the perimeter of the bed.

(F) Walls.

(i) The interior walls of a sludge drying bed must be watertight and extend 12 to 24 inches above and at least 6 inches below the bed surface.

(ii) The exterior walls of a sludge drying bed must be watertight and extend 12 to 24 inches above the bed surface or ground elevation, whichever is higher.

(G) Sludge Removal.

(i) A sludge drying bed system must be arranged to facilitate sludge removal.

(ii) The sludge drying beds must have concrete pads for vehicle support tracks on 20 foot centers for all percolation type sludge beds.

(H) Sludge Influent.

(i) A sludge pipe to the beds must terminate at least 12 inches above the surface of the media and be arranged so that the pipe drains to a sump to be pumped to the headworks.

(ii) A sludge discharge point must have a concrete splash plate.

(I) Drying Bed Bottom.

(i) The bottom of a sludge drying bed must consist of a minimum of one foot layer of clayey subsoil having a permeability of less than 10^{-7} centimeters per second (cm/sec).

(ii) An impermeable concrete pad must be installed over a liner in locations where the groundwater table is within 4.0 feet of the bottom.

(3) Innovative or Non-Conforming Sludge Drying Beds. The executive director will review any vacuum assisted or other variations to the gravity drying bed concept as innovative and/or nonconforming technologies subject to §217.7(b)(2) of this title (relating to Types of Plans and Specifications Approvals).

(4) Rotary Vacuum Filtration.

(A) Filtration Rate. The report must justify the actual value calculated for the rates of filtering for various types of sludge with proper conditioning, using the following table:
Figure: 30 TAC §217.250(e)(4)(A)

(B) Duplicate Equipment. Unless dual trains are provided, the following equipment must be provided in duplicate to allow equipment alternation: feed pump, vacuum pump and filtrate pump. Spare filter fabric must be provided except when metal coils are used.

(C) Filter Equipment. Wetted parts must be constructed of corrosion-resistant material. Drum and agitator assemblies must be equipped with variable-speed drives and provisions must be made for adjusting the liquid level.

(D) Pumps.

(i) A vacuum pump with a capacity of at least 1.5 cubic feet per minute per square foot (cfm/sf) must be provided for metal-covered drums.

(ii) A dry-type vacuum pump must have a vacuum receiver.

(iii) A filtrate pump must have adequate capacity to pump the maximum amount of liquid to be removed from the sludge.

(iv) Each filter must be fed by a separate feed pump to ensure a proper feed rate.

(5) Centrifugal Dewatering.

(A) The report must justify the sizing and design of a centrifugation system. A design must be based on performance data from a similar centrifugation system when available. If no performance data is available, the results of a pilot or full-scale test must be used.

(B) Selection of a material for a scroll must be include consideration of the amount of grit expected in the sludge.

(C) A design must include adequate sludge storage.

(D) Unless dual trains are provided, a centrifugation system must have the following spare equipment, including necessary connecting pipes and electrical controls:

(i) drive motor;

(ii) gear assembly; and

(iii) feed pump.

(E) Each feed pump must have variable speed.

(F) Each centrifuge must have a separate feed system.

(G) Each centrifuge must be equipped for variable scroll speed and pool depth.

(H) Each centrifugation system must have a crane or monorail for equipment removal or maintenance.

(I) Each centrifuge system must have access for adequate and efficient wash down of the interior of the machine.

(6) Plate and Frame Presses.

(A) Sizing.

(i) A design must be based on performance data developed from similar operational characteristics concerning the size of a plate and frame press when available. If no performance data is available, the results of a pilot scale tests or full-scale tests must be used.

(ii) A design may be based on appropriate scale-up factors for full size designs if pilot scale testing is done in lieu of full-scale testing.

(iii) The report must justify the size of a plate and frame press.

(B) Duplicate Equipment and Spare Parts. Unless multiple units are provided, a plate and frame press system must include the following spare equipment:

(i) a duplicate feed pump;

(ii) at least one extra plate for every ten required for startup, but not less than two;

(iii) one complete filter fabric set;

(iv) one closure drive system;

(v) air compressor; and

(vi) one washwater booster pump.

(C) Operational Requirements.

(i) The filter feed pumps must be capable of a combination of initial high flow, low pressure filling, followed by sustained periods of operating at 100 pounds per square inch (psi) to 225 psi.

(ii) A design may specify an integral pressure vessel to produce this initial high volume flow.

(iii) A plate and frame system may use operating pressures less than 225 psi if the report includes actual performance data using similar sludge justifying such a use.

(iv) A design may include provisions for cake breaking to protect or enhance down line processes when necessary.

(D) Maintenance.

(i) A plate and frame system must have a crane or monorail capable of removing the plates.

(ii) A plate and frame system must have a high-pressure water or acid wash system to clean the filter.

(7) Belt Presses.

(A) Sizing.

(i) Actual performance data developed from a facility with similar operational characteristics must be used to size a belt

press system. If pilot plant testing is performed in lieu of full-scale testing, appropriate scale-up factors must be used to develop a full-scale design.

(ii) A belt press system must have a duplicate belt press or another method of sludge processing or disposal that has been approved by the executive director if the design flow exceeds 4.0 million gallons per day (mgd).

(iii) The report must include all data used to size a belt press system.

(B) Duplicate Equipment and Spare Parts. Unless multiple units are provided, a belt press system must have the following spare equipment:

(i) a duplicate feed pump;

(ii) washwater booster pumps;

(iii) one complete set of belts;

(iv) one set of bearings for each type of press bearing;

(v) duplicate tensioning;

(vi) tracking sensors;

(vii) one set of wash nozzles;

(viii) one doctor blade; and

(ix) duplicate conditioning or flocculation drive equipment.

(C) Conditioning. The report must include the polymer selection methodology, account for sludge variability, and document the anticipated sludge loading to the press.

(D) Sludge Feed.

(i) The sludge feed must be relatively constant to eliminate difficulties in polymer addition and press operation.

(ii) The report must include the range in feed variability.

(iii) A belt press system may include grinders ahead of a flocculation system.

(iv) The sludge feed must provide a method for uniform sludge dispersion on a belt.

(v) A belt press system must use thickening of the feed sludge unless the report justifies separate thickening or dual purpose thickening.

(E) Filter Press Belts.

(i) A belt must have variable speed.

(ii) A belt press system must have belt tracking and tensioning equipment.

(iii) The report must justify the weave, material, width, and thickness of the belts.

(F) Filter Press Rollers.

(i) The rollers must have a protective finish.

(ii) The maximum roller deflection and operating tension of a belt must be included in the report to justify equipment selection.

(iii) The roller bearings must be watertight and rated for a life of 100,000 hours.

(G) Spray Wash System.

(i) A belt press system must use high-pressure wash water for each belt.

(ii) A design must specify the operating pressure at the point of washwater discharge.

(iii) A spray wash system must allow cleaning without interfering with the system operation.

(iv) The report must justify the nozzle and nozzle cleaning system selection.

(v) A belt press system must have replaceable spray nozzles and spray curtains.

(H) Maintenance Requirements.

(i) A belt press system must have drip trays under the press and under the thickener when gravity belt thickening is employed.

(ii) The side and floor of a belt press must have adequate clearance for maintenance and removal of the dewatered sludge.

(iii) An electrical panel or other material subject to corrosion must be weatherproof or located outside of the press area.

(iv) A doctor blade clearance must be adjustable.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
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SUBCHAPTER K. CHEMICAL DISINFECTION

30 TAC §§217.271 - 217.283

STATUTORY AUTHORITY

The new rules are adopted under the authority of Texas Water Code (TWC), §5.013, which provides the commission's general jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted new rules implement TWC, §§5.013, 5.103, 5.105, 5.120, 26.027, 26.034, and 26.121.

§217.271. Chlorine (Cl_2) Disinfection and Sulfur Dioxide (SO_2) Dechlorination System Redundancy Requirements.

(a) Each Cl_2 disinfection and SO_2 and dechlorination system must include at least two banks of chemical storage cylinders.

(b) A bank of cylinders must include a device that automatically switches from an empty bank of cylinders to a full bank of cylinders in a manner that ensures continuous disinfection.

(c) A facility must have sufficient space to store a bank of empty cylinders.

(d) A chemical delivery system must be designed so that the pound per day requirements in §217.272 of this title (relating to Capacity and Sizing of Chlorine (Cl_2) Disinfection and Sulfur Dioxide (SO_2) Dechlorination) are met with the largest chlorinator, sulfonator, or evaporator out of service.

(e) A chemical delivery system must include a backup pump for any injector water supply system requiring a booster pump.

(f) A chemical delivery system must include an emergency power source capable of maintaining operation of the chlorination and dechlorination of the minimum flow necessary to keep the facility from being inundated by influent during an extended power outage.

§217.274. Dosage Control for Chlorine (Cl_2) Disinfection and Sulfur Dioxide (SO_2) Dechlorination Systems.

A new, expanded or materially altered Chlorine (Cl_2) and Sulfur Dioxide (SO_2) system must include automatic dosage control that adjusts the dosage of Cl_2 or SO_2 relative to the flow of an effluent stream.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER L. ULTRAVIOLET LIGHT DISINFECTION

30 TAC §§217.291 - 217.300

STATUTORY AUTHORITY

The new rules adopted under the authority of Texas Water Code (TWC), §5.013, which provides the commission's general jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted new rules implement TWC, §§5.013, 5.103, 5.105, 5.120, 26.027, 26.034, and 26.121.

§217.292. Ultraviolet Light Disinfection Systems Effluent Limitations.

Ultraviolet light disinfection systems must be designed to comply with at least the effluent limits relating to the bacterial limit in the facility's wastewater permit.

§217.293. Ultraviolet Light Disinfection Systems Redundancy Requirements.

(a) An ultraviolet (UV) disinfection system must include a least two banks positioned in series in a disinfection channel.

(b) A UV light disinfection system must be designed so that the dosage requirements determined in §217.295 of this title (relating to Ultraviolet Light Disinfection Dosage and System Sizing) are met under all conditions.

(c) An owner must maintain an inventory of spare equipment, including but not limited to, lamps, ballasts, banks, and modules, to replace equipment during emergency repairs and scheduled maintenance.

§217.295. Ultraviolet Light Disinfection Dosage and System Sizing.

(a) A system must be sized based upon the results of an independent bioassay. The following are the minimum criteria.

(1) The lamp and ballast in a bioassay test system must have the same spectral characteristics and 254 nanometers (nm) output as the full-scale system.

(2) Spacing of the lamps in a bioassay test unit must be the same as in the full-scale system.

(3) The arrangement of the lamps must mirror the full-scale system.

(4) The maximum scale-up factor is 10.

(5) Scale down is prohibited.

(6) The minimum number of lamps in a bioassay is 4 lamps per reactor.

(b) If a variable output lamp is used, detailed documentation from the lamp manufacturer must be provided to document 254nm ultraviolet output, operational wattage versus lamp input power (voltage and current), along with data demonstrating power requirements to the lamp and ballast to achieve the stated output.

§217.296. Ultraviolet Light Disinfection Bioassay Test Procedure.

(a) A bioassay procedure must conform to one of the three following protocols:

(1) *USEPA (1986) Design Manual: Municipal Wastewater Disinfection*, EPA/625/1-86/021;

(2) National Water Research Institute's *Ultraviolet Disinfection Guidelines for Drinking Water and Water Reuse* (May 2003); or

(3) NSF International, The Public Health and Safety Company, 40CFR35.6450 *Environmental Technology Verification Protocol* (October 2002).

(b) The following minimum standards are required for proper validation:

(1) The source of water for the test organism solution must be identified and its UV transmittance must be recorded. If potable water is used, the bioassay must also address how disinfectant residues were removed.

(2) The depth of the suspension must be 1.0 centimeter (cm).

(3) The organism density must be 10^5 to 10^7 plaque forming units or colony forming units per milliliter.

(4) The dose response relationship must be based on a range of five to seven exposure times.

(5) Runs must be in at least triplicate, each from a separate dilution of the stock suspension.

(6) A minimum of two controls (unexposed) must be sampled with each dose run.

(7) The diameter of the collimating tube must at least equal the diameter of the Petri dish. Any difference in diameters must be accounted for in the supporting calculations.

(8) The narrow band detector used for intensity determination must be calibrated for accuracy.

(9) 254 nanometer ultraviolet must be measured and reported as the dose response.

(10) The speed of the mixing bar must not cause spatter or cavitation.

(11) Any difference between the velocity profile in the bioassay and the velocity profile in the full-scale unit must be justified.

(12) Any difference between the gallons per minute per inch of UV lamp in the bioassay and the gallons per minute per inch of UV lamp the full-scale unit must be justified.

(13) The lamp intensity data obtained in the bioassay must be used to set the operating parameters of the lamps.

(14) Lamp intensity used in the flow through test reactor shall be set after a 100-hour burn in and stabilization period.

(15) Electrical input for 100% lamp output must be recorded and verified.

(16) Lamp intensity in the bioassay must be measured at the exact height of the surface of the suspension.

(17) No operating condition may be used that has not been proven effective by the bioassay.

(18) Any variation from the criteria in this subsection must:

(A) be justified by using industry best practices such as *Standardization of Method for Fluence (UV Dose) Determination in Bench-Scale UV Experiments*, Bolton and Linden (2003); and

(B) approved through the variance procedures in §217.4 (relating to Variances) in this chapter.

(19) Bioassay procedures and results must be signed and sealed by a licensed professional engineer.

(c) Effluent percent transmission during the full scale testing shall be established in accordance with the terms and conditions of the facility's wastewater permit.

§217.298. Ultraviolet Light Disinfection System Cleaning and Maintenance.

(a) A design must include provisions for draining each ultraviolet (UV) disinfection channel and routine cleaning of the UV lamps and modules.

(b) A UV system must include the following spare parts, as a percentage of the total system equaling at least:

(1) 5% of the lamps;

(2) 2% of the ballasts; and

(3) 5% of the quartz sleeves.

(c) The owner must provide the minimum number of spare banks or modules necessary to ensure continuous disinfection during maintenance and repair.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER M. SAFETY

30 TAC §§217.321 - 217.333

STATUTORY AUTHORITY

The new rules are adopted under the authority of Texas Water Code (TWC), §5.013, which provides the commission's general jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted new rules implement TWC, §§5.013, 5.103, 5.105, 5.120, 26.027, 26.034, and 26.121.

§217.321. Safety Design.

(a) The safety aspects of a treatment facility design must be based on *Design of Municipal Treatment Plants*, WEF Manual of Practice No. 8, published by the Water Environment Federation, or other safety design guidelines approved by the executive director.

(b) Occupational safety and health hazards and risks to workers and the public must be addressed in the design of collection system and treatment facility equipment and processes.

(c) A facility design must incorporate processes that use the least hazardous and toxic chemicals and the least amounts of those chemicals that will effectively treat and disinfect the influent so that the effluent and the sludge meet the requirements in the associated wastewater permit and do not degrade the water quality in a receiving stream or cause accumulation in a land application area.

(d) Where applicable, a design must follow the guidelines established under 29 Code of Federal Regulations, Part 1910.

(e) A design must demonstrate compliance with this section by implementing §217.322 of this title (relating to Safety and Security Audits) and §217.323 of this title (relating to Hazardous Operation and Maintenance).

§217.322. Safety and Security Audits.

(a) Safety Audit.

(1) The owner of an existing facility being materially altered or expanded must conduct a safety audit of the facility that evaluates injuries and incidents at the facility during the prior three-year period in order to determine the locations, causes, types of injuries, and jobs being performed when the injuries or incidents occurred.

(2) A safety audit must identify the locations and jobs associated with injuries or incidents and any subsequent corrective action taken or planned.

(3) A design must include measures that address the needed corrective actions identified in the safety audit as part of a material alteration or expansion project.

(b) Security Audit.

(1) The owner of an existing facility may conduct a security audit.

(2) The security audit may be based on the *Asset Based Vulnerability Checklist for Wastewater Utilities* by the Association of Metropolitan Sewerage Agencies or an equivalent security audit protocol.

§217.323. Hazardous Operation and Maintenance.

(a) An owner shall perform an analysis of operational and maintenance tasks to identify potentially hazardous situations for a new, expanded, or materially altered facility.

(b) For those identified potentially hazardous tasks, a list must be prepared for each task that identifies the necessary:

(1) tools, equipment, and supplies;

(2) fixed and portable lifting equipment;

(3) fixed and portable monitoring equipment;

(4) personal protective equipment and clothing;

(5) warning signs and guards; and

(6) first-aid supplies.

(c) The tools at a facility must be sufficient to:

(1) allow workers to safely and properly operate equipment;

(2) perform required preventive maintenance, in compliance with the manufacturers' minimum requirements;

(3) make repairs; and

(4) maintain processes, pumps, motors, blowers, compressors, laboratory, instrumentation, and other equipment.

§217.326. Electrical and Fire Code Compliance.

(a) The electrical elements of a facility or system design must conform to local electrical codes or to the National Fire Protection Association (NFPA) 70 - National Electrical Codeif the facility is located in an area that does not have a local electrical code.

(b) The facility or system design must conform to local fire codes or to the National Fire Protection Association (NFPA) 70 if the facility is located in an area that does not have a local fire code.

§217.328. Facility Access Control.

(a) A facility must be completely fenced and have a lockable gate at each access point.

(b) A facility containing an open tank must have hazard signs stating "DANGER - OPEN TANKS - NO TRESPASSING" within visible sighting of each other and on each gate.

(c) A facility containing an open tank must be surrounded by an intruder resistant fence that is :

(1) at least an 8.0 foot solid material or chain-link fence topped with at least one strand of barbed-wire;

(2) at least a 6.0 foot high solid material or chain-link fence topped with three strands of barbed-wire ; or

(3) a five-strand barbed-wire fence may be used in a rural area for fencing lagoons or overland-flow plots, in lieu of chain-link or board fencing required by paragraphs (1) and (2) of this subsection.

(d) A facility must have at least one all-weather access road with the driving surface situated above the 100-year flood plain.

§217.329. Color Coding of Pipes.

(a) A new facility must have color-coded pipes.

(b) A new facility must have tracer tape for each non-metallic underground pipe.

(c) An existing facility must color-code and install tracer tape for each pipe associated with a material alteration or expansion.

(d) A non-potable water pipe must be painted purple and be stenciled "NON-POTABLE WATER" or "UNSAFE WATER."

(e) A facility design must use the following color-coding for pipes:

(1) Sludge - brown;

(2) Natural gas - red;

(3) Potable water - light blue;

(4) Chlorine - yellow;

(5) Sulfur Dioxide - lime green with yellow bands;

(6) Sewage - grey;

(7) Compressed air - light green;

(8) Heated water - blue with 6 inch red bands spaced 30 inches apart;

(9) Power conduit - in compliance with the National Electric Code;

(10) Reclaimed water - purple;

(11) Instrument air - light green with dark green bands;

(12) Liquid alum - yellow with orange bands;

(13) Alum (solution) - yellow with green bands;

(14) Ferric chloride - brown with red bands;

(15) Ferric sulfate - brown with yellow bands;

(16) Polymers - white with green bands;

(17) Ozone - stainless steel with white bands;

(18) Raw water - tan; and

(19) Effluent after clarification - dark green.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 317. DESIGN CRITERIA FOR SEWERAGE SYSTEMS

30 TAC §§317.1 - 317.13, 317.15

The Texas Commission on Environmental Quality (commission) adopts the repeal of §§317.1 - 317.13 and 317.15 without changes to the proposed text as published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2234) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted repeal of Chapter 317, along with the adoption of new Chapter 217, accomplishes three tasks: implementing the commission's goal of having all water related rules under the 200 series; allowing the design criteria to be updated with current technology and engineering practices; and allowing the rules to be written with current rule language guidelines and be more logically organized.

Chapter 317 is irretrievably out of date. The changes needed to bring the design criteria for domestic wastewater systems into conformity with current rule writing standards, logical organization, and technical advances are better served by repealing Chapter 317 and adopting the updated criteria in Chapter 217. The commission last comprehensively revised Chapter 317 in 1986. Minor revisions in 1988, 1990, and 1994 addressed specific concerns, but did not bring the rules in line with advances in wastewater technologies or current commission rule standards. Additionally, repealing Chapter 317 allows the commission to make needed revisions to address requirements in current wastewater permits in Chapter 217.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC new Chapter 217, Design Criteria for Domestic Wastewater Systems.

SECTION BY SECTION DISCUSSION

The adoption will repeal all sections of Chapter 317, §§317.1 - 317.13 and 317.15. The requirements in these sections will be edited, updated, and adopted in new Chapter 217.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225, because it does not meet the criteria for a "major environmental rule" as identified in that statute. Major environmental rule is defined as 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. Repeal of the Chapter 317 rules will not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of this rulemaking is to repeal the outdated Chapter 317 design standards and issue new rules in Chapter 217 that update the design standards and criteria for wastewater treatment systems to current engineering practices and include recent advances in wastewater treatment technologies. The repeal of Chapter 317 does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Specifically, repealing the Chapter 317 rules does not exceed a federal standard because no applicable federal standard exists. Repeal of the Chapter 317 rules does not exceed an express requirement of state law nor exceed a requirement of a delegation agreement. Finally, the repeal of the Chapter 317 rules was not developed solely under the general powers of the agency; but in conjunction with the specific authority of Texas Water Code, §26.034 to propose new design standards and criteria in Chapter 217.

TAKINGS IMPACT ASSESSMENT

The commission performed an assessment of the rulemaking in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to repeal the outdated design standards and criteria for wastewater treatment systems and issue a new set of rules in proposed Chapter 217 that updates those rules to meet current engineering practices and to include recent advances in wastewater treatment technologies. Also, the adopted Chapter 217 rules will allow increased flexibility to attain the design standards and criteria; update the standards and criteria reflecting the commission's domestic wastewater permitting practices; and amend and specify the commission's review and approval processes for proposed wastewater treatment facility projects. The repeal of the Chapter 317 rules will constitute neither a statutory nor a constitutional taking of private real property, impose no burdens on private real property because the repealed rules neither relates to, nor has any impact on the use or enjoyment of private real property, and there is no reduction in value of property as a result of this rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

The commission determined that the repeal, which is a procedural mechanism for removing rules which are outdated, is consistent with CMP goals and policies and will not have a direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation of the repeals will not violate (exceed) any standards identified in the applicable CMP goals and policies.

PUBLIC COMMENT

The commission held a public hearing on this proposal in Austin on April 10, 2008, at 10:00 a.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building B, Room 201A. The comment period closed on April 14, 2008. No comments were received at the hearing.

The commission received comments from the City of Garland (Garland), Process Engineered Equipment Company (PEECO),

Trojan Technologies (Trojan), UtraTech Systems, Inc. (UltraTech), Water Environment Association of Texas (WEAT), and seven individuals. None of the comments received applied to the repeal of Chapter 317.

STATUTORY AUTHORITY

The repeals are adopted under the authority of Texas Water Code, §5.013, which provides the commission's general jurisdiction; §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §12.081, which provides the commission's continuing right of supervision over certain districts and authorities; §12.082, which provides the commission's duty to investigate fresh water supply district projects; §26.027, which authorizes the commission to issue permits; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.121, which provides the commission's authority to prohibit unauthorized discharges.

The adopted repeals implement TWC, §§5.013, 5.103, 5.105, 5.120, 12.081, 12.082, 26.027, 26.034, and 26.121.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 13. LAND RESOURCES

SUBCHAPTER B. RIGHTS-OF-WAY OVER PUBLIC LANDS

31 TAC §13.17

The General Land Office (GLO) adopts amendments to 31 TAC, Part 1, Chapter 13, relating to Land Resources, Subchapter B, relating to Rights-of-Way Over Public Lands, §13.17, relating to Fees and Renewal Terms for Right-of-Way Easements, with changes to the proposed text as published in the June 20, 2008 issue of the *Texas Register* (33 TexReg 4820).

The amendments to §13.17(a), relating to Fees for Right-of-Way Easements, are adopted with change to add language to the attached graphic rate schedules for 10 and 20-year pipeline easement terms. The 10 and 20-year pipeline easement terms were both changed by 1) adding language to exempt directional drilling easements from the Damages Fees, 2) adding that September 1 is the adjustment date for annual rate changes, and 3) adding that the annual rate increase may not exceed 3% of the previous year rate. The Pipeline Easements Regions Map is adopted without change.

The intent of this rulemaking is to amend the applicable fees for pipeline right-of-way easements across public lands and to change the number of and boundaries of the regions that define the geographic limits to which the fees apply. References to renewal terms are deleted in one case and modified in another in order to allow the commissioner the flexibility to deal with the merits of each easement, as provided for by statutory changes made during the 80th Legislature by Senate Bill 654.

BACKGROUND AND SECTION-BY-SECTION ANALYSIS OF PROPOSED AMENDMENTS

The amendments to §13.17(a) substitutes the Attached Graphic with a new graphic that provides revised rate schedules for 10 and 20-year pipeline easement terms and also provides a revised Pipeline Easements Regions Map. The rate schedule includes notes that ascribe processing fees, minimum easement rates, an annual rate adjustment index, and clarifications about the applicability of the rates. The current pipeline easement rates were established in February 1984 and they were applied to standard 10-year easement terms. The Regions map was also established in 1984.

The amendments to §13.17(c) strikes a phrase requiring a renewal term of 10 years for easements initially issued after December 31, 1983. Striking this enables the commissioner to work with the grantee on renewal terms under the discretion provided by §51.291 et.seq. Texas Natural Resources Code (TNRC).

The amendments to §13.17(d) changes from 10 years to 20 years in a phrase that allows the commissioner to renew easements for any length of time less than the 20 years, and retains the language that specifies that the rate for renewal for a specific period of time will be prorated accordingly.

The amendments to §13.17(c) and §13.17(d) are adopted without changes.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the adopted rulemaking in accordance with Texas Government Code, §2007.043(b), and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines, to determine whether a detailed takings impact assessment is required. The GLO has determined that the proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution. Furthermore, the GLO has determined that the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendments. The GLO has determined that the proposed rulemaking will not result in a taking of private property and that there are no adverse impacts on private real property interests inasmuch as the property subject to the proposed amendments is owned by the state.

CONSISTENCY WITH CMP

The proposed rulemaking is subject to the CMP, 31 TAC §505.11(a)(1)(C) - (I) and §505.11(c), relating to the Actions and Rules Subject to the CMP. The GLO has reviewed these pro-

posed actions for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals); §501.17 (Relating to Policy for Construction, Operation, and Maintenance of Oil and Gas Exploration and Production Facilities); and §501.23 (relating to Policies for Development in Critical Areas); and §501.24 (relating to Policies for Construction of Waterfront Facilities and Other Structures on Submerged Lands). The proposed rulemaking changes only the amount of compensation paid for easements, not the manner in which operations are conducted. Therefore, since requests for the use of coastal public land must continue to meet the same criteria for GLO approval, the GLO has determined that the proposed actions are consistent with applicable CMP goals and policies.

PUBLIC COMMENTS

Written comments on the proposed amendment were received from three industry organizations.

RESPONSE TO COMMENTS

Written responses were sent to the industry organizations. Changes to 13.17(a) were made as a result of the comments that were received. In addition, GLO will establish procedures for handling abandonment of pipelines.

STATUTORY AUTHORITY

The amendments are adopted under the Texas Natural Resources Code §§51.291 - 51.307, relating to the commissioner's ability to grant easements or other interests in property for rights-of-way or access across, through and under state public land; and Texas Natural Resources Code §51.014(a) and §51.014(b), providing that the commissioner may adopt procedural and substantive rules which it considers necessary to administer, implement and enforce Chapter 51, Texas Natural Resources Code, with the approval of the governor.

Texas Natural Resources Code §§51.291 - 51.307 are affected by the adopted amendments.

§13.17. Fees for Right-of-Way Easement.

(a) The following table lists the fees and terms for pipeline right-of-way easements across public lands as established by the commissioner of the General Land Office.
Figure: 31 TAC §13.17(a)

(b) Right-of-way easements for pipelines issued prior to December 31, 1983, shall be renewed upon the expiration of their current term at the full rate presented in subsection (a) of this section. These renewals shall be considered as easements for new pipelines for purposes of subsection (c) of this section.

(c) Right-of-way easements issued for new pipelines after December 31, 1983, shall be renewed at the full rate applicable to pipelines at the time of renewal, provided grantee has complied with all the terms and conditions of the easement agreement, including the notice, application, renewal fee payment, and documentation requirements contained therein.

(d) At the commissioner's discretion, a right-of-way easement for pipelines may be renewed for a term less than 20 years and the rates prorated accordingly.

(e) The following table lists the fees and terms for power and telephone line rights-of-way over public lands as established by the commissioner.
Figure: 31 TAC §13.17(e) (No change.)

(f) Renewal fees for all power and telephone line rights-of-way over public lands are the rates in effect at the time of renewal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2008.

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PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER A. STATEWIDE HUNTING AND FISHING PROCLAMATION

The Texas Parks and Wildlife Commission adopts amendments to §§65.9 - 65.11, 65.42, and 65.72, concerning the Statewide Hunting and Fishing Proclamation. Sections 65.9 and 65.72 are adopted with changes to the proposed text as published in the February 22, 2008, issue of the *Texas Register* (33 TexReg 1494). Sections 65.10, 65.11 and 65.42 are adopted without changes and will not be republished.

The change to §65.9, concerning Open Seasons: General Rules, corrects an inaccurate reference to a statutory provision. The proposed text cited Parks and Wildlife Code, §62.001. The reference should have been to Parks and Wildlife Code, §62.003.

The change to §65.72 eliminates the proposed three-year extension of the provisions of subsection (c)(5)(A), which allowed the take of catfish by means of lawful archery equipment. As adopted, the change makes it unlawful for any person to take catfish by means of lawful archery equipment after August 31, 2008.

The change to §65.72(a)(7) establishes a formula, rather than a flat weight limit, for calculating the allowable annual landings of menhaden. The rule now provides that the starting point (baseline) for calculating the annual landings limit for 2009 is 31,500,000 pounds. In 2010 and subsequent years, the baseline will be adjusted upwards in the amount by which the actual catch in the previous season fell short of 31,500,000 pounds, however, the upward adjustment allowed under subsection (a)(7)(B) cannot exceed 3,150,000 pounds. In the event the actual catch in a season exceeds 31,500,000 pounds, a downward adjustment will be made in the following season in the amount by which the baseline was exceeded in the previous season. An additional tolerance of 10% is allowed, but any exceedance will reduce the annual limit in the following season. Additionally the proposal was modified to specify that the Captain Daily Fishing Reports (CDFR) or another system developed by TPWD will be utilized as a tracking mechanism for the annual landings limit.

The amendment to §65.9, concerning Open Seasons: General Rules, alters subsection (a) to make it consistent with statutory changes made by the legislature. Section 44 of House Bill 12, enacted by the 80th Legislature, amended Parks and Wildlife Code, §62.001, to prohibit the hunting of any bird or animal on a public roadway or right of way, except as provided. The amendment is necessary to ensure that the agency's regulations are consistent with statutory law.

The amendment to §65.10, concerning Possession of Wildlife Resources, allows certain department-issued tags to function as proof-of-sex documentation for harvested deer. Current rules require that proof of sex remain with deer, turkey, or antelope until reaching either the possessor's permanent residence or a cold storage/processing facility. For deer, proof of sex consists of the unskinned head, a receipt from a taxidermist, or a signed statement from the owner of the land where the deer was killed. The amendment adds new subsection (e) to allow specific department-issued tags (Managed Lands Deer Permit, Landowner Assisted Management Permit, antlerless mule deer permit, special permits on wildlife management areas and state parks, and Antlerless and Spike-buck Control Permit) to function as proof-of-sex documentation. The amendment is necessary to reduce duplication of effort on the part of hunters. The amendment also corrects an inaccurate reference in subsection (b)(6).

The amendment to §65.11, concerning Lawful Means, eliminates the minimum draw weight requirement for archery equipment. Under current rule, the minimum draw weight for compound bows, recurved bows, and longbows is 40 pounds. Staff believes that elimination of the minimum draw weight will make bowhunting more accessible to younger hunters and others who might have difficulty drawing a 40-pound bow.

The amendment to §65.42, concerning Deer, implements a nine-day, buck-only mule deer season in Andrews (east of U.S. Highway 385), Martin, and Gaines counties. Under current rule, there is no open season for mule deer in Andrews (east of U.S. Highway 385), Martin, or Gaines counties. The nine-day, buck-only season offers increased hunter opportunity without adversely impacting mule deer reproduction or distribution. The literature suggests that the implementation of a buck-only season will not have any measurable impact on herd productivity or expansion; however, a measurable change in the age structure of bucks is anticipated as a result of harvest pressure on a previously unhunted population.

The amendment to §65.42 also implements a 16-day, buck-only general season and a 30-day buck-only archery season for mule deer in Sherman and Hansford counties. Under current rule, there is no open season for mule deer in Sherman or Hansford counties. Each county has low-density populations of mule deer in pockets of suitable habitat. The literature suggests that the implementation of a buck-only season will not have any measurable impact on herd productivity or expansion; however, a measurable change in the age structure of bucks is anticipated as a result of harvest pressure on a previously unhunted population. The nature of mule deer populations in the Panhandle allows the department to provide those counties a 30-day archery-only season in addition to the 16-day general season. The amendment therefore also implements an archery season in Hansford and Sherman counties during which harvest is restricted to buck deer. The hunter success rate for archers is statistically insignificant and the biological impacts of that harvest are negligible when harvest is restricted to buck deer. The rule is expected to result in increased hunter opportunity with no measurable effect on reproduction or distribution of mule deer populations.

The amendment to §65.72, concerning Fish, consists of several components.

The portions of the amendment affecting subsections (a)(7) and (c)(5)(J) function collaboratively to establish a limit for the purse seine fishery for menhaden. Under current rules a boat may not take or assist in taking menhaden in tidal waters unless the appropriate menhaden license has been obtained. The menhaden season opens on the third Monday in April and runs through the first day in November. There are no daily bag limits or trip limits, but menhaden may not be taken within one-half mile of the shore or one mile of a jetty or pass. In effect, the amendment maintains current rules, but closes the fishery once the annual landings limit has been reached. The baseline for calculating the annual landings limit is based on a five-year average of landings from 2002 - 2006.

The primary benefits of the rule are: 1) protection of the menhaden population; and 2) protection of bycatch species. Menhaden is a primary component of the gulf estuarine marine ecosystem. When considering predator-prey relationships, it is a key forage species for many other species in the gulf. Menhaden eggs and larvae are food for various filter-feeding and larval fishes and invertebrates including but not limited to themselves, other clupeids, chaetognaths, coelenterates, mollusks, and ctenophores. Fishes known to eat menhaden include: the mackerels, bluefish, sharks, white and spotted seatrout, blue runner, ladyfish, longnose and alligator gars, and red drum. Piscivorous birds that have been found to consume menhaden include: brown pelicans, osprey, common loons and terns. Marine mammals have also been reported as predators of menhaden. (Gulf States Marine Fisheries Commission Regional Management Plan #99, 2002).

The rule as adopted allows the continued commercial harvest of menhaden, but would prevent significant expansion of this industry in Texas waters. Texas law (TPWC §61.002) charges the department with the duty to conserve wildlife resources, including aquatic animal life such as menhaden. With regard to nongame fish species such as menhaden, the department is obligated to establish limits on taking and possession that it considers necessary to manage the species (TPWC §67.004).

All commercial salt water fisheries in Texas, other than menhaden, are regulated by limited entry, bag limits, or both. Accordingly, to bring management of the menhaden fishery in line with management of other commercial fish species in Texas, the department has chosen to manage the overall take of menhaden by establishing a flexible annual catch limit, which is analogous to a bag limit but more appropriate for a fishery of this nature.

Menhaden is a fishery that has had a long history of exploitation in the gulf. The goal of managing Texas fisheries is to manage fisheries at a level that is sustainable, including all sources of mortality that may be occurring. This includes natural mortality and any direct or indirect (bycatch) fishing mortality that may be occurring. In general, the goal is to manage a fishery for maximum economic yield (MEY). This yield is typically below the yield which would be considered the maximum sustainable yield (MSY). Optimum yield for other Texas fisheries, such as shrimp, is defined as the amount of shrimp (yield) that the fishery will produce on a continuing basis to achieve the maximum economic benefits (MEY) to the shrimping industry and the state as modified by any relevant social or ecological factors

(Texas Shrimp Fishery Management Plan, 1989, Source Document, page 3). A National Research Council's Committee on Ecosystem Effects of Fishing, Phase II (NRC 2006) report concluded that if the United States is to manage fisheries within an ecosystem context, food web interactions, life-history strategies, and trophic effects will need to be explicitly accounted for when developing fishery harvest strategies. A more precautionary approach to forage fish management is needed to provide buffers against multiple sources of uncertainty in the scientific advice and ensure that the integrity of the marine food web is not compromised by excessive removals of these key species. In response to the NRC report a group of 91 marine scientists recommended that such an approach should be guided by the following general principles: (1) forage fish play a critical ecological role; (2) there is uncertainty involved in measuring the impacts of forage fish fisheries; (3) MSY is not an appropriate basis for setting catch levels of forage fish; and (4) managing forage fish requires more conservative standards than MSY.

While the available scientific evidence does not indicate that menhaden is currently overfished, there are reasons for concern and therefore for assuring that the industry does not significantly expand in Texas waters. The stock assessment published by Vaughn et al. (2007) (Fisheries Research 83: 263-275) clearly indicates that the stock is below the ideal level. Moreover, the stock assessment cautions that the menhaden stock may experience increased susceptibility due to the hypoxic zone. The hypoxic zone is an area off the Louisiana and Texas coast that exhibits low dissolved oxygen in bottom waters. The assessment indicated that the gulf menhaden probably migrate from areas of low dissolved oxygen, as suggested by the poor or zero catches off central Louisiana when the dead zone impinges close to the shoreline. This displacement is likely to concentrate menhaden schools into narrow coastal corridors, making them more susceptible to exploitation. The stock assessment found a recent rise in fishing mortality (a measurement of the rate of removal of fish from a population by fishing) in the menhaden stock. The stock assessment further concludes that a rise in fishing mortality and a decrease in landings is consistent with a decrease in abundance. The stock assessment indicates if this is true, the increased susceptibility, along with decreased recruitment, could account for the recent rise in fishing mortality. It goes on to explain that the rise in fishing mortality is consistent with a decrease in abundance, which follows declining recruitment.

In addition, the bycatch (the non-target species caught in menhaden nets and usually killed) from this fishery is also part of the ecosystem; thus, the impacts of menhaden harvest on other fisheries and the aquatic ecosystem must also be considered. Note that the bycatch figures estimated here are slightly revised from the statistics used in the rule proposal preamble. This change reflects a correction of a mathematical error made in the original calculation. The department estimates that at current harvest levels the total bycatch in Texas waters from the commercial menhaden industry is approximately 416,000 organisms per year. The top five bycatch species by weight are Atlantic croaker (25%), striped mullet (17%), gafftopsail catfish (12%), silver seatrout (10%), and Spanish mackerel (9%) (in rank order of the catches with the approximate percent by weight in parenthesis). The top five bycatch species by number are gafftopsail catfish (29%), Atlantic croaker (28%), crevalle jack (9%), sharks (7%), and Penaeid sp. (6%). Additionally, other key recreational species, such as red drum and sharks, appear in menhaden bycatch. The approximate number of red drum and shark mortalities associated with the current menhaden harvest is 2,080 and 29,119, respectively. The red drum fishery in the federal waters of the Gulf of Mexico remains completely closed to any directed commercial or recreational fishing to ensure the stocks will recover from being overfished. Similarly, sharks have undergone greater protection since bycatch studies were performed and further regulatory action for some species is being contemplated (Federal Register-July 27, 2007). Limits for recreational fishermen have been significantly curtailed and quota restrictions have been implemented to protect shark species. The proposed rule would prevent expansion of bycatch from the menhaden industry beyond current levels.

The portions of the amendment affecting §65.72(b)(2)(D)(i) alter largemouth bass regulations on Lake Nacogdoches, Purtis Creek State Park Lake, and Lake Raven; carp regulations on Lady Bird Lake; spotted bass regulations on Lake Texoma; and red drum regulations on lakes Colorado City and Nasworthy.

The current harvest regulations for largemouth bass on Lake Nacogdoches consist of a 14-21 inch slot limit and a five-fish daily bag limit, and anglers are allowed to retain one bass of 21 inches or greater in length per day. The amendment to §65.72(b)(2)(D)(i) implements a 16-inch minimum length limit, and anglers are allowed to temporarily retain live fish 24 inches or larger in a livewell for purposes of weighing for possible inclusion in the department's ShareLunker program; however, oversized fish must be released if not accepted by the department. The amendment is necessary because the department has determined that Lake Nacogdoches is capable of producing trophy-quality largemouth bass. Lake Nacogdoches currently supports a high-quality largemouth bass fishery with potential for development. It has demonstrated trophy largemouth bass potential, having produced four fish heavier than 13 pounds. A 14-21 inch slot limit was implemented in 1988 to provide increased numbers of quality-sized bass. Spring quarter creel surveys from 2001 and 2005 indicated high directed fishing effort and catch rates for largemouth bass. Largemouth bass growth is adequate, with fish reaching 14 inches in 2.6 years, and electrofishing catch rates and recruitment are high. Therefore, increasing the minimum length limit and implementing catch-and-release only rules will allow the population of larger fish to increase.

Current regulations on Lake Raven and Purtis Creek State Park Lake restrict angling to catch-and-release only, but provide for temporary retention of live largemouth bass 21 inches or longer in length for weighing at department-operated weigh stations. The amendment to §65.72(b)(2)(D)(i) increases the length limit for temporary retention to 24 inches, allows for the weighing of fish by means of personal scales, and eliminates the requirement for weighing at a department-operated weigh station. As on Lake Nacogdoches, oversized fish must be released if not accepted by the department's ShareLunker program. The rule is necessary to explore the possibility of creating a trophy largemouth bass fishery and to address problems associated with the availability of weigh stations for public use at all times.

There are currently no daily bag or minimum length limits for common carp on Lady Bird Lake (formerly Town Lake, in Travis County). The amendment to §65.72(b)(2)(D)(i) implements a daily bag limit of one common carp 33 inches or larger per day with an unrestricted harvest of common carp less than 33 inches. Lady Bird Lake is a 468-acre impoundment located on the Colorado River adjacent to downtown Austin. Recently, the reservoir has received national and worldwide notoriety for producing documented catches of numerous large common carp. Dur-

ing a carp tournament in 2006, one angler landed a new state rod-and-reel record for common carp, weighing 43.13 pounds. Carp-angling groups organize catch-and-release tournaments and have advocated for protecting the trophy carp population in Lady Bird Lake from harvest. The proposed length limit is based on the Gabelhouse equation that sets trophy length at approximately 75% of world-record length. The amendment is necessary to explore the possibility of establishing Lady Bird Lake as a premier fishery for common carp.

Current regulations for spotted bass on Lake Texoma establish a 14-inch minimum length limit. The amendment to §65.72(b)(2)(D)(i) eliminates the minimum length limit. The 14-inch minimum length limit for spotted bass on Lake Texoma was the only exception to the statewide spotted bass limit and was implemented to create uniform regulations on both the Texas and Oklahoma sides of Lake Texoma. The Oklahoma Department of Wildlife Resources (ODWR) has removed both the length and bag limits for spotted bass in all Oklahoma waters except Lake Texoma. ODWR has agreed to retain the five-fish bag limit for Lake Texoma in order to remain consistent with the bag limit in Texas.

Current regulations for red drum on Lake Nasworthy allow for unrestricted bag and possession limits. Red drum were stocked on the lake prior to 2002 because the power plant on the lake provided warm water discharges sufficient to sustain populations through cold weather. In 2002, the power plant began operating on an as-needed basis, resulting in a partial red drum kill during the winter of 2002 - 2003. The department has determined that a viable population of red drum no longer exists in Lake Nasworthy, making the exception to the statewide standards superfluous.

Current harvest regulations for red drum on Lake Colorado City consist of a 20-inch minimum length limit and no daily bag limit. The department has discontinued the stocking of red drum on Lake Colorado City because of the presence of and continued threat of fish kills due to golden alga. A viable population of red drum no longer exists in Lake Colorado City; therefore, the exception to the statewide standard is no longer necessary.

The portion of the amendment affecting §65.72(c)(2) restricts anglers to a maximum of two lines/poles on community fishing lakes (CFLs) that are not within state parks. CFLs are public impoundments of 75 acres or smaller located totally within an incorporated city limits or a public park, and all impoundments of any size lying totally within the boundaries of a state park. Under current rule, means and methods on CFLs are restricted to pole-and-line angling only. Because of their proximity to population centers and easy access, CFLs are quite popular. CFLs are important because they are good places to introduce people to the angling experience, particularly youth and families. The department has received complaints that some persons are monopolizing bank space on CFLs by utilizing large numbers of taking devices. Therefore, the amendment restricts the number of devices that a person may employ while fishing on a CFL. The amendment exempts lakes on state parks because per-person angling effort on state park lakes is well dispersed and user conflicts have not been documented. The amendment is necessary to ensure equitable distribution of angling opportunity and prevent user conflicts.

Current regulations allow the harvest of catfish by means of lawful archery equipment until August 31, 2008. The department proposed a three-year extension of that provision. In the course of receiving and analyzing public comment, the commission has concluded that the provision is not consistent with regulations governing the means and methods used to take other species of game fishes; therefore, the commission elected not to adopt the proposal and it will be unlawful to take catfish with archery equipment after August 31, 2008.

The amendment to §65.9 will function by making the agency's regulations consistent with statutory law.

The amendment to §65.10 will function by allowing Managed Lands Deer Permits, Landowner Assisted Management Permits, antlerless mule deer permits, special permits on wildlife management areas and state parks, and Antlerless and Spike-buck Control Permits to function as proof-of-sex documentation for harvested deer.

The amendment to §65.11 will function by eliminating the minimum draw weight requirement for archery equipment.

The amendment to §65.42 will function by implementing a nine-day, buck-only mule deer season in Andrews (east of U.S. Highway 385), Martin, and Gaines counties and a 16-day, buck-only general season (with a 35-day buck-only archery season) for mule deer in Sherman and Hansford counties.

The amendment to §65.72 will function by altering largemouth bass regulations on Lake Nacogdoches, Curtis Creek State Park Lake, and Lake Raven; carp regulations on Lady Bird Lake; spotted bass regulations on Lake Texoma; and red drum regulations on lakes Colorado City and Nasworthy; by prohibiting the take of catfish by lawful archery equipment; and by establishing an annualized total allowable catch for commercial harvest of menhaden.

The department received 52 comments opposing adoption of the amendment to §65.10, which allowed certain department-issued tags to function as proof-of-sex for white-tailed deer. Fourteen commenters stated a rationale or explanation for opposing adoption of the proposed amendment. Those comments, accompanied by the agency's response, are as follows.

One commenter opposed adoption and stated that there are enough limitations on tagging already. The department agrees with the commenter and responds that the amendment as adopted does not impose limitations, it removes them. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that elimination of the current requirement would make it easier for unscrupulous hunters and land owners to beat the system. The department disagrees with the comments and responds that the rule as adopted does not eliminate the proof-of-sex requirement, it simply eliminates duplication. There is still a proof-of-sex requirement and persons who do not comply with it can be cited. No changes were made as a result of the comments.

Three commenters opposed adoption and stated the amendment increases complication and confusion. The department disagrees with the comment and responds that the amendment as adopted is a simplification and should not present complications. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the amendment should not include Managed Lands Deer Permits (MLDP) because MLDP holders are not trustworthy. The department disagrees with the comment and responds that there is no indication that persons who are issued MLDPs are any more or less trustworthy than any other population and that there is no reason to exclude them. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the amendment creates a loophole for "post-season antler hunting." The department disagrees with the comment and responds that hunting outside of an open season is unlawful, whether proof-of-sex requirements are obeyed or not. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that if the department was willing to trust permit holders, it should trust all hunters. The department disagrees that the issue revolves around trust. Persons who possess deer under circumstances that require proof-of-sex documentation must possess evidence of the sex of the deer. The rule as adopted allows certain department-issued, sex-specific tags to function as proof of sex. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the amendment allows a select few to avoid requirements that everyone else must follow. The department disagrees with the comment and responds that the amendment does not eliminate proof-of-sex requirements, it provides additional means to satisfy the requirements. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the current regulation is sufficient. The department disagrees with the comment and responds that the department believes the rule as adopted will simplify documentation requirements for a large number of hunters. No changes were made as a result of the comments.

The department received 227 comments supporting adoption of the proposed amendment.

The Texas Wildlife Association commented in support of adoption of the proposed amendment.

The department received 135 comments opposing adoption of the amendment to §65.11, which eliminated the minimum draw weight for lawful archery equipment. Seventy-seven commenters stated a rationale or explanation for opposing adoption of the proposed amendment. Those comments, accompanied by the agency's response, are as follows.

Seventy-seven commenters opposed adoption and stated that the elimination of the minimum draw weight would result in increased wounding loss of game animals. The department disagrees with the comments and responds that predictions of greater wounding loss are based on the assumption that hunters who currently shoot bows at the current minimum draw weight will opt to shoot at lower draw weights or that large numbers of new archers will begin hunting. The intent of the department in eliminating the minimum draw weight is to make archery hunting more accessible to persons for whom a 40-pound bow is difficult or impossible to draw. The number of people expected to participate in archery hunting as a result of the rule is small. The department believes that current archers will continue to tune their equipment to accomplish immediate lethality, and that newcomers to the sport will use archery equipment in an effective manner.

The Lone Star Bowhunters Association commented against adoption of the proposed amendment.

The department received 183 comments supporting adoption of the proposed amendment.

The Texas Wildlife Association commented in support of adoption of the proposed amendment.

The department received 17 comments opposing adoption of the amendment to §65.42 establishing a nine-day mule deer season in Gaines, Martin, and Andrews counties. Eleven commenters stated a specific reason or rationale for opposing adoption. Those comments, accompanied by the agency's response, are as follows.

Two commenters opposed adoption and stated that mule deer hunting in Gaines, Martin, and Andrews counties should be by drawn permit. The department disagrees with the comments and responds that permit systems are appropriate for placing absolute limits on harvest of species that for whatever reason are sensitive to hunting pressure. The department believes that mule deer populations in the affected counties should be able to withstand hunting pressure because the harvest is restricted to bucks only. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there are not enough deer in Gaines, Martin, and Andrews counties to justify an open season. The department disagrees with the comment and responds that information available to the department indicates the existence of a stable and huntable population in the affected counties. By restricting the harvest to bucks only and the season length to nine days, the department believes that the mule deer population in the affected counties will not be reduced below its immediate recuperative potential. No changes were made as a result of the comment.

One commenter opposed adoption and stated that opening a deer season would result in less land available for quail hunting. The department disagrees with the comment and responds that the decision to provide hunting access rests entirely with landowners. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the deer herds in Gaines, Martin, and Andrews counties should be allowed to increase in size before they are hunted. The department disagrees with the comment and responds that mule deer populations in the affected counties are at or near the maximum carrying capacity of the existing habitat and will not increase to a statistically significant extent, regardless of the presence or absence of hunting pressure. No changes were made as a result of the comment.

One commenter opposed adoption and stated that harvest should be restricted to older bucks. The department disagrees with the comment and responds that age restrictions would be inappropriate, given the large average tract size and typically light hunting pressure in the affected areas. No changes were made as a result of the comments.

One commenter opposed adoption and stated that poaching would increase if a season were opened. The department disagrees with the comment and responds that poaching activity is not related to the presence or absence of an open season in a given county. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the department should provide links to scientific references used to justify the proposal. The department agrees with the comment and responds the information used to develop the proposal is available upon request, and that department biologists are available and willing to discuss the rationale and justification for regulatory proposals with any interested party. The scientific basis for the proposal was stated in the preamble to the proposed rule, namely, that by limiting the harvest only to bucks, there will be little im-

pact on population expansion, regardless of current population size. No changes were made as a result of the comment.

One commenter opposed adoption and stated that an open season would cause economic problems for agriculture. The department disagrees with the comment and responds that open seasons are and have been provided throughout the state for various species of birds and animals and the department is unaware of any resulting conflicts with agriculture. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there is not an overpopulation of deer in the affected counties. The department agrees with the comment. No changes were made as a result of the comment.

The department received 191 comments supporting adoption of the proposed amendment.

The Texas Wildlife Association commented in support of adoption of the proposed amendment.

The department received 13 comments opposing adoption of the amendment to §65.42 establishing a 16-day mule deer season in Sherman and Hansford counties. Five commenters stated a specific reason or rationale for opposing adoption. Those comments, accompanied by the agency's response, are as follows.

One commenter opposed adoption and stated that hunting should be by permit only in Sherman and Hansford counties. The department disagrees with the comment and responds that permit systems are appropriate for placing absolute limits on harvest of species that for whatever reason are sensitive to hunting pressure. The department believes that mule deer populations in the affected counties should be able to withstand hunting pressure because the harvest is restricted to bucks only. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the deer herds in Sherman and Hansford counties should be allowed to increase in size before they are hunted. The department disagrees with the comments and responds that mule deer populations in the affected counties are at or near the maximum carrying capacity of the existing habitat and will not increase to a statistically significant extent, regardless of the presence or absence of hunting pressure. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the department should provide links to scientific references used to justify the proposal. The department disagrees with the comments and responds the information used to develop the proposal is available upon request, and that department biologists are available and willing to discuss the rationale and justification for regulatory proposals with any interested party. The scientific basis for the proposal was stated in the preamble to the proposed rule, namely, that by limiting the harvest only to bucks, there will be little impact on population expansion, regardless of current population size. No changes were made as a result of the comments.

The department received 172 comments supporting adoption of the proposed amendment.

The Texas Wildlife Association commented in support of adoption of the proposed amendment.

The department received 2,753 comments supporting adoption of the portion of the proposed amendment to §65.72 that affects menhaden. Some of the commenters may have commented multiple times. The following organizations commented in support of the rule: Coastal Conservation Association; National Coalition for Marine Conservation; and one letter signed by the American Littoral Society Southeast Chapter, American Sportfishing Association, Bayou Preservation Association, Cos Bait and Tackle, Environment Texas, Fishntexas.com, Fulton Harbor Baits and Seafood, Galveston Bay Foundation, Greenpeace USA, Gulf Restoration Network, Houston Underwater Club, International Game Fish Association, Lazy Pelican, Marine Fish Conservation Network, National Coalition for Marine Conservation, Pelican Bait, Recreational Fishing Alliance, Saltgrass Bait and Tackle, Sea Gun Bait Stand, Lone Star Chapter Sierra Club, Tucker and Sons Bait and Tackle, TXRodNGun.com, and Uncle Buck's Bait Shop.

The Gulf States Marine Fisheries Commission (GSMFC) commented on the proposal on behalf of its Menhaden Advisory Committee. The GSMFC stated that the "proposed action is in accordance with the management recommendations in the GSMFC's Gulf Menhaden Fishery Management Plan." GSMFC stated, "We respect and applaud the [department's] proactive interest in the Gulf menhaden fishery." GSFMC asked several questions: (1) "Does the [department] have any data indicating a need for the proposed 'cap' at this time?" The department responds that the data on which this rule is based are discussed elsewhere in this preamble. (2) "How does [the department] proposed to administer the 'cap'?" The department responds that the Captain's Daily Fishing Reports (CDFR) which is the current report that industry has provided to NMFS will be used as the tracking mechanism or another report created by TPWD will be used. (3) "How will the 'cap' be monitored and by whom?" The department responds that the cap will be monitored by TPWD. TPWD will obtain the CDFR from NMFS or the industry participants as they submit the report to NMFS as the end of each week. Landings will be monitored and tracked weekly and the department will notify the industry participants as they near the allowable annual limit. (4) "What actions will be taken should the 'cap' be exceeded in any year?" The department responds that the proposal has been modified to allow some flexibility in the cap, and an exceedance of the baseline in a given year will reduce the annual limit in the following year. In addition if there are landings which exceed the allowable annual limit which is calculated each year and the 10% tolerance then the vessel(s) will be in violation.

The department received 319 comments opposing adoption of the amendment. As with the supporting comments some of the commenters opposing the rule may have presented testimony multiple times. For example, Omega Protein provided written correspondence as well as public testimony and each is counted here as a separate comment. The department received comments in opposition to the rule from Americans for Prosperity and Omega Protein Inc. The letter from Omega Protein Inc. included a report from Ocean Associates Inc. in support of the Omega Protein Inc. comment.

Thirty-nine comments disagreed with the proposal on the basis that it is not restrictive enough. These comments advocated a complete closure of the Texas Territorial Sea (TTS) to commercial menhaden fishing. The department disagrees with these comments. Establishing a flexible annual limit for the TTS provides a reasonable approach to ensure that further expansion of the menhaden fishery does not occur in Texas waters. This is an appropriate, measured response to the information concerning increased fishing mortality and reduced recruitment as indicated in the stock assessment.

The department received a letter containing three comments, signed by multiple entities at the final public hearing in Austin, Texas, which called for the rule to require the industry to fund an observer program. These observers would go out on the menhaden boats to assure that the industry does not exceed the annual limits and to monitor bycatch. The department disagrees with these comments. Establishing a flexible annual limit for the TTS provides a reasonable approach to ensure that further expansion of the menhaden fishery does not occur in Texas waters. This is an appropriate, measured response to the information concerning increased fishing mortality and reduced recruitment as indicated in the stock assessment. Future observer programs for real time quota monitoring and for continued monitoring of bycatch may be warranted in the future but are not needed at the present time.

The department agrees in part with the comments from Omega Protein Inc. that harvests can be somewhat increased in years of high abundance without threatening the long-term health of menhaden populations. Thus, the department has modified the rule from the proposal to allow for an increase over the baseline limit in a given year, which must be offset by a corresponding reduction in the following year.

The department received 248 comments opposing the adoption of the proposed rules on the basis that the rule was arbitrary. The department disagrees with the comment. "Arbitrary" has been defined as "existing or coming about seemingly at random or by chance". In that sense, the baseline limit of 31,500,000 pounds is certainly not arbitrary. That figure is based on the average catch over five recent years of landings (2002 - 2006). By choosing that figure, the department aims to allow the industry to continue near the current level. This level has not, to the department's present knowledge, threatened the sustainability of the fishery. Accordingly, the baseline limit of 31,500,000 pounds is based on data, industry needs, and fishery sustainability, not a random choice. This choice reflects a decision by the department that the sustainability of both the menhaden population and the industry can be achieved by maintaining the fishery at this level. The department believes this level will work for the industry because the industry has remained in business at this level.

The comments by Americans for Prosperity and two other commenters assert that the rules are unnecessary and that federal regulations govern the industry. Two of these comments go on to reference the 2007 stock assessment (Vaughn et al. (2007) Fisheries Research 83: 263-275) and they say this document indicates the fishery is healthy and thus the regulations are unnecessary. The department disagrees with these comments. While this fishery has cooperatively reported landings to the National Marine Fisheries Service the fishery occurs largely in state waters. The TPWC has authority to regulate this fishery and this rule places a flexible harvest cap on an important forage and commercial species in Texas waters. This fishery is a key component of the gulf ecosystem and this rule seeks to curb future expansion of this fishery. The cap established still allows commercial harvest at recent levels while ensuring that the fishery will not expand in the future. The TPWC clearly has the authority to establish the flexible cap for Texas waters and there is no federal jurisdiction which has already or which would have authority to establish such a flexible cap.

Omega Protein Inc.'s comment acknowledges that current Texas law and regulation would not prevent "a significant expansion of menhaden fishing effort in Texas state waters". The department agrees with this comment. Omega Protein's proposed response to the department's concern is to work with the TPW Commission and the legislature to develop a limited-entry program for licensees. All other commercial saltwater fisheries in Texas currently operate under limited-entry programs (crabs, shrimp, oysters, and commercial finfish such as black drum and southern flounder), so the department agrees that limited entry is a very useful tool for managing commercial fisheries. Current law, however, does not allow the department to establish a limited-entry program for commercial menhaden fishing, and the department has no ability to ensure when, if ever, such authority will be granted by law. Accordingly, the department disagrees with Omega Protein's proposal to await legislative action. Under current law, establishment of a flexible annual limit is an available management tool that will address the department's concerns about expansion of the fishery and bycatch. Moreover, in those fisheries that operate under limited entry programs, bag limits are often used in combination with limited entry to manage a fishery, reflecting the department's view that fishery management is often best achieved through complementary management methods rather than an either/or choice of management tools.

Omega Protein's comment also states that the rule is a unilateral action by the TPWC and accordingly violates Article I of the Gulf States Marine Fisheries Compact. The department disagrees with this comment. Article I of Texas Parks and Wildlife Code, §91.008, which incorporates the Gulf States Marine Fisheries Compact, confirms the primacy of state jurisdiction over fisheries in their coastal waters. Article I begins: "Whereas the Gulf Coast States have the proprietary interest in and jurisdiction over fisheries in the waters within their respective boundaries. . .". Clearly, the Gulf States Marine Fisheries Compact recognizes that each state has jurisdiction over the fisheries within its boundaries. Article IX of the Compact reaffirms the authority of Texas to impose the conservation measures it considers necessary: "Nothing in this compact shall be construed to limit the powers of the proprietary interest of any signatory State, or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by a signatory State, imposing additional conditions and restrictions to conserve its fisheries." The Compact does not limit the authority of any signatory state to impose additional restrictions to conserve its fisheries. The flexible annual limit for menhaden established by the rule is an additional restriction that the TPWC has determined to be necessary to conserve the menhaden fishery.

Omega Protein's comment claims that the bycatch numbers are overstated and offers support from Ocean Associates, Inc. The department disagrees with this comment. Several studies have documented the bycatch in this fishery. The most recent study (Condrey 1994) found that bycatch was 1.2% by weight and 1.0% by number. These numbers were apparently reversed in subsequent reporting of this study in the Gulf States Marine Fisheries Commission Regional Management Plan: The Menhaden Fishery of the Gulf of Mexico, United States 99: 2002, page 6-18. The department has relied on the bycatch percentages from the Condrey report to determine the number and weight of bycatch in the purse seine fishery off of Texas. The bycatch percentages by weight and number in the Condrey study are within the range of bycatch figures from previous studies. Guillory and Hutton (1982) documented bycatch of 2.68% by number and 2.35% by weight. Previous studies dating back to the 1950's show a range of 0.05% to 3.90% by number and 1.59% to 2.80% by weight. The department believes that the Condrey study is reliable because it is the most recent, although other studies are available to show both greater and lesser bycatch figures.

Omega Protein's comment questions whether the Condrey study represents the conditions in the Texas fishery. The department believes that the Condrey study is the best information available to represent the Texas fishery. The Condrey study is the latest study and all of the previous studies appear to fall within a fairly consistent range in measuring the overall percent of bycatch by both weight and number. Thus the department disagrees that the values from the Condrey study should not be used for the waters off of Texas.

In addition, the Omega Protein Inc. comment refers to a recent estimate of bycatch of large coastal sharks, such as bull sharks and tiger sharks, of 20,200 sharks caught from the entire gulf. On this basis, Omega Protein asserts that the TPWD estimate of bycatch is too great. The department disagrees with this comment. The department used the most recent study, and the estimate relied on by Omega Protein appears to have omitted the bycatch of shark species from the small coastal shark complex, such as Atlantic sharpnose, finetooth, blacknose and bonnethead sharks.

Omega Protein's comment states that the current take of menhaden in the Gulf and Texas has no impact on recreational fisheries or has a positive impact by removing competing predators. The department does not agree that unlimited take of menhaden would have no impact on recreational fisheries or would have a beneficial impact on recreational fisheries. The rule would prevent significant expansion of the fishery in Texas waters, thus maintaining the current ecosystem balance. Considering the important role that menhaden is known to occupy in the marine ecosystem, the department believes that depletion or collapse of this fishery would be detrimental to the Gulf ecosystem. Loss of forage fish abundance has been associated with declines in health and abundance of striped bass in Chesapeake Bay (J. H. Uphoff, Fisheries Management and Ecology (2003) 10: 313-322).

Omega Protein's comment states that catching menhaden does not increase chances of algae blooms or red tide. The department has not asserted that the rule is justified by considerations related to algae blooms or red tide.

Omega Protein's comment states that unilateral action by Texas could encourage other states to take action as well. TPWD disagrees with the comment. The rule does not change the legal relationships between Texas and other signatories to the Gulf States Marine Fisheries Compact, or affect the ability of those states to manage their fisheries. Clearly, the Gulf States Marine Fisheries Compact recognizes that each state has jurisdiction over the fisheries within its boundaries. Article IX of the Compact provides: "Nothing in this compact shall be construed to limit the powers of the proprietary interest of any signatory State, or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by a signatory State, imposing additional conditions and restrictions to conserve its fisheries."

Omega Protein's comment stated that the proposed rule would suppress catches in years of high abundance. The department agrees with this comment in part, and has accordingly changed the proposed rule to allow some flexibility in the annual catch limit. The department disagrees with this comment to the extent that it advocates no catch limit whatsoever. The goal of managing Texas fisheries is to manage fisheries at a level that is sustainable including all sources of mortality that may be occurring. This includes natural mortality and any direct or indirect (bycatch) fishing mortality that may be occurring. In general, the goal is to manage a fishery for maximum economic yield (MEY). This yield is typically below the yield which would be considered the maximum sustainable yield (MSY). Optimum yield for other Texas fisheries, such as shrimp, is defined as the level of catch that the fishery will produce on a continuing basis to achieve the maximum economic benefits (MEY) to the industry and the State as modified by any relevant social or ecological factors (Texas Shrimp Fishery Management Plan, 1989, Source Document, p. 3). The National Research Council's Committee on Ecosystem Effects of Fishing, Phase II (NRC 2006) report concluded that if the United States is to manage fisheries within an ecosystem context, food web interactions, life-history strategies, and trophic effects will need to be explicitly accounted for when developing fishery harvest strategies. Moreover, a more precautionary approach to forage fish management is needed to provide buffers against multiple sources of uncertainty in the scientific advice and ensure the integrity of the marine food web is not compromised by excessive removals of these key species. In response to the NRC report, a group of 91 marine scientists recommended that such an approach should be guided by the following general principles: (1) forage fish play a critical ecological role; (2) there is uncertainty involved in measuring the impacts of forage fish fisheries; (3) MSY is not an appropriate basis for setting catch levels of forage fish; and (4) managing forage fish requires more conservative standards than MSY.

While the available scientific evidence does not indicate that menhaden is currently overfished, there are reasons for concern and therefore for assuring that the industry does not significantly expand in Texas waters. The stock assessment published by Vaughn et al. (2007) (Fisheries Research 83: 263-275) clearly indicates that the stock is below the ideal level. Moreover, the stock assessment cautions that the menhaden stock may experience increased susceptibility due to the hypoxic zone. The hypoxic zone is an area off the Louisiana and Texas coast that exhibits low dissolved oxygen in bottom waters. The assessment indicated that the gulf menhaden probably migrate from areas of low dissolved oxygen, as suggested by the poor or zero catches of central Louisiana when the dead zone impinges close to the shoreline. This displacement is likely to concentrate menhaden schools into narrow coastal corridors making them more susceptible to exploitation. The stock assessment found a recent rise in fishing mortality (a measurement of the rate of removal of fish from a population by fishing) in the menhaden stock. The stock assessment further concludes that a rise in fishing mortality and a decrease in landings is consistent with a decrease in abundance. The stock assessment indicates if this is true, the increased susceptibility, along with decreased recruitment, could account for the recent rise in fishing mortality. It goes on to explain that the rise in fishing mortality is consistent with a decrease in abundance which follows declining recruitment.

Omega Protein's comment also says that there is not any possibility of expansion of the gulf fleet. The department disagrees with this comment. There is nothing currently that prohibits further expansion by the current industry members or by someone who would like to start new in this fishery.

Lastly, the comment suggests that the rule is based on a book by an English professor. The department has not asserted that a book by an English professor is a justification for the rule as proposed. The rule relies on the most recent stock assessment; TPWD data; The Menhaden Fishery of the Gulf of Mexico, United States: A Regional Management Plan (2002), Number 99 produced by the Gulf States Marine Fisheries Commission; and other relevant literature as discussed elsewhere in this preamble.

Compared to the alternative proposals considered and rejected, the adopted rules will result in the best combination of effectiveness in obtaining the desired results and of economic costs not materially greater than the costs of any alternative regulatory method considered. In making its final regulatory decision, the department has assessed all information submitted to it, whether quantitative or qualitative, consistent with generally accepted scientific standards; actual data where possible; and assumptions that reflect actual impacts that the regulation is likely to impose.

The department received 217 comments opposing adoption of the portion of the proposed amendment to §65.72 that established a minimum length limit for common carp on Lady Bird Lake. Sixty-three commenters stated a specific reason or rationale for opposing adoption. Those comments, accompanied by the agency's response, are as follows.

Forty-nine commenters opposed adoption and stated that there should be no protection of any kind for carp because carp is an invasive exotic species that competes with native fish. The department agrees that carp are an invasive species but disagrees that the amendment has any negative biological impact on freshwater ecosystems. Common carp were introduced into Texas as early as 1879. Most biologists now consider common carp a "naturalized" species because it has established viable reproductive populations in most of the freshwater habitats Texas and cannot be eradicated. The amendment as adopted will neither encourage nor discourage population growth. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department will be encouraged to implement a minimum length limit for carp on additional lakes and water bodies. The department disagrees with the comment and responds that fishing regulations are a function of what is appropriate for individual lakes and water bodies, given the specific biological and recreational realities on a specific lake or water body, and the department makes such decisions accordingly. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the amendment was the first step in getting game fish status for carp. The department disagrees with the comments sand responds that there are no plans to designate carp as a game fish. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the amendment will result in population growth of carp and harm to native fish species. The department disagrees with the comment and responds that carp are already firmly established in all freshwater habitats in Texas and that the rule as adopted will not encourage population growth. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should not create regulations to encourage trophy management. The department disagrees with the comment and responds that angler preference is a major component in management strategies designed to enhance and improve fishing opportunity. Where appropriate, the department considers such preference as part of the process of developing freshwater fishing regulations.

One commenter opposed adoption and stated that the amendment would allow carp anglers to take rights away from bowfishermen. The department disagrees with the comment and responds that the sole intent of the department in promulgating the rule is to explore the potential of a trophy carp fishery on Lady Bird Lake, where the carp population is well established and there is a demonstrable angler preference for carp. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the amendment would make it difficult for bowfishermen to determine whether a carp was of legal size or not. The department disagrees with the comment and responds that bowfishermen who are unsure of the legality of a given fish have the ability to decide not to take that fish. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that restrictions designed to protect to large fish result in larger populations of smaller fish. The department disagrees with the comments and responds that the intent of the regulation is to protect a very small cohort of the carp population from lethal harvest and that the rule will not result either in a population increase or a shift in the age structure of the current population. No changes were made as a result of the comments.

Five commenters opposed adoption and stated that common carp should be eradicated. The department agrees that exotic species are harmful to native ecosystems but disagrees that it is possible to eradicate carp, which are endemic to and naturalized in every freshwater ecosystem in the state. No changes were made as a result of the comments.

The department received 289 comments supporting adoption of the proposed amendment.

The Carp Anglers Group and the Inland Fisheries Advisory Board commented in support of adoption of the proposed amendment

The Texas Bowfishing Association commented against adoption of the proposed amendment.

The department received 108 comments opposing adoption of the portion of the proposed amendment to §65.72 that restricts anglers on certain community fishing lakes (CFLs) to a maximum of two taking devices. Nineteen commenters stated a specific reason or rationale for opposing adoption. Those comments, accompanied by the agency's response, are as follows.

One commenter opposed adoption and stated that there should be a 10-hook limit, rather than a limit on taking devices. The department disagrees with the comment and responds that intent of the regulation is to alleviate user conflicts on small impoundments where competition for bank space is significant. The department believes that a 10-hook minimum would not accomplish the intent of the rule as adopted. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that bag limits, rather than device limits, should be used on CFLs. The department disagrees with the comments and responds that the intent of the rule is to provide distribution of opportunity rather than distribution of harvest. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that the device restrictions should only be imposed on the days that CFLs are stocked, since that is when user conflict is problematic. The department disagrees with the comments and responds that user conflicts are most acute when angling activity increases on days that CFLs are stocked, but the problem exists at other times and

cannot be predicted, so it is best to have a standard that applies at all times. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there should be no new laws. The department disagrees with the commenter and responds that natural resource systems are dynamic and that regulations are constantly changing in response. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the more devices a person employs, the quicker they reach the daily bag limit and leave. The department disagrees with the comment and responds that there are large groups of people who because of the multiple personal bag limits are able to monopolize bank access. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the rule should not be applied on CFLs where angling pressure is light. The department disagrees with the comments and responds the rule is more easily and efficiently enforced if it is universal. The department does not have the resources to monitor CFLs to determine the level of angling effort on each. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rule should allow no more than three devices to be employed. The department disagrees with the comment and responds that the rule restricts persons to no more than two devices because the department wanted to drastically reduce user conflicts cause by competition for bank access, but did not want to discourage anglers by restricting them to one device. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the rule should allow no more than four devices to be employed. The department disagrees with the comments and responds that the rule restricts persons to no more than two devices because the department wanted to drastically reduce user conflicts cause by competition for bank access, but did not want to discourage anglers by restricting them to one device. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the restriction should apply only to persons using live bait. The department disagrees with the comment and responds that restricting the applicability of the amendment to persons using live bait would allow the use of other types of baits, such as prepared baits, on multiple rods, negating the purpose of the rule, which is to more equitably distribute angling opportunity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule should not apply on Lake Sheldon in Harris County. The department agrees and responds that the rule does not apply on Lake Sheldon, because state parks lakes such as Lake Sheldon are exempt from the amendment. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the regulation should be expanded to prohibit trotlines and juglines. The department agrees with the comment and responds that current rules restrict means and methods on CFLs to pole-and-line only. No changes were made as a result of the comment.

One commenter opposed adoption and stated that angling with only two poles is boring. The agency disagrees with the comment and responds that the restriction applies only on CFLs. On impoundments larger than 75 acres a person may use as many poles as they wish. No changes were made as a result of the comments.

The department received 390 comments supporting adoption of the amendment.

The department received 74 comments opposing adoption of the portion of the proposed amendment to §65.72 that implemented a 16-inch maximum length limit for largemouth bass and allows the temporary retention of largemouth bass larger than 24 inches on Lake Nacogdoches. Fifteen commenters stated a specific reason or rationale for opposing adoption. Those comments, accompanied by the agency's response, are as follows.

Two commenters opposed adoption and stated that if smaller bass are not removed, the lake will be dominated by small fish. The department disagrees with the comments and responds that the regulation protects only those fish greater than 16 inches in length, leaving the smaller size fish available for harvest. Although anglers have the choice of whether to retain a fish or not, the department believes that harvest of some of the smaller bass will benefit the bass population by reducing overall abundance and improving the growth of remaining bass. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that Lake Nacogdoches should be a catch-and-release lake. The department disagrees with the comments and responds that it believes that Lake Nacogdoches can become a trophy fishery without limiting harvest to catch-and-release. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department is too involved in trophy management. The department disagrees and responds that anger surveys have repeatedly and unambiguously shown that users desire the department to manage fisheries to improve the quality of the angling experience. The department believes that lakes that have the potential to become trophy fisheries should be managed with that goal in mind. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the current regulation is adequate. The department disagrees with the comment and responds that the current slot limit does not allow for optimum growth rates in fish that could attain trophy size. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that there should be one length limit for the entire state. The department disagrees with the comments and responds that because of the wide variety of management challenges across the state, a single length limit for the entire state would frustrate the department's ability to tailor management strategies for specific lakes and stream segments. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the current size limit should be retained but the bag limit should be reduced to three fish. The department disagrees with the comment and responds that the intent of the rule as adopted is to promote growth of bass that have trophy potential. Reducing the bag limit would have the effect of causing the population of fish below the maximum size limit to stack up, which limit the growth of larger fish. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there are too many trophy lakes and that a 14-inch minimum length would work better for club tournament fishing. The department disagrees with the comment and responds that the department's management philosophy is oriented towards the satisfying the

wide variety of recreational angler desires. The rule as adopted is intended to encourage the growth of high-quality largemouth bass that surveys indicate are preferred by anglers on lakes that demonstrate the potential to become trophy fisheries. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule should allow anglers to retain one fish larger than 16 inches. The department disagrees with the comment and responds that the intent of the rule as adopted is to increase the population of large fish. Allowing the retention of one fish larger than 16", given the high directed fishing effort on Lake Nacogdoches, would at worst defeat the intent of the regulation and at best unnecessarily prolong the attainment of the goal of the rule. No changes were made as a result of the comment.

One commenter opposed adoption and stated that anglers should be allowed to retain fish over 26 inches in length, and another felt that anglers should be able to retain fish larger than 24 inches. The department disagrees with the commenter and responds that allowing the retention of fish 24 inches and larger would defeat the purpose of the rule, which is to protect fish in those size classes. No changes were made as a result of the comment.

One commenter opposed adoption and stated that bass regulations should be the same as crappie regulations. The department disagrees with the comment and responds that crappie and bass are different species with different life histories and management requirements; therefore, they are managed accordingly and the rules reflect that. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be a slot limit and a one-fish bag limit for fish over 24 inches. The department disagrees with the comment and responds that slot limits are useful in developing a fishery, but in order to fully explore a lake's potential to be a trophy fishery, the largest fish must be protected. No changes were made as a result of the comments.

One commenter opposed adoption and stated that slot limits should be eliminated. The department agrees with the comment and responds that the rule as adopted removes the slot limit on Lake Nacogdoches.

The department received 305 comments supporting adoption of the proposed amendment.

The department received 55 comments opposing adoption of the portion of the proposed amendment to §65.72 that increases the length limit for largemouth bass temporarily retained for weighing on Lake Raven and Purtis Creek State Park Lake. Eight commenters stated a specific reason or rationale for opposing adoption. Those comments, accompanied by the agency's response, are as follows.

Three commenters opposed adoption and stated that the state should provide, staff, and maintain scales. The department disagrees with the comments and responds that it is cost-prohibitive for the department to provide, staff, and maintain scales. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there should be one length limit for the entire state. The department disagrees with the comment and responds that because of the wide variety of management challenges across the state, a single length limit for the entire state would frustrate the department's ability to tailor management strategies for specific lakes and stream segments. No changes were made as a result of the comment.

One commenter opposed adoption and stated that anglers should be allowed to retain fish over 26 inches in length. The department disagrees with the commenter and responds that allowing the retention of fish 26 inches and larger on a small reservoir such as Lake Raven or Purtis Creek would quickly lead to the disappearance of that size class. Lakes Raven or Purtis Creek are catch-and-release lakes that cannot withstand heavy directed fishing pressure. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department is too involved in trophy management. The department disagrees and responds that anger surveys have repeatedly and unambiguously shown that users desire the department to manage fisheries to improve the quality of the angling experience. The department believes that lakes that have the potential to become trophy fisheries should be managed with that goal in mind. No changes were made as a result of the comment.

The department received 288 supporting adoption of the proposed amendment.

The department received 79 comments opposing adoption of the portion of the proposed amendment to §65.72 that implements a 14-inch minimum length limit for spotted bass on Lake Texoma. Nine commenters stated a specific reason or rationale for opposing adoption. Those comments, accompanied by the agency's response, are as follows.

One commenter opposed adoption and stated that fishermen cannot differentiate spotted bass from largemouth bass and that removing the standardized length will cause problems. The department disagrees with the commenter and responds that prior to this rulemaking Lake Texoma was the only reservoir in the state that imposed a length limit on spotted bass. Therefore, Lake Texoma regulations are now identical to the rest of the state and there should be little to no confusion, since there is no length limit. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule should not be adopted until a similar rule has been adopted by Oklahoma. The department disagrees with the comment and responds that Oklahoma has adopted an identical regulation. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the minimum length limit should not be eliminated. The department disagrees with the comment and responds that the only reason for the 14-inch limit was to be consistent with regulations in Oklahoma. This is the only reservoir in the state that has a length limit for spotted bass. Removing the length limit is not expected to result in any appreciable changes to populations or average size. No changes were made as a result of the comment.

One commenter opposed adoption and stated that elimination of the length limit will result in population declines because people will keep everything they catch. The department disagrees with the comment and responds that the five-fish bag limit assures the stability of the population given current angling pressure. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule will result in the proliferation of smaller fish and that what is needed is a regulation that would protect larger fish. The department disagrees with the commenter and responds that most spotted

bass population are dominated by smaller fish, and the daily bag limit of five fish will protect the population from overharvest.

Three commenters opposed adoption and stated that the 14-inch length limit should be retained. The department disagrees with the comments and responds that most smallmouth bass populations such as in Lake Texoma are dominated by fish below the 14-inch limit. The daily bag limit of five fish will protect the population from overharvest.

One commenter opposed adoption and stated that there will be too much confusion with Oklahoma's spotted bass regulations. The department disagrees with the comment and responds that Oklahoma's regulations and those in Texas are the same, alleviating a source of possible angler confusion.

The department received 280 comments supporting adoption of the proposed amendment.

The department received 21 comments opposing adoption of the portion of the proposed amendment to §65.72 that removed the exception to the standard bag and possession limits for red drum on lakes Nasworthy and Colorado City. One commenter stated a specific reason or rationale for opposing adoption. The commenter stated that discontinuing the stocking program would be detrimental to the overall health of freshwater red drum populations. The department disagrees with the comment and responds that stocking operations have ceased because the conditions necessary for the survival of red drum in no longer exist on either lake. No changes were made as a result of the comment.

The department received 243 comments supporting adoption of the proposed amendment.

The department received 333 comments opposing adoption of the amendment to §65.72(b)(5)(F) that would have allowed the take of catfish by lawful archery equipment until August 31, 2011. Fifteen commenters stated a specific reason or rationale for opposing adoption. Those comments, accompanied by the agency's response, are as follows.

Two commenters opposed adoption and stated that use of archery equipment for the take of catfish was dangerous. The department disagrees with the comment and responds that archery equipment is already a lawful means of taking nongame fish and is not believed to be dangerous when employed in a conscientious manner.

One commenter opposed adoption and stated that game fish should not be taken by means of archery equipment because the lethality of the means prevents the return of undersized fish, which is especially undesirable for game fish. The department agrees with the comment and has made changes accordingly.

Three commenters opposed adoption and stated that it should be lawful to take any game fish by means of archery equipment. The department disagrees with the comments and responds that angler preference and the traditional policy of the department has been for game species to be taken by nonlethal methods so that undersize or undesired fish can be released. No changes were made as a result of the comment.

One commenter opposed adoption and stated that archery equipment should be lawful only for the take of invasive species. The department disagrees with the commenter and states that it would be very difficult for anglers to differentiate invasive species from native species with certainty. No changes were made as a result of the comments.

Seven commenters opposed adoption and stated that archery equipment should be lawful only for the take of nongame species. The department agrees with the comment and has made changes accordingly.

One commenter opposed adoption and stated that catfish should be managed as a game fish. The department agrees with the comment and responds that catfish are a game fish and are managed as a game fish. No changes were made as a result of the comment.

The department received 322 comments supporting adoption of the proposed amendment.

DIVISION 1. GENERAL PROVISIONS

31 TAC §§65.9 - 65.11

The amendments are adopted under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life ay be hunted, taken, or possessed; and Chapter 67, which authorizes the commission by regulation to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species; and §1.012, which authorizes the department to protect the fish in public waters under rules as it may prescribe.

§65.9. Open Seasons; General Rules.

(a) Except as provided under Parks and Wildlife Code, §62.003, no person may hunt a wild animal or bird when the person is on a public road or right-of-way.

(b) No antlerless deer permit is required to take an antlerless deer during the archery-only open season, except on lands for which Managed Lands Deer permits have been issued.

(c) The hunting of roosting turkey is unlawful.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804274
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: August 31, 2008
Proposal publication date: February 22, 2008
For further information, please call: (512) 389-4775

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DIVISION 2. OPEN SEASONS AND BAG LIMITS--HUNTING PROVISIONS

31 TAC §65.42

The amendments are adopted under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life ay be hunted, taken, or possessed; and Chapter 67, which authorizes the commission by regulation to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species; and §1.012, which authorizes the department to protect the fish in public waters under rules as it may prescribe.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200804275
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General Counsel
Texas Parks and Wildlife Department
Effective date: August 31, 2008
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♦ ♦ ♦

DIVISION 3. SEASONS AND BAG LIMITS--FISHING PROVISIONS

31 TAC §65.72

The amendments are adopted under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life ay be hunted, taken, or possessed; and Chapter 67, which authorizes the commission by regulation to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species; and §1.012, which authorizes the department to protect the fish in public waters under rules as it may prescribe.

§65.72. Fish.

(a) General rules.

(1) There are no public waters closed to the taking and retaining of fish, except as provided in this subchapter.

(2) Game fish may be taken only by pole and line, except as provided in this subchapter.

(3) The bag and possession limits of this subchapter do not apply to the possession or landing of fish lawfully raised under an offshore aquaculture permit issued under Chapter 57, Subchapter C of this title (relating to Introduction of Fish, Shellfish, and Aquatic Plants).

(4) It is unlawful:

(A) to take or attempt to take, or possess fish within a protected length limit, in greater numbers, by other means, or at any time or place, other than as permitted under this subchapter;

(B) while fishing on or in public waters to have in possession fish in excess of the daily bag limit or fish within a protected length limit as established for those waters;

(C) to land by boat or person any fish within a protected length limit, or in excess of the daily bag limit or possession limit established for those fish;

(D) to use game fish or any part thereof as bait, except for processed catfish heads used as crab-trap bait by a licensed crab fisherman, provided the catfish is obtained from an aquaculture facility permitted to operate in the United States. A person who uses catfish as bait under this subparagraph shall, upon the request of a department employee acting within the scope of official duties, furnish appropriate authenticating documentation, such as a bill of sale or receipt, to prove that the catfish was obtained from a legal source.

(E) to possess a finfish of any species, except broadbill swordfish, shark or king mackerel, taken from public water that has the head or tail removed until such person finally lands the catch on the mainland, a peninsula, or barrier island not including jetties or piers and does not transport the catch by boat;

(F) to use any vessel to harass fish; or

(G) to release into the public waters of this state a fish with a device or substance implanted or attached that is designed, constructed or adapted to produce an audible, visual, or electronic signal used to monitor, track, follow, or in any manner aid in the location of the released fish.

(5) Finfish tags: Prohibited Acts.

(A) No person may purchase or use more finfish (red drum) tags during a license year than the number and type authorized by the commission, excluding duplicate tags issued under Parks and Wildlife Code, §46.006.

(B) It is unlawful to:

(i) use the same finfish tag for the purpose of tagging more than one finfish;

(ii) use a finfish tag in the name of another person;

(iii) use a tag on a finfish for which another tag is specifically required;

(iv) catch and retain a finfish required to be tagged and fail to immediately attach and secure a tag, with the day and month of catch cut out, to the finfish at the narrowest part of the finfish tail, just ahead of the tail fin;

(v) have in possession both a Red Drum Tag and a Duplicate Red Drum Tag issued to the same license or salt water stamp holder;

(vi) have in possession both a Red Drum Tag or a Duplicate Red Drum Tag and a Bonus Red Drum Tag issued to the same license or salt water stamp holder;

(vii) have in possession both an Exempt Red Drum Tag and a Duplicate Exempt Red Drum Tag issued to the same license holder; or

(viii) have in possession both an Exempt Red Drum Tag or a Duplicate Exempt Red Drum Tag and a Bonus Red Drum Tag issued to the same holder.

(6) Commercial fishing seasons.

(A) The commercial seasons for finfish species listed in this paragraph and caught in Texas waters shall run concurrently with commercial seasons established for the same species caught in federal waters of the Exclusive Economic Zone (EEZ).

(B) The commercial fishing season in the EEZ will be set by the National Marine Fisheries Service for:

(i) red snapper under guidelines established by the Fishery Management Plan for Reef Fish Resources for the Gulf of Mexico. No person may land red snapper in Texas for commercial purposes unless that person is in compliance with the provisions of this clause.

(I) Requirement for Individual Fishing Quota (IFQ) vessel endorsement and allocation. No person aboard any vessel shall sell, barter, trade, or exchange red snapper; land or attempt to land red snapper for the purpose of sale, barter, trade, or exchange; or possess red snapper for the purpose of sale, barter, trade, or exchange unless the person possesses a valid federal permit for the harvest of Gulf of Mexico Reef Fish and a valid federal red snapper Individual Fishing Quota (IFQ) vessel endorsement.

(-a-) No person shall harvest or land red snapper for the purpose of sale, barter, trade, or exchange, without holding or being assigned federal IFQ allocation at least equal to the pounds of red snapper landed/docked at a shore side location.

(-b-) At-sea or dockside transfer of red snapper from one vessel to another vessel for the purpose of sale, barter, trade, or exchange, is prohibited.

(-c-) Except as provided in this subparagraph, no person shall purchase, sell, exchange, barter, or attempt to purchase, sell, exchange, or barter any red snapper in excess of any possession limit for which federal commercial license, permit, and appropriate allocation were issued.

(-d-) On the last fishing trip of the year, a vessel may exceed by 10% the remaining IFQ allocation.

(II) Offloading and transfer. During the hours from 6:00 p.m. until 6:00 a.m. (local time), no person shall offload from a vessel or receive from a vessel red snapper harvested for the purpose of sale, barter, trade, or exchange. No person who is in charge of a commercial red snapper fishing vessel shall offload red snapper from the vessel prior to three hours after proper notification is made to National Oceanographic and Atmospheric Administration (NOAA) Fisheries.

(III) Recreational limits. Persons aboard a vessel for which permits indicate both charter vessel/headboat for Gulf reef fish and commercial Gulf reef fish may retain reef fish under the recreational take and possession limits specified in subsection (b) of this section, provided the vessel is operating as a validly licensed charter vessel or headboat with prepaid recreational charter fishermen aboard the vessel.

(IV) VMS requirement. No person shall harvest red snapper for the purpose of sale, barter, trade or exchange, from a vessel unless that vessel is equipped with a fully operational and federally approved Vessel Monitoring System (VMS) device. Approved devices are those devices approved by NOAA Fisheries and operating under the requirements mandated by NOAA Fisheries.

(V) Requirement for IFQ dealer endorsement. In addition to the requirement for a federal dealer permit for Gulf reef fish, a dealer must have a federal Gulf red snapper IFQ dealer endorsement in order to receive Gulf red snapper from a commercial fishing vessel. A person aboard a vessel with a federal Gulf red snapper IFQ vessel endorsement must also have a federal Gulf red snapper IFQ dealer endorsement to sell to anyone other than a permitted dealer.

(VI) Requirement for transaction approval code. The owner or operator of a vessel landing red snapper for the purpose of sale, barter, trade, or exchange is responsible for calling National Marine Fisheries Service (NMFS) Office of Law Enforcement at least 3 hours, but no more than 12 hours, in advance of landing to report the time and location of landing and the name of the IFQ dealer where the red snapper are to be received. Failure to comply with this advance notice of landing requirement will preclude authorization to complete the required NMFS landing transaction report and, thus, will preclude issuance of the required NMFS-issued transaction approval code. Possession of red snapper for the purpose of sale, barter, trade, or exchange, from the time of transfer from a vessel through possession by a dealer is prohibited unless the red snapper are accompanied by a transaction approval code verifying a legal transaction of the amount of red snapper in possession.

(VII) Wholesale dealers. Wholesale dealers are required to comply with the provisions of Parks and Wildlife Code, §66.019, when acquiring, purchasing, possessing, and selling red snapper. Wholesale dealers shall maintain approval codes issued by NOAA Fisheries associated with all transactions of red snapper on purchases and sales on records.

(VIII) Recreational limit. All persons aboard a vessel for which no commercial vessel permit for Gulf reef fish has been issued by the National Marine Fisheries Service under the Federal Fishery Management Plan for the Gulf of Mexico Reef Fish resources are limited to the recreational bag limit specified in subsection (b) of this section for red snapper, and such fish may not be bartered or sold.

(ii) king mackerel under guidelines established by the Fishery Management Plan for Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; and

(iii) sharks (all species, their hybrids and subspecies) under guidelines established by the Fishery Management Plan for Highly Migratory Species.

(C) When federal and/or state waters are closed, it will be unlawful to:

(i) purchase, barter, trade or sell finfish species listed in this paragraph landed in this state;

(ii) transfer at sea finfish species listed in this paragraph caught or possessed in the waters of this state; and

(iii) possess finfish species listed in this paragraph in excess of the current recreational bag or possession limit in or on the waters of this state.

(7) Menhaden.

(A) The commercial purse seine season for menhaden (Brevoortia patronus) is open beginning on the third Monday in April and will continue until whichever of the following first occurs:

(i) the annual landings limit for the season has been reached; or

(ii) the first day in November.

(B) The starting point (baseline) for calculating the annual landings limit for 2009 is 31,500,000 pounds. In 2010 and subsequent years, the baseline shall be adjusted upwards in the amount by which the actual catch in the previous season fell short of 31,500,000 pounds; however, the upward adjustment allowed under this subparagraph shall not exceed 3,150,000 pounds. In the event the actual catch in a season exceeds 31,500,000 pounds, a downward adjustment shall be made in the following season in the amount by which the baseline was exceeded in the previous season.

(C) Annual landings may exceed the amount established or calculated in subparagraph (B) of this paragraph by up to 10%.

(D) Landings will be tracked using the Captain Daily Fishing Reports or another tracking mechanism specified by TPWD.

(8) In Brewster, Crane, Crockett, Culberson, Ector, El Paso, Jeff Davis, Hudspeth, Kinney, Loving, Pecos, Presidio, Reeves, Terrell, Upton, Val Verde, Ward, and Winkler counties, the only fishes that may be used or possessed for bait while fishing are common carp, fathead minnows, gizzard and threadfin shad, sunfish (Lepomis), goldfish, golden shiners, Mexican tetra, Rio Grande cichlid, and silversides (Atherinidae family).

(b) Bag, possession, and length limits.

(1) The possession limit does not apply to fish in the possession of or stored by a person who has an invoice or sales ticket showing the name and address of the seller, number of fish by species, date of the sale, and other information required on a sales ticket or invoice.

(2) There are no bag, possession, or length limits on game or non-game fish, except as provided in these rules.

(A) Possession limits are twice the daily bag limit on game and non-game fish except as provided in these rules.

(B) For flounder, the possession limit is the daily bag limit.

(C) Except as provided in subparagraph (D) of this paragraph, the statewide daily bag and length limits shall be as follows.
Figure: 31 TAC §65.72(b)(2)(C) (No change.)

(D) Exceptions to statewide daily bag, possession, and length limits shall be as follows:

(i) Freshwater species.
Figure: 31 TAC §65.72(b)(2)(D)(i)

(ii) Saltwater species.
Figure: 31 TAC §65.72(b)(2)(D)(ii) (No change.)

(iii) Bag and possession limits for black drum and sheepshead do not apply to the holder of a valid Commercial Finfish Fisherman's License.

(iv) Fish caught in federal waters in compliance with a federal fishery management plan may be landed in Texas.

(v) The bag limit for a guided fishing party is equal to the total number of persons in the boat licensed to fish or otherwise exempt from holding a license minus each fishing guide and fishing guide deckhand multiplied by the bag limit for each species harvested.

(c) Devices, means and methods.

(1) In fresh water only, it is unlawful to fish with more than 100 hooks on all devices combined.

(2) Game and non-game fish may be taken by pole and line only in:

(A) community fishing lakes; however, on community fishing lakes that are not within or part of a state park, no person may employ more than two devices (i.e., poles or lines) at the same time;

(B) sections of rivers lying totally within the boundaries of state parks;

(C) Lake Pflugerville (Travis County);

(D) the North Concho River (Tom Green County) from O.C. Fisher Dam to Bell Street Dam; and

(E) the South Concho River (Tom Green County) from Lone Wolf Dam to Bell Street Dam.

(3) It is unlawful to take, attempt to take, or possess fish caught in public waters of this state by any device, means, or method other than as authorized in this subsection.

(4) In salt water only, it is unlawful to fish with any device that is marked with a buoy made of a plastic bottle(s) of any color or size.

(5) Device restrictions.

(A) Cast net. It is unlawful to use a cast net exceeding 14 feet in diameter.

(i) Only non-game fish may be taken with a cast net.

(ii) In salt water, non-game fish may be taken for bait purposes only.

(B) Dip net.

(i) It is unlawful to use a dip net except:

(I) to aid in the landing of fish caught on other legal devices; and

(II) to take non-game fish.

(ii) In salt water, non-game fish may be taken for bait purposes only.

(C) Gaff.

(i) It is unlawful to use a gaff except to aid in landing fish caught by other legal devices, means or methods.

(ii) Fish landed with a gaff may not be below the minimum, above the maximum, or within a protected length limit.

(D) Gig. Only non-game fish may be taken with a gig.

(E) Jugline. For use in fresh water only. Non-game fish, channel catfish, blue catfish and flathead catfish may be taken with a jugline. It is unlawful to use a jugline:

(i) with invalid gear tags. Gear tags must be attached within six inches of the free-floating device, are valid for 30 days after the date set out, and must include the number of the permit to sell non-game fish taken from freshwater, if applicable;

(ii) for commercial purposes that is not marked with an orange free-floating device;

(iii) for non-commercial purposes that is not marked with a white free-floating device;

(iv) in Lake Bastrop in Bastrop County, Bellwood Lake in Smith County, Lake Bryan in Brazos County, Boerne City Park Lake in Kendall County, Lakes Coffee Mill and Davy Crockett in Fannin County, Dixieland Reservoir in Cameron County, Gibbons Creek Reservoir in Grimes County, and Tankersley Reservoir in Titus County.

(F) Lawful archery equipment. Only non-game fish, channel catfish, blue catfish, and flathead catfish may be taken with lawful archery equipment or crossbow. After August 31, 2008, only nongame fish may be taken by means of lawful archery or crossbow.

(G) Minnow trap (fresh water and salt water).

(i) Only non-game fish may be taken with a minnow trap.

(ii) It is unlawful to use a minnow trap that exceeds 24 inches in length or with a throat larger than one by three inches.

(H) Perch traps. For use in salt water only.

(i) Perch traps may be used only for taking non-game fish.

(ii) It is unlawful to fish a perch trap that:

(I) exceeds 18 cubic feet in volume;

(II) is not equipped with a degradable panel. A trap shall be considered to have a degradable panel if one of the following methods is used in construction of the trap:

(-a-) the trap lid tie-down strap is secured to the trap by a loop of untreated jute twine (comparable to Lehigh brand # 530) or sisal twine (comparable to Lehigh brand # 390). The trap lid must be secured so that when the twine degrades, the lid will no longer be securely closed; or

(-b-) the trap lid tie-down strap is secured to the trap by a loop of untreated steel wire with a diameter of no larger than 20 gauge. The trap lid must be secured so that when the wire degrades, the lid will no longer be securely closed; or

(-c-) the trap contains at least one sidewall, not including the bottom panel, with a rectangular opening no smaller than 3 inches by 6 inches. Any obstruction placed in this opening may not be secured in any manner except:

(-1-) it may be laced, sewn, or otherwise obstructed by a single length of untreated jute twine (comparable to Lehigh brand # 530) or sisal twine (comparable to Lehigh brand # 390) knotted only at each end and not tied or looped more than once around a single mesh bar. When the twine degrades, the opening in the sidewall of the trap will no longer be obstructed; or

(-2-) it may be laced, sewn, or otherwise obstructed by a single length of untreated steel wire with a diameter of no larger than 20 gauge. When the wire degrades, the opening in the sidewall of the trap will no longer be obstructed; or

(-3-) the obstruction may be loosely hinged at the bottom of the opening by no more than two untreated steel hog rings and secured at the top of the obstruction in no more than one place by a single length of untreated jute twine (comparable to Lehigh brand # 530), sisal twine (comparable to Lehigh brand # 390), or by a single length of untreated steel wire with a diameter of no larger than 20 gauge. When the twine or wire degrades, the obstruction will hinge downward and the opening in the sidewall of the trap will no longer be obstructed.

(III) that is not marked with a floating visible orange buoy not less than six inches in height and six inches in width. The buoy must have a gear tag attached. Gear tags are valid for 30 days after date set out.

(I) Pole and line.

(i) Game and non-game fish may be taken by pole and line. It is unlawful to take or attempt to take fish with one or more hooks attached to a line or artificial lure used in a manner to foul-hook a fish (snagging or jerking). A fish is foul-hooked when caught by a hook in an area other than the fish's mouth.

(ii) Game and nongame fish may be taken by pole and line. It is unlawful to take fish with a hand-operated device held underwater except that a spear gun and spear may be used to take nongame fish.

(iii) Game and non-game fish may be taken by pole and line, except that in the Guadalupe River in Comal County from the second bridge crossing on River Road upstream to the easternmost bridge crossing on F.M. Road 306, rainbow and brown trout may not be retained when taken by any method except artificial lures. Artificial lures cannot contain or have attached either whole or portions, living or dead, of organisms such as fish, crayfish, insects (grubs, larvae, or adults), or worms, or any other animal or vegetable material, or synthetic scented materials. This does not prohibit the use of artificial lures that contain components of hair or feathers. It is an offense to possess rainbow and brown trout while fishing with any other device in that part of the Guadalupe River defined in this paragraph.

(J) Purse seine (net).

(i) Purse seines may be used only for taking menhaden, only from that portion of the Gulf of Mexico within the jurisdiction of this state extending from one-half mile offshore to nine nautical miles offshore.

(ii) Purse seines used for taking menhaden may not be used within one mile of any jetty or pass.

(iii) The purse seine, not including the bag, shall not be less than three-fourths inch square mesh.

(K) Sail line. For use in salt water only.

(i) Non-game fish, red drum, spotted seatrout, and sharks may be taken with a sail line.

(ii) Line length shall not exceed 1,800 feet from the reel to the sail.

(iii) The sail and most shoreward float must be a highly visible orange or red color. All other floats must be yellow.

(iv) No float on the line may be more than 200 feet from the sail.

(v) A weight of not less than one ounce shall be attached to the line not less than four feet or more than six feet shoreward of the last shoreward float.

(vi) Reflectors of not less than two square inches shall be affixed to the sail and floats and shall be visible from all directions for sail lines operated from 30 minutes after sunset to 30 minutes before sunrise.

(vii) There is no hook spacing requirement for sail lines.

(viii) No more than one sail line may be used per fisherman.

(ix) Sail lines may not be used by the holder of a commercial fishing license.

(x) Sail lines must be attended at all times the line is fishing.

(xi) Sail lines may not have more than 30 hooks and no hook may be placed more than 200 feet from the sail.

(L) Seine.

(i) Only non-game fish may be taken with a seine.

(ii) It is unlawful to use a seine:

(I) which is not manually operated.

(II) with mesh exceeding 1/2-inch square.

(III) that exceeds 20 feet in length.

(iii) In salt water, non-game fish may be taken by seine for bait purposes only.

(M) Shad trawl. For use in fresh water only.

(i) Only non-game fish may be taken with a shad trawl.

(ii) It is unlawful to use a shad trawl longer than six feet or with a mouth larger than 36 inches in diameter.

(iii) A shad trawl may be equipped with a funnel or throat and must be towed by boat or by hand.

(N) Spear. Only non-game fish may be taken with a spear.

(O) Spear gun. Only non-game fish may be taken with spear gun.

(P) Throwline. For use in fresh water only.

(i) Non-game fish, channel catfish, blue catfish and flathead catfish may be taken with a throwline.

(ii) It is unlawful to use a throwline in Lake Bastrop in Bastrop County, Bellwood Lake in Smith County, Lake Bryan in Brazos County, Boerne City Park Lake in Kendall County, Lakes Coffee Mill and Davy Crockett in Fannin County, Dixieland Reservoir in Cameron County, Gibbons Creek Reservoir in Grimes County, and Tankersley Reservoir in Titus County.

(Q) Trotline.

(i) Non-game fish, channel catfish, blue catfish, and flathead catfish may be taken by trotline.

(ii) It is unlawful to use a trotline:

(I) with a mainline length exceeding 600 feet;

(II) with invalid gear tags. Gear tags must be attached within three feet of the first hook at each end of the trotline and are valid for 30 days after date set out, except on saltwater trotlines, a gear tag is not required to be dated;

(III) with hook interval less than three horizontal feet;

(IV) with metallic stakes; or

(V) with the main fishing line and attached hooks and stagings above the water's surface.

(iii) In fresh water, it is unlawful to use a trotline:

(I) with more than 50 hooks;

(II) in Gibbons Creek Reservoir in Grimes County, Lake Bastrop in Bastrop County, Lakes Coffee Mill and Davy Crockett in Fannin County, Fayette County Reservoir in Fayette County, Pinkston Reservoir in Shelby County, Lake Bryan in Brazos County, Bellwood Lake in Smith County, Dixieland Reservoir in Cameron County, Boerne City Park Lake in Kendall County, and Tankersley Reservoir in Titus County.

(iv) In salt water:

(I) it is unlawful to use a trotline:

(-a-) in or on the waters of the Gulf of Mexico within the jurisdiction of this state;

(-b-) from which red drum, sharks or spotted seatrout caught on the trotline are retained or possessed;

(-c-) placed closer than 50 feet from any other trotline, or set within 200 feet of the edge of the Intracoastal Waterway or its tributary channels. No trotline may be fished with the main fishing line and attached hooks and stagings above the water's surface;

(-d-) baited with other than natural bait, except sail lines;

(-e-) with hooks other than circle-type hook with point curved in and having a gap (distance from point to shank) of no more than one-half inch, and with the diameter of the circle not less than five-eighths inch. Sail lines are excluded from the restrictions imposed by this clause; or

(-f-) in Aransas County in Little Bay and the water area of Aransas Bay within one-half mile of a line from Hail Point on the Lamar Peninsula, then direct to the eastern end of Goose Island, then along the southern shore of Goose Island, then along the causeway between Lamar Peninsula and Live Oak Peninsula, then along the eastern shoreline of the Live Oak Peninsula past the town of Fulton, past Nine-Mile Point, past the town of Rockport to a point at the east end of Talley Island, including that part of Copano Bay within 1,000 feet of the causeway between Lamar Peninsula and Live Oak Peninsula.

(II) No trotline or trotline components, including lines and hooks, but excluding poles, may be left in or on coastal waters between the hours of 1:00 p.m. on Friday through 1:00 p.m. on Sunday of each week, except that attended sail lines are excluded from the restrictions imposed by this clause. Under the authority of the Texas Parks and Wildlife Code, §66.206(b), in the event small craft advisories or higher marine weather advisories issued by the National Weather Service are in place at 8:00 a.m. on Friday, trotlines may remain in the water until 6:00 p.m. on Friday. If small craft advisories are in place at 1:00 p.m. on Friday, trotlines may remain in the water until Saturday. When small craft advisories are lifted by 8:00 a.m. on Saturday, trotlines must be removed by 1:00 p.m. on Saturday. When small craft advisories are lifted by 1:00 p.m. on Saturday, trotlines must be removed by 6:00 p.m. on Saturday. When small craft advisories or higher marine weather advisories are still in place at 1:00 p.m. on Saturday, trotlines may remain in the water through 1:00 p.m. on Sunday. It is a violation to tend, bait, or harvest fish or any other aquatic life from trotlines during the period that trotline removal requirements are suspended under this provision for adverse weather conditions. For purposes of enforcement, the geographic area customarily covered by marine weather advisories will be delineated by department policy.

(III) It is unlawful to fish for commercial purposes with:

(-a-) more than 20 trotlines at one time;

(-b-) any trotline that is not marked with yellow flagging attached to stakes or with a floating yellow buoy not less than six inches in height, six inches in length, and six inches in width attached to end fixtures;

(-c-) any trotline that is not marked with yellow flagging attached to stakes or with a yellow buoy bearing the commercial finfish fisherman's license plate number in letters of a contrasting color at least two inches high attached to end fixtures;

(-d-) any trotline that is marked with yellow flagging or with a buoy bearing a commercial finfish fisherman's license plate number other than the commercial finfish fisherman's license plate number displayed on the finfish fishing boat;

(IV) It is unlawful to fish for non-commercial purposes with:

(-a-) more than 1 trotline at any time; or

(-b-) any trotline that is not marked with a floating yellow buoy not less than six inches in height, six inches in length, and six inches in width, bearing a two-inch wide stripe of contrasting color, attached to end fixtures.

(R) Umbrella net.

(i) Only non-game fish may be taken with an umbrella net.

(ii) It is unlawful to use an umbrella net with the area within the frame exceeding 16 square feet.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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PART 4. SCHOOL LAND BOARD

CHAPTER 155. LAND RESOURCES

SUBCHAPTER A. COASTAL PUBLIC LANDS

31 TAC §§155.1 - 155.5, 155.15

The School Land Board (board) adopts amendments to §155.1 relating to General Provisions, §155.2 relating to Leases, §155.3 relating to Easements, §155.4 relating to Permits, §155.5 relating to Registration of Structures and §155.15 relating to Fees. The amendments to §155.1 and §155.15 are adopted with changes to the proposal as published in the June 13, 2008, issue of the *Texas Register* (33 TexReg 4625) and will be republished. Amendments to §§155.2 - 155.5 are adopted without changes to the proposal as also published in the June 13, 2008, issue of the *Texas Register* (33 TexReg 4625) and will not be republished.

Amended §155.1 was changed to add a definition for the term boat ramp and to include that term in the definition of watercraft storage facility. The definition for the terms boathouse and boatlift was also changed to clarify that easement holders may not enclose or cover the area above the roof of the boathouse or boatlift, consistent with U.S. Army Corps of Engineers regulations. Amended §155.15 was modified to delete boat ramps from the list of structures covered by the fees found in §155.15(b)(2)(J), to be consistent with current definitions. Amended §155.15(l) was changed so that only a filing fee exists for authorized shoreline stabilization projects, consistent with current state practices. These minor changes are necessary for the efficient and fair administration of the coastal easement program and to clarify the amendments as proposed.

BACKGROUND, REASONED JUSTIFICATION, AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the amendments is to clarify the rules and avoid duplication by deleting provisions that incorporate specific language from applicable statutes or standard contract provisions. The amendments also incorporate statutory changes made during the 80th Legislature by House Bill (HB) 2819 (Acts 2007, 80th Leg., Ch. 1256, eff. Sept. 1, 2007) which amended Texas Natural Resources Code §§33.002, 33.012, 33.063, and 33.102 - 33.105 and repealed §33.014 and §33.110(b). The amendments will enable the GLO to administer the coastal public land program more fairly and efficiently and expand the board's ability to issue coastal easements and leases, consistent with state law.

§155.1. General Provisions.

The amendments to §155.1 (relating to General Provisions) incorporate and amend, as applicable, general policies previously found in §§155.2(c)(5) (relating to Leases), 155.2(c)(7) (relating to Leases), 155.3(d) (relating to Easements), and 155.15(b)(2)(I) (relating to Fees), as these policies are general in nature and apply to Chapter 155 in its entirety. Amendments to these policies incorporate statutory changes made by HB 2819, clarify original language, or change language to conform the policy to Chapter 155 in its entirety. Specifically, the amendments to §155.1(a) include policies restricting rights in the surface estate of coastal public lands from unduly preventing or interfering with the board's management or administration of coastal public lands or the board's authority to grant other rights to coastal public land; authorizing the GLO to inspect any structure located on coastal public land at any time; requiring grantees to provide a coastal boundary survey and field notes in conjunction with shoreline alteration projects, as indicated by Texas Natural Resources Code §33.136; and authorizing the board to waive the requirements of any rule or fee in Chapter 155 if such action would be in the public's best interest, as indicated by Texas Natural Resources Code §32.061 and §32.062.

The amendments to §155.1 add language authorizing the board to grant an interest in coastal public lands for any purpose that the board determines is in the best interest of the state, in accordance with changes made to Texas Natural Resources Code §33.103 by HB 2819. Finally, the amendments to §155.1 expand the definition section by incorporating all applicable definitions previously included in §155.15 (relating to Fees) in order to have one major definition section, which will provide clarity for the public. The amendments also add new definitions for the terms boathouse (which has been modified from the preamble version as described above), boatlift (which has been modified from the preamble version as described above), boat ramp (which has been added since the preamble version as described above), boat-skid, boat slip, coastal natural resource area, dilapidated or derelict structure, personal watercraft, oversized personal watercraft slip, personal watercraft slip, riprap, sewage, watercraft, and watercraft storage facility (which has been modified from the preamble version as described above). Other definitions have been amended to clarify meaning and assist the public in understanding the rules. The amendments also add a new §155.1(f) regarding the requirement of grantees to submit an application to the GLO in order to obtain a lease, easement, or permit for the use of coastal public land, as indicated by Texas Natural Resources Code §33.101 and §33.102. Finally, the amendments incorporate necessary numbering, lettering, and abbreviation changes.

§155.2. Leases.

The amendments to §155.2 (relating to Leases) clarify coastal lease provisions and incorporate a requirement to provide an e-mail address, if available, on a lease application. The amendments also delete provisions that are included as standard provisions in all lease agreements or are more appropriately located in §155.1 (relating to General Provisions). Finally, the amendments incorporate necessary numbering, lettering, and abbreviation changes.

§155.3. Easements.

The amendments to §155.3 (relating to Easements) clarify easement provisions and delete §155.3(d), which is now located in §155.1(f) (relating to General Provisions). This deletion is consistent with current procedures and incorporates amendments made to Texas Natural Resources Code §33.104 by HB 2819. The amendments also add references to watercraft storage facilities in what is now §155.3(f)(4) in order to conform the rules to current board policies. A new §155.3(f)(4)(D) has been added to clarify that a littoral owner of property used for a private residence may, in certain limited instances, construct additional watercraft storage facilities on coastal public land. The amendments delete §§155.3(j)(1) - 155.3(m)(2) because these provisions are standard easement terms in all easements. Finally, the amendments incorporate necessary numbering, lettering, and abbreviation changes.

§155.4. Permits.

The amendments to §155.4 (relating to Permits) clarify provisions related to previously unauthorized structures (cabins) on coastal public land and avoid duplication by deleting provisions that incorporate statutory requirements found in Chapter 33, Texas Natural Resources Code or standard permits conditions. Finally, the amendments incorporate necessary numbering, lettering, and abbreviation changes.

§155.5. Registration of Structures.

The amendments to §155.5 (relating to Registration of Structures) add references to boathouses, boat-skids, boat slips, and personal watercraft slips where applicable in order to clearly define standards that allow for the registration of piers and associated appurtenances. The amendments also incorporate necessary numbering, lettering, and abbreviation changes.

§155.15. Fees.

The amendments to §155.15 (relating to Fees) relocate all applicable definitions from §155.15 to §155.1 (relating to General Provisions) in order to have one comprehensive definition section, which will provide clarity for the public. The amendments delete limitations in §155.15(b)(2)(A) and clarify the board's authority to negotiate fees for coastal leases granted for public purposes in accordance with changes made to Texas Natural Resources Code §33.105 in HB 2819. The amendments also amend §155.15(b)(2)(D) to incorporate fees for additional boatlifts, boathouses, and oversized personal watercraft slips related to a private residence in an effort to provide the public with a more comprehensive fee policy concerning watercraft storage facilities at private residences and to incorporate amendments to new §155.3(f)(4)(D). Although the board has historically reviewed on a case-by-case coastal easements for the construction of additional boatlifts, boathouses, and oversized personal watercraft slips related to a private residence on coastal public land, requests for additional structures have increased dramatically in recent years. The amendments to §155.15(b)(2)(D) will provide clarity for the board and the public regarding the ability of certain grantees to construct additional watercraft storage facilities on coastal public land. Before granting authority beyond what is authorized by new §155.3(f)(4)(C) (relating to Easements), the board may weigh factors such as the location, density, and environmental health of the area, as specified in new §155.3(f)(4)(A) and (B) (relating to Easements). The amendments also delete language in §155.15 relating to the board's authority to reduce or waive fees if such action would be in the best interest of the public, as this provision was amended and relocated in §155.1 (relating to General Provisions), as described above. As noted above, the term boat ramps was deleted from §155.15(b)(4)(J) for consistency with the definitions found in §155.1, and §155.15(b)(4)(I) was changed so that only a filing fee exists for authorized shoreline stabilization projects, consistent with current state practices. The amendments also add a new §155.15(b)(10), which prohibits the board from increasing coastal easement fees related to a private residence when the grantee reaches the age of 65 and applies to the GLO for such a freeze, unless the area of encumbered state land increases or the use of the coastal public land changes. Finally, the amendments incorporate necessary numbering, lettering, and abbreviation changes.

ENVIRONMENTAL REGULATORY ANALYSIS

The board has evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "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 amendments to Chapter 155 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 the adopted rulemaking implements legislative requirements in Texas Natural Resources Code §§33.101 - 33.136 relating to the board's ability to grant rights in coastal public land.

CONSISTENCY WITH CMP

The adopted rule amendments are subject to the CMP, 31 TAC §§505.11(a)(1)(E) - (I) and §505.11(c), relating to the Actions and Rules Subject to the CMP. The board has reviewed these actions for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The adopted action is consistent with the applicable CMP goals and policies.

PUBLIC COMMENT

The board did not receive any comments on the amendments.

STATUTORY AUTHORITY

The amendments are adopted under the Texas Natural Resources Code §§33.101 - 33.136, relating to the board's ability to grant rights in coastal public land, and Texas Natural Resources Code §33.064, providing that the board may adopt procedural and substantive rules which it considers necessary to administer, implement and enforce Chapter 33, Texas Natural Resources Code.

Texas Natural Resources Code §§33.101 - 33.136 are affected by the adopted amendments.

§155.1. General Provisions.

(a) Policy. The surface estate in the coastal public lands of this state constitutes an important and valuable asset dedicated to the permanent school fund and to all people of Texas. Such estate shall be managed as follows.

(1) The natural resources of the surface estate in coastal public lands shall be preserved. Such resources shall be construed to include the natural aesthetic values of those areas and the value of such areas in their natural state for the protection and nurture of all types of marine life and wildlife.

(2) Uses which the public at large may enjoy and in which they may participate shall take priority over those uses which are limited to fewer individuals.

(3) The public interest in navigation in the intracoastal waters shall be protected.

(4) Unauthorized use of coastal public lands shall be prevented.

(5) Utilization and development of the surface estate in such lands shall not be allowed unless the public interest as expressed in the act is not significantly impaired thereby.

(6) The surface estate in coastal public lands shall not be alienated except by the granting of leaseholds and lesser interests therein.

(7) Vested rights in land shall be protected subject to the paramount authority of the state in the exercise of such rights; and the orderly use of littoral property in a manner consistent with the public policy of this state shall not be impaired.

(8) The economic benefits of leases, easements, and other grants of interests in the surface estate of coastal public lands shall be weighed against the need to protect and preserve the resources of coastal public lands.

(9) Rights to use the surface estate of coastal public lands shall not unduly prevent or interfere in any way with the board's management or administration of coastal public lands or the board's authority to grant other rights to coastal public land.

(10) The General Land Office (GLO), may at any time, inspect any structure located on coastal public land.

(11) If shoreline alteration is proposed, a coastal boundary survey, as defined in Texas Natural Resources Code §33.136, and field notes shall be required.

(12) The board may modify or waive the requirements of any rule or fee set forth herein if such action would be in the public's best interest as determined by the board.

(b) Scope of rules. These rules set forth the practice and procedure for administration by the board in granting a lease, easement, permit, and the registration of a structure on coastal public lands. All grants of interest are subject to these rules and regulations. The board may grant the following interest in coastal public lands for the indicated purposes:

(1) leases for public purposes;

(2) easements for purposes connected with ownership of littoral property:

(3) permits authorizing limited continued use of heretofore unauthorized structures on coastal public lands, not connected with ownership of littoral property;

(4) channel easements to the holder of any surface or mineral interests in coastal public lands, for purposes necessary or appropriate to the use of such interests; and

(5) any other interest in coastal public land for any purpose that the board determines is in the best interest of the state.

(c) If a Department of the Army Corps of Engineers permit is required for a proposed project, the board may postpone a decision on the application pending receipt of comments on the work described in the Corps of Engineers public notice.

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

(1) Adjacent littoral property--The property that is contiguous to and borders the coastal public land upon which the property interest is sought.

(2) Alignment Bulkheads--Proposed bulkheads which align with an adjacent, preexisting bulkhead, or bulkheads.

(3) Appraised market value of adjacent littoral property--Fair market value of the unimproved adjacent littoral property as determined by the appropriate tax appraisal district.

(4) Basin--A structure used for a commercial or industrial activity that consists of the area of the land encumbered and any fixtures attached thereto. This definition includes the construction and maintenance of marinas, piers, walkways, docks, dolphins, and wharves and any and all dredged area associated therewith.

(5) Basin formula--The amount of encumbered state land multiplied by the appraised market value of the adjacent littoral property multiplied by the submerged land discount multiplied by the return on investment.

(6) Board--The School Land Board of Texas.

(7) Boathouse--A garage-like enclosed structure built over water for the purpose of storing watercraft. Boathouses are suitable for long-term storage and may contain lifts, winches, or other ancillary docking mechanisms. A boathouse may not include a partially or fully covered or enclosed second story unless it was in existence prior to September 1, 2008

(8) Boatlift--A covered or uncovered boat slip with winch or pulley devices, used for lifting watercraft out of the water; suitable for long-term storage. The covering structure may not enclose the slip. A boatlift may not include a partially or fully covered or enclosed second story unless it was in existence prior to September 1, 2008

(9) Boat ramp--An inclined structure extending from the adjacent property or pier into state owned submerged land for the purpose of launching and retrieving boats. Typically constructed of concrete or wood.

(10) Boat-skid--A ramp-like device, typically using 2 pieces of wood, used to place watercraft in or remove watercraft from the water.

(11) Boat slip--An encumbered area of water (covered or uncovered but not enclosed), formed by adjacent finger piers or pilings, into which a watercraft is moored or stored. Most suitable for short-term storage.

(12) Breakwater--A structure of timber, cement, or other material, either fixed or floating, designed to protect beaches, bay shorelines, and harbor areas from wave action.

(13) Bulkhead--Structures of timber, steel, concrete, rock, or similar substance erected parallel to the shoreline for erosion control purposes.

(14) Coastal area--Refers to the geographic area comprising all the counties of Texas having any tidewater shoreline including that portion of the continental bed and waters of the Gulf of Mexico within the jurisdiction of the State of Texas.

(15) Coastal natural resource area--As defined by Texas Natural Resource Code §33.203(1).

(16) Coastal public lands--All or any portion of the state-owned submerged lands, the waters overlying those lands, and all state-owned islands in coastal area.

(17) Commercial activity--Activity which is designed to enhance or accommodate a venture associated with a revenue generating activity. This definition excludes industrial activity, but includes residential uses if there is revenue generating activity conducted on the premises.

(18) Commissioner--The commissioner of the GLO.

(19) Dilapidated or derelict structure--Any structure which has deteriorated to an unsafe and/or unusable condition due to neglect, misuse, or which has been made inhabitable by vandalism or natural forces, or which or has been abandoned either through neglect or misuse.

(20) Dredged Area--An area that has been made deeper by the removal or relocation of sediments; dredged areas are considered to be structures on state-owned submerged land. When dredged areas are evaluated for permitting purposes, placement of dredged material must be addressed.

(21) Dredged material--The sediments that have been removed from a dredged area; initial dredging of an area often produces usable material and maintenance dredging typically produces unconsolidated material that must dry before possible use.

(22) Dredging--The moving of soil, sand, gravel, shell or other materials from its natural setting, including propwashing, and thereby artificially altering the water depth, e.g., channels, basins, etc.

(23) Encumbered state land--The amount of state coastal public land encumbered by the permitted activity and is expressed in number of square feet.

(24) Evaluation fee--A one-time fee assessed upon the granting of a commercial instrument. In the case of multiple-purpose easement applications, only one evaluation fee will be assessed.

(25) Island--Any body of land surrounded by the waters of a salt water lake, bay, inlet, estuary, or inland body of water within the tidewater limits of this state and shall include man-made islands resulting from dredging of other operations. An island may be coastal public land.

(26) Jetties and groins--Structures of rock, concrete, steel, or other material built perpendicular to the shoreline and are designed to modify or control sediment movement along a shore.

(27) Fill--The placement of materials on coastal public lands for the purpose of changing the elevation of a water body or to create emergent land.

(28) Fill area--A structure, excluding riprap, concrete stairs, breakwaters, jetties, and groins that permanently and fully encumbers, and entirely displaces, the water covering the coastal public land. The construction and maintenance of associated bulkheads is considered part of the fill area.

(29) Fill formula--Encumbered state land multiplied by the appraised market value of adjacent littoral property multiplied by the return on investment.

(30) Homeowners association--An association whose individual members, by virtue of holding full and exclusive title to the adjacent littoral property area specifically defined in an easement application, are entitled, as a group, to the privileges of an easement that may be granted by the State of Texas for use of coastal public land.

(31) Industrial activity--A use of coastal public land which involves one or more of the following:

(A) processing, manufacturing, or handling materials or products predominantly from extracted or raw materials,

(B) storage, manufacturing, or materials handling processes that involve flammable or explosive materials, or

(C) storaging, manufacturing, or materials handling processes that involve hazardous or commonly recognized offensive conditions.

(32) Littoral owner--The owner or leaseholder of any public or private upland bordered by or contiguous to coastal public lands.

(33) Maintenance dredging--Re-dredging an authorized channel to a previously authorized depth. The same limitations and conditions that applied to the initial dredging will apply to the maintenance dredging.

(34) Marina--A combination of docks or piers floating or constructed on pilings, extending onto or over coastal public lands, which is used for purposes of storing or docking boats, watercraft, shrimp boats, and similar structures and is available to the public and charges are made for any of its services, and which do not constitute wharves, docks, or piers as hereinafter defined.

(35) Mineral interest holder--Holder of a state mineral lease who plans to dredge on coastal public land outside the state leasehold tract to obtain access to the state leasehold tract.

(36) Mitigation sequence--The series of steps which must be taken to prevent or reduce impacts to sensitive habitat while planning or evaluating a project.

(37) New dredged area--An excavated area which is not under current permit with the GLO. The new dredged area rate is charged for the first year, and the fee for maintaining the dredged area is charged for each subsequent year of the easement term.

(38) Oversized personal watercraft slip--A personal watercraft slip that exceeds 120 square feet in overall area.

(39) Person--Any individual, firm, partnership, association, corporation (public or private, profit or nonprofit), trust, or political subdivision or agency of the state.

(40) Personal watercraft--A small boat or other craft for water transportation or recreation typically made for use/occupancy by no more than two people at one time.

(41) Personal watercraft slip--A small area designed for the docking and/or storage of personal watercraft; includes boat slips and boat skids; limited to a maximum of 120 square feet.

(42) Pier and dock--Structures of timber or other material built onto or over coastal public lands which are used for fishing and recreational boating purposes.

(43) Private non-profit use--A private activity which does not contemplate the generation of any revenue.

(44) Public activity--Activity which is performed in the public interest, as defined by the board, and is not designed to enhance or accommodate a profit-making venture, nor is it primarily associated with a revenue generating activity.

(45) Public entity--City, county, state agency, board or commission, or any other political subdivision of the state.

(46) Residential use, Category I--One single-family residential structure per defined lot or parcel of land; both land and improvements are typically under the same ownership.

(47) Residential use, Category II--Multi-family residential units per defined lot or parcel of land; land and individual units may be separately owned; includes uses by condominium developments and homeowners associations acting for and on behalf of owners of a multi-family residential development, but does not include time-share developments or any use that includes commercial activities.

(48) Resource Impact Fee--A one-time fee assessed for proposed projects that impact seagrass, emergent marsh, or oyster reef, for which there is no separate mitigation requirement.

(49) Return on investment--A number used in the basin, fill, and industrial activity formulas that reflects a financial return expectation. The return on investment rate will be set annually by the board and will be effective at the beginning of each fiscal year.

(50) Riprap--hard substrate material placed seaward of the shoreline to reduce wave energy.

(51) Seaward--The direction away from the shore and toward the body of water bounded by such shore.

(52) Sensitive habitat--An area of submerged or emergent vegetation or reefs.

(53) Sewage--Refuse liquids or waste (including human waste) matter typically carried off by sewers or stored in septic tanks.

(54) Shoreline stabilization project--Vegetative cover or rip-rap consisting of concrete block, concrete rubble, rock, brick, sack crete or similarly stable material approved by the GLO utilized to control shoreline erosion.

(55) Structure--As defined in the Natural Resources Code, §33.004.

(56) Submerged lands--As defined in Section 33.004, Texas Natural Resources Code.

(57) Submerged land discount--60% discount used in formulas when the easement is commercial, 70% discount used in formulas when the easement is industrial.

(58) Waste and/or garbage--Includes discarded food, refuse, human waste, and unwanted man-made degradable and non-degradable items such as containers, equipment, and other rubbish.

(59) Watercraft--A boat or other craft for water transport or recreation. Included, but not limited to, motorboat, personal watercraft, and sailboat.

(60) Watercraft storage facility--A boathouse, boatlift, boat ramp, boat-skid, boat slip or personal watercraft slip.

(61) Wharf--A structure of timber, cement, masonry, earth, or other material built onto or over coastal public lands, so that vessels can receive and discharge cargo, products, goods, any paying passengers, etc. This definition applies only to structures or portions thereof which are directly connected with and used for the loading and unloading of water borne commerce but specifically excludes such structures used only for commercial fishing purposes.

(e) Consistency with Coastal Management Program. Except as otherwise provided in §16.1(c) of this title (relating to Definitions and Scope), an action listed in §16.1(b) of this title (relating to Definitions and Scope) taken or authorized by the GLO or SLB pursuant to this chapter that may adversely affect a coastal natural resource area, as defined in §16.1 of this title (relating to Definitions and Scope), is subject to and must be consistent with the goals and policies identified in Chapter 16 of this title (relating to Coastal Protection) in addition to any goals, policies, and procedures applicable under this chapter. If the provisions of this chapter conflict with and can not be harmonized with certain provisions of Chapter 16 of this title, such conflicting provisions of Chapter 16 of this title (relating to Coastal Protection) will control.

(f) An applicant desiring a lease, easement, or permit in coastal public land must submit an application to the GLO on forms approved by the GLO not less than 90 days prior to the desired approval date. Applicants should present reasons why the lease, easement, or permit should be granted. The GLO may request any additional information it deems necessary.

§155.15. Fees.

(a) General.

(1) Form of payment. Fees may be paid by cash, check or other legal means acceptable to the commissioner.

(2) Time for payment. Payment is generally required in advance of issuance of permits, leases and other documents and/or delivery of services and/or materials by the General Land Office (GLO).

(3) Dishonor or nonpayment by other means. In the event a fee is not paid due to dishonor, nonpayment, or otherwise, the GLO shall have no further obligation to issue permits, leases and other documents and/or provide services and/or materials to the permittee, lessee, or applicant.

(b) Board fees and charges. The board is authorized and required under the Natural Resources Code, Chapter 33, to collect the fees and charges set forth in this subsection where applicable. The board will charge the following coastal lease and coastal easement fees for use of coastal public land, and will charge the following structure registration and permit fees. The board charge will be based on either the fixed fee schedule or the alternate commercial, industrial, residential, and public formulas as delineated in subparagraphs (3) and (4) of this paragraph. The greater of the fixed fee or formula rate will be charged.

(1) Coastal lease charges. The board may grant coastal leases for public purposes as prescribed by the Natural Resources Code, Sections 33.103(1), 33.105, and 33.109. The filing fee and annual fee shall be negotiable.

(2) Structure registration fee. Structure registration fee is required for private piers or docks that are 100 feet long or less and 25 feet wide or less and require no dredging or filling, as authorized by the Natural Resources Code, §33.115. Though board approval is not required for construction, the applicant must register the location of the structure. The registration is valid for the life of the structure:

(A) filing fee: $25;

(B) annual fee: no charge;

(C) assignment fee: $25;

(D) amendment fee: $25.

(3) Miscellaneous coastal easement fees:

(A) assignment fee: $50;

(B) amendment fee: $50;

(C) late payment fee: 10% of past due amount/$25 minimum.

(4) Coastal easement fees:

(A) piers, docks, and watercraft storage facilities:

(i) residential use, Category I:

(I) filing fee: $25;

(II) annual fee: $.03 per square foot/$25 minimum;

(III) annual fee for more than one boatlift or boathouse and any oversized personal water craft slip: $250 each;

(ii) residential use, Category II:

(I) filing fee: $50;

(II) annual fee: 75% of fee calculated for same use as a commercial activity/$100 minimum;

(iii) commercial:

(I) filing fee: $50;

(II) evaluation fee: $50;

(III) annual fee: $.20 per square foot/$100 minimum;

(iv) Other, private non-profit use:

(I) filing fee: $50;

(II) annual fee: negotiable/$100 minimum.

(B) marinas:

(i) Clear Lake:

(I) filing fee: $50;

(II) evaluation fee: $50;

(III) annual fee: $4.00 per boat slip linear foot;

(ii) residential use: Category II:

(I) filing fee: $50;

(II) annual fee: 75% of fee calculated for same use as a commercial activity;

(iii) other:

(I) filing fee: $50;

(II) evaluation fee: $50;

(III) annual fee: $3.00 per boat slip linear foot;

(C) wharf:

(i) filing fee: $50;

(ii) evaluation fee: $50;

(iii) annual fee: $.30 per square foot/$100 minimum;

(D) breakwaters, jetties, and groins:

(i) residential--Category I:

(I) filing fee: $25;

(II) annual fee: $.20 per square foot/$25 minimum;

(ii) residential--Category II:

(I) filing fee: $50;

(II) annual fee: 75% of fee calculated for same use as a commercial activity/$100 minimum;

(iii) commercial activity:

(I) filing fee: $50;

(II) evaluation fee: $50;

(III) annual fee: $.20 per square foot/$100 minimum;

(E) dredged area:

(i) mineral interest holder:

(I) filing fee: $50;

(II) evaluation fee: $50;

(III) annual fee:

(-a-) first year fee for a new dredged area: $.02 per square foot/$100 minimum;

(-b-) fee for maintaining a dredged area after first year of easement: $.005 per square foot/$100 minimum;

(ii) residential--Category I:

(I) filing fee: $50;

(II) annual fee:

(-a-) first year fee for a new dredged area: $.03 per square foot/$25 minimum;

(-b-) fee for maintaining a dredged area after first year of easement: $.005 per square foot/$25 minimum;

(iii) residential--Category II:

(I) filing fee: $50;

(II) annual fee: 75% of fee calculated for same use as commercial activity/$100 minimum;

(iv) commercial activity:

(I) filing fee: $50;

(II) evaluation fee: $50;

(III) annual fee:

(-a-) first year fee for a new dredged area: $.05 per square foot/$100 minimum;

(-b-) fee for maintaining a dredged area after first year of easement: $.01 per square foot/$100 minimum;

(F) Open encumbered area:

(i) residential--Category I:

(I) filing fee: none;

(II) annual fee: none;

(ii) residential--Category II:

(I) filing fee: $50;

(II) annual fee: 75% of fee calculated for same use as commercial activity/$100 minimum;

(iii) commercial activity:

(I) filing fee: $50;

(II) evaluation fee: $50;

(III) annual fee: $.03 per square foot/$100 minimum;

(iv) Other, private non-profit use:

(I) filing fee: $50;

(II) evaluation fee: $50;

(III) annual fee: negotiable/$100 minimum;

(G) basin: commercial and industrial activity:

(i) industrial activity:

(I) filing fee: $50;

(II) annual fee: basin formula, industrial activity;

(III) evaluation fee: $50;

(ii) commercial activity:

(I) filing fee: $50;

(II) annual fee: basin formula, commercial activity;

(III) evaluation fee: $50;

(H) fill area: all activity:

(i) commercial/industrial:

(I) filing fee: $50;

(II) annual fee: $.20 per square foot, $100 minimum, or fill formula;

(III) evaluation fee: $50;

(ii) private activity/public activity:

(I) filing fee: $50;

(II) annual fee:

(-a-) existing fill (excluding bulkheads) not permitted as of August 15, 1995: $.02 per square foot or $25, whichever is greater;

(-b-) annual fee for an alignment bulkhead to be constructed or constructed, but not permitted, as of August 15, 1995: $.02 per square foot or $25, whichever is greater;

(III) annual fee for other: $.10 per square foot or fill formula, whichever is greater/$25 minimum;

(I) Shoreline stabilization project--filing fee: $25;

(J) Concrete stairs, concrete slabs:

(i) residential--Category I:

(I) filing fee: $25;

(II) annual fee: $.03 per square foot/$25 minimum;

(ii) residential--Category II:

(I) filing fee: $50;

(II) annual fee: 75% of fee calculated for same use as a commercial activity/$100 minimum;

(iii) commercial activity:

(I) filing fee: $50;

(II) evaluation fee: $50;

(III) annual fee: $.20 per square foot/$100 minimum;

(iv) Other, private non-profit use:

(I) filing fee: $50;

(II) annual fee: $100.

(5) Structure (cabin) permits:

(A) fees:

(i) refundable deposit: $200;

(ii) annual fee for all structures excluding piers, docks, and walkways will be calculated at $.60 per square foot per year/$175 minimum;

(iii) contract renewal: $175;

(iv) new contract issuance or transfer of interest approved by the board: $325;

(v) bonus payment for new contract issuance for structure determined by the board to be abandoned or for which the permit was terminated by the board for cause: negotiable/minimum to be determined by the board;

(vi) filing fee for competitive bid proposal for permit for structure determined by the board to be abandoned or for which the permit was terminated by the board for cause: $50;

(vii) late payment fee: 25% of past due amount;

(B) permittee may apply for a continuation of the previous fee if the permit was issued prior to July 18, 1983 (the date of the initial rate increase), and if the annual fee will impose an undue financial hardship on a current permit holder.

(6) Resource Impact Fee:

(A) Public use piers and residential piers constructed within guidelines: exempt;

(B) All others: $100 plus $1.00 per square foot of impacted area.

(7) Term. The term for all coastal leases and coastal easements is negotiable. Board approval is required prior to construction.

(8) Rental adjustments--all commercial and industrial easements. At every five-year interval in the term of commercial and industrial easements, the rental fee for the easement will be subject to adjustment. The adjustment, if any, will be in accordance with the then current Fee Schedule as adopted by the Board.

(9) Implementation.

(A) New residential developments. Upon the application for an easement associated with the development of a multi-unit or single-family residential project, the easement application will be processed and fee determined according to the appropriate commercial activity rate. Upon the sale of an individual residential unit associated with the easement, with sufficient infrastructure in place to convert use of the unit to individual use (and use of associated easement to pri-

vate activity), the original easement applicant, upon agreement with the commissioner of the GLO, may pay a $50 conversion fee. The easement fee may then be reduced by the percentage that the sold unit represented to the total number of units associated with the easement. At the time the conversion fee is paid under the provisions herein, the unit will then be considered to be subject to the residential activity rates upon renewal of the easement. For units already sold prior to the effective date of this section, conversion to a residential activity rate will be granted without the payment of the conversion fee.

(B) Additional terms. The commissioner of the GLO may require, as a condition for the granting of an easement set forth in this section, such additional terms that he feels are necessary to secure performance under any such easement.

(10) Senior fee freeze. Upon application to the GLO and submission of proof of age by a grantee, fees for coastal easements associated with a single family residence will not be increased after the point in time when the littoral property owner (one person in the case of joint ownership) reaches the age of 65, unless the area of encumbered state land increases or there is a change in use of the coastal public land.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2008.

TRD-200804134

Trace Finley

Deputy Commissioner, Policy and Governmental Affairs, General Land Office

School Land Board

Effective date: September 1, 2008

Proposal publication date: June 13, 2008

For further information, please call: (512) 475-1859

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31 TAC §155.6, §155.8

The School Land Board (board) adopts the repeal of §155.6 relating to Shoreline Alteration Projects and §155.8 relating to Federal, State, and Local Laws and Regulations. The repeals are adopted without changes to the proposal as published in the June 13, 2008, issue of the *Texas Register* (33 TexReg 4640).

Section 155.6 (relating to Shoreline Alteration Projects) included provisions related to the requirements for a coastal boundary survey when conducting shoreline alteration projects. This section is unnecessary because the requirement to provide a coastal boundary survey is found in Texas Natural Resources Code §33.136 and adopted amendments to §155.1 (relating to General Provisions).

Section 155.8 (relating to Federal, State, and Local Laws and Regulations) addressed the requirement that all grantees comply with all applicable federal, state, and local laws and regulations related to their use of coastal public land. Deletion of this section avoids duplication because all contract documents already require such compliance.

The adoption of the repeal will result in the removal of unnecessary and potentially confusing provisions from the Texas Administrative Code.

The board has evaluated the adopted repeal rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "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 repeal of these sections 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 repeal implements legislative requirements in Texas Natural Resources Code §§33.101 - 33.136 relating to the board's ability to grant rights in coastal public land.

The adopted repeals are subject to the CMP, 31 TAC §§505.11(a)(1)(E) - (I) and §505.11(c), relating to the Actions and Rules Subject to the CMP. The board has reviewed these actions for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The adopted action is consistent with the applicable CMP goals and policies.

The board did not receive any comments on the repeal.

The repeal is adopted pursuant to Texas Natural Resources Code §§33.101 - 33.136, relating to the board's ability to grant rights in coastal public land, and Texas Natural Resources Code §33.064, providing that the board may adopt procedural and substantive rules which it considers necessary to administer, implement and enforce Chapter 33, Texas Natural Resources Code.

Texas Natural Resources Code §§33.101 - 33.136 are affected by the repeals.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200804135

Trace Finley

Deputy Commissioner, Policy and Governmental Affairs, General Land Office

School Land Board

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 7. PREPAID HIGHER EDUCATION TUITION PROGRAM

SUBCHAPTER A. GENERAL RULES

34 TAC §7.1

The Comptroller of Public Accounts adopts an amendment to §7.1, concerning general statement of purpose of the Prepaid

Higher Education Tuition Board, to incorporate the new prepaid tuition unit undergraduate education program (Texas Tomorrow Fund II), without changes to the proposed text as published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5253).

This section is being amended to implement House Bill 3900, 80th Legislature, 2007. House Bill 3900 amends the Education Code, Chapter 54, by adding Subchapter H, Prepaid Tuition Unit Undergraduate Education Program: Texas Tomorrow Fund II (codified at Education Code, §§54.751 - 54.778). House Bill 3900 directs the Texas Prepaid Higher Education Tuition Board ("board") to administer the new prepaid tuition unit undergraduate education program. Under the new law, a person may prepay the costs of all or a portion of a beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education. The amendment adds a new subsection (c) to incorporate into the general purpose of the board the responsibility to develop, implement, and administer the new prepaid tuition unit program, and describe the purpose of the program and the subchapters' role in informing the public about the program.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Education Code, §54.752(b)(1), which authorizes the board to adopt rules to implement the Prepaid Tuition Unit Undergraduate Education Program.

The amendment implements Education Code, §54.752.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200804126
Martin Cherry
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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SUBCHAPTER C. BOARD RESPONSIBILITIES

34 TAC §7.21

The Comptroller of Public Accounts adopts an amendment to §7.21, concerning general responsibilities of the Prepaid Higher Education Tuition Board, without changes to the proposed text as published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5254).

This section is being amended to implement House Bill 3900, 80th Legislature, 2007. House Bill 3900 amends the Education Code, Chapter 54, by adding Subchapter H, Prepaid Tuition Unit Undergraduate Education Program: Texas Tomorrow Fund II (codified at Education Code, §§54.751 - 54.778). House Bill 3900 directs the Texas Prepaid Higher Education Tuition Board ("board") to administer the new prepaid tuition unit undergraduate education program. Under the new law, a person may prepay the costs of all or a portion of a beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education. The amendment incorporates into the general responsibilities of the board additional powers that may be required to develop, implement, and administer the new prepaid tuition unit program, as authorized by Education Code, §54.752. The amendment revises the language regarding contract approval amounts in paragraph (6) to make this paragraph consistent with a recent amendment to §7.33(5) adopted by the board related to delegated responsibilities. The amendment also adds new paragraph (7) regarding board authority to approve agreements or other transactions with the United States, state agencies, general academic teaching institutions, two-year institutions of higher education, and local governments. And the amendment also adds new paragraph (8) regarding board authority to approve contracts with persons or entities to market and enroll persons in the programs.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Education Code, §54.752(b)(1), which authorizes the board to adopt rules to implement the Prepaid Tuition Unit Undergraduate Education Program.

The amendment implements Education Code, §54.752.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Martin Cherry
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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SUBCHAPTER D. EXECUTIVE DIRECTOR

34 TAC §7.33

The Comptroller of Public Accounts adopts an amendment to §7.33, concerning delegated responsibilities of the Prepaid Higher Education Tuition Board that are delegated to the comptroller, as executive director of the board, without changes to the proposed text as published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5255).

This section is being amended to implement House Bill 3900, 80th Legislature, 2007, to incorporate additional responsibilities necessary or proper to administer the new prepaid tuition unit undergraduate education program (Texas Tomorrow Fund II). House Bill 3900 amends the Education Code, Chapter 54, by adding Subchapter H, Prepaid Tuition Unit Undergraduate Education Program: Texas Tomorrow Fund II (codified at Education Code, §§54.751 - 54.778). House Bill 3900 directs the Texas Prepaid Higher Education Tuition Board ("board") to administer the new prepaid tuition unit undergraduate education program.

Under the new law, a person may prepay the costs of all or a portion of a beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education. The amendment incorporates into the delegated responsibilities of the board additional powers outlined in Education Code, §54.752, which may be required by the executive director to implement the new prepaid tuition unit undergraduate education program. The amendment adds new paragraph (7) authorizing the executive director to negotiate agreements or other transactions with the United States, state agencies, general academic teaching institutions, two-year institutions of higher education, and local governments. New paragraph (8) authorizes the executive director to appear before governmental agencies. New paragraph (9) authorizes the executive director to engage the services of private consultants, actuaries, trustees, records administrators, managers, legal counsel, and auditors for administrative or technical assistance. New paragraph (10) authorizes the executive director to solicit and accept on behalf of the board gifts, grants, loans, and other aid from any source or participate in any other way in any government program to carry out this chapter. And new paragraph (11) authorizes the executive director to purchase liability insurance covering the board and employees and agents of the board.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Education Code, §54.752(b)(1), which authorizes the board to adopt rules to implement the Prepaid Tuition Unit Undergraduate Education Program.

The amendment implements Education Code, §54.752.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Martin Cherry
General Counsel
Comptroller of Public Accounts
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SUBCHAPTER E. APPLICATION, ENROLLMENT, PAYMENT, AND FEES

34 TAC §7.42

The Comptroller of Public Accounts adopts an amendment to §7.42, concerning enrollment period, with changes to the proposed text as published in the May 23, 2008, issue of the *Texas Register* (33 TexReg 4125).

House Bill 2173, 80th Legislature, 2007, effective June 15, 2007, requires the board to establish by rule criteria and procedures to guide the board in determining when and under what conditions to reopen new enrollment in the program and requires the board to develop procedures for annually assessing whether administrative changes could be made that would enable the board to reopen new enrollment. Subsection (a) is amended to remove obsolete language. Subsection (b) is amended to account for temporary suspensions of enrollment. New subsection (d) is added to require the board, in each year that new enrollment in the program remains closed, to determine if new enrollment may be reopened. The amendments set forth the procedures and the criteria on which the board bases this determination and permits the board to reopen new enrollment in the program in certain circumstances. The amendments also require the board to consider annually the structure of the program and whether statutory or administrative changes could be made that would lead to reopening new enrollment in the program. Subsection (d) was non-substantively changed by deletion of an unnecessary "the" and the replacement of a colon with a comma.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Education Code, §54.619(k), which requires the board to establish by rule procedures and criteria used by the board to make an annual determination whether new enrollment in the program may be reopened.

The amendment implements Education Code, §54.619(k).

§7.42. Enrollment Period.

(a) Except as provided in subsection (c) of this section, each enrollment period shall begin and end on dates set annually by the board and published in the *Texas Register.* The official postmark date affixed by the United States Postal Service or date stamp evidencing actual receipt of the application at the address specified as follows, whichever is earlier, shall be considered the date of receipt of an application for purposes of the enrollment period. Applications may be mailed to the following address: Prepaid Higher Education Tuition Program, Office of the Comptroller of Public Accounts, P.O. Box 13407, Austin, Texas 78711-3407. In the alternative applications may be delivered to the following address: 111 East 17th Street, Room 1114, Austin, Texas 78774-0001.

(b) The board reserves the right to limit or suspend enrollment if necessary to ensure the actuarial soundness of the fund.

(c) An extended enrollment period for beneficiaries classified as "newborns" may be established by the Board on an annual basis.

(d) In each year that new enrollment in the program is temporarily suspended under Education Code, §54.619(j), the board shall determine whether to reopen new enrollment in the program based on the following criteria: the sufficiency of available alternatives for college savings offered by the state, whether analysis of actuarial data shows that new enrollment in the program may be reopened in an actuarially sound manner, and any other relevant criteria. The board may reopen the program to new enrollment if it determines that the alternatives for college savings offered by the state do not offer Texans sufficient help to attain a college education, and that the program could be reopened in an actuarially sound manner. In each year that new enrollment in the program remains closed, the board shall consider the current structure of the program and determine whether statutory or administrative changes are needed to enable the board to reopen the program to new enrollment in an actuarially sound manner.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Martin Cherry
General Counsel
Comptroller of Public Accounts
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SUBCHAPTER I. REFUNDS, TERMINATION

34 TAC §7.82

The Comptroller of Public Accounts adopts an amendment to §7.82, concerning termination of prepaid tuition contract, without changes to the proposed text as published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5255). The amendment deletes from subsection (d) an obsolete provision prohibiting the purchaser of a prepaid tuition contract that terminated automatically as provided by Education Code, §54.631(b) from receiving a refund. This provision was adopted to comply with a federal law that is no longer in effect.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Education Code, §54.618(b)(2), which gives the board the authority to adopt rules to implement this subchapter.

The amendment implements Education Code, §54.632(c) and §54.632(b), which requires the board to determine the method by which the amount of the refund is calculated and provides that the person named in the contract is entitled to a refund on termination of the contract.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Martin Cherry
General Counsel
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SUBCHAPTER L. PREPAID TUITION UNIT UNDERGRADUATE EDUCATION PROGRAM: TEXAS TOMORROW FUND II

34 TAC §§7.121 - 7.145

The Comptroller of Public Accounts adopts new §§7.121 - 7.145, concerning implementation of the new prepaid tuition unit undergraduate education program (Texas Tomorrow Fund II), with changes to the proposed text as published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5256). The new sections will be under new Subchapter L, Prepaid Tuition Unit Undergraduate Education Program: Texas Tomorrow Fund II. The new sections implement House Bill 3900, 80th Legislature, 2007. House Bill 3900 amends Education Code, Chapter 54, by adding Subchapter H, Prepaid Tuition Unit Undergraduate Education Program: Texas Tomorrow Fund II (codified in Education Code, §§54.751 - 54.778). House Bill 3900 directs the Texas Prepaid Higher Education Tuition Board ("board") to administer the new prepaid tuition unit undergraduate education program. Under the new law, a person may prepay the costs of all or a portion of a beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education.

New §7.121 addresses the application of the rules. The new section provides that the prepaid tuition unit undergraduate education program is being established to enable individuals to enter into a prepaid tuition contract with the board on behalf of a beneficiary for the purchase of tuition units that the beneficiary will be able to redeem for the payment of all or a portion of the beneficiary's undergraduate tuition and required fees at an eligible educational institution.

New §7.122 outlines definitions that are applicable to the program, including among others, definitions of eligible educational institution, tuition unit, Refund Value, Reduced Refund Value, Transfer Value and three-year holding period. As provided by House Bill 3900, eligible educational institutions include general academic teaching institutions, two-year institutions of higher education, private or independent institutions of higher education, or accredited out-of-state institutions of higher education, as defined under Education Code, §61.003 and §54.751.

New §7.123 provides that the program is intended to meet the requirements of Internal Revenue Code, §529 as a qualified tuition program. New §7.124 addresses the purchase of tuition units, types of tuition units (Types I, II and III), assigned value and price of the units.

New §7.125 describes the redemption of tuition units, providing that when a beneficiary under a prepaid tuition contract redeems tuition units to pay costs of tuition and required fees, the board will apply money from the Texas Tomorrow Fund II, in the amount provided by Education Code, §54.765, to pay all or the applicable portion of the costs of the beneficiary's tuition and required fees at the eligible educational institution in which the beneficiary enrolls. Consistent with House Bill 3900, the section provides that tuition units must be held for at least three years before being redeemed to pay for tuition and required fees.

New §7.126 outlines the requirements of a prepaid tuition unit contract required be completed to enroll in the program. New §7.127 describes the requirements to be a purchaser and beneficiary under the program. Consistent with House Bill 3900, the section provides that at the time the purchaser enters into a prepaid tuition contract, the beneficiary of the contract must be a resident of this state or a nonresident who is the child of a parent who is both a resident of this state and the purchaser of the contract.

New §7.128 addresses contract payments. The section provides that payments under prepaid tuition contracts may be made in single or periodic Pay-As-You-Go payments, or under an installment plan, or both. The section also provides that installment payments will include an implied interest component at a rate set by the board to ensure the actuarial soundness of the fund. New §7.129 addresses the deferred use of prepaid credit hours. New §7.130 outlines the requirements to change a beneficiary. New §7.131 describes purchaser obligations and requests.

New §7.132 provides that nothing in these rules should be construed as a promise or guarantee that a beneficiary will be admitted to any public or private institution of higher education, allowed to continue enrollment at a public or private institution of higher education, or allowed to graduate from a public or private institution of higher education.

New §7.133 describes the circumstances for contract termination. New §7.134 describes circumstances of default and delinquency conversion. The section provides that an account is subject to a late payment penalty for payments not received within 15 days of the payment due date. The section provides further that any refund in the event of a default shall be limited to the Reduced Refund Value.

New §7.135 describes the parameters for obtaining a refund on an unused or terminated tuition contract. The section provides generally that if an account is held for three or more years, a purchaser is entitled to a refund of the Refund Value of the account (includes some earnings). If a purchaser cancels the prepaid tuition contract within 3 years of the first payment due date, the purchaser may be entitled to a Reduced Refund Value (no earnings with the refund), unless special circumstances apply. New §7.136 addresses payments to eligible educational institutions upon redemption of tuition units.

New §7.137 describes transfers among Internal Revenue Code, §529, qualified tuition programs. The section provides that a purchaser may transfer money between a prepaid tuition account and an account under another Internal Revenue Code, §529, plan established by this state or by another state or other authorized entity in accordance with Internal Revenue Code, §529, and that the value of the account at the time of transfer is an amount defined as the Transfer Value less any fees due and payable under the contract. New §7.138 outlines recordkeeping requirements for rollover contributions from other Internal Revenue Code, §529, programs.

New §7.139 provides that the board will administer the Texas Tomorrow Fund II in a manner that is sufficiently actuarially sound to pay the costs of program administration and operations and to meet the obligations of the program. The new rule also provides that the board may adjust the terms of subsequent prepaid tuition contracts as necessary to ensure the actuarial soundness of the fund.

New §7.140 provides that on the request of the comptroller as the comptroller considers necessary to ensure the actuarial soundness of the fund, the board may temporarily suspend new enrollment in the program. The new rule provides further that if the comptroller determines that the program is financially infeasible, the comptroller will notify the governor and the legislature and recommend that the program be modified or terminated. New §7.141 addresses the effect of program termination on an existing contract. New §7.142 outlines the requirement for and components of an annual statement for the purchaser regarding the status of the purchaser's prepaid tuition contract.

New §7.143 describes the Texas Save and Match program under which money paid by a purchaser under a prepaid tuition contract may be matched with contributions made by another person or entity to the Texas Save and Match program and used to purchase additional tuition units on behalf of the beneficiary. Contributions may also be matched with any money appropriated by the legislature for the Texas Save and Match program and used to purchase additional tuition units on behalf of certain beneficiaries. New §7.144 allows gift contributions to be made, and provides that a person or entity may purchase tuition units for a beneficiary designated in an existing prepaid tuition contract by making a gift contribution.

New §7.145 describes marketing considerations, and provides that the program will be marketed in a manner that promotes the participation goals and targets of the most recent revision of "Closing the Gaps," the state's master plan for higher education.

We received comments from the Center for Public Policy Priorities (CPPP), RAISE Texas, and staff members from comptroller's office. Following is a summary of the comments received and the responses.

A staff member from the comptroller's office commented that in §7.121(b), the room number for program staff at 111 East 17th Street in Austin, Texas should be Room 1115 instead of Room 1114. The board agrees and has corrected the rule accordingly.

The CPPP and RAISE Texas commented on the proposed enrollment period, and recommended that the board establish a provisional enrollment status during the interim period that is outside the regular enrollment period, similar to the State of Florida's prepaid program. CPPP and RAISE Texas expressed concern that the regular enrollment period from September to the end of February could erect a barrier for families, especially those households eligible for the Earned Income Tax Credit (EITC) who may receive their tax credit payments outside of the enrollment period and be more willing to enroll when the tax credit is received. The board agrees with the basis for the comment and has revised the definition of "enrollment period" in §7.122(5) to authorize, but not require, the executive director to develop a provisional enrollment process that allows potential purchasers to apply outside of the designated enrollment period with the pricing to be established in the next enrollment period. The nature and extent of any provisional enrollment process will need to be developed further in conjunction with the plan manager to determine what may be feasible to implement during the first year of program operation.

The CPPP and RAISE Texas expressed support for the minimum tuition unit purchase requirement of one unit as outlined in §7.124(h)(1), as being extremely important to ensuring access to enrollment. The board agrees with this comment with respect to the minimum required purchase using the Pay-As-You-Go payment option (purchasing tuition units at current prices, at regular or irregular intervals in whatever frequency desired). The board, however, has removed "lump sum" purchase from the allowable one tuition unit minimum purchase in subsection (h)(1) because it is administratively infeasible to maintain indefinitely a single account consisting of only one tuition unit. Under a lump sum purchase, a purchaser would ordinarily purchase tuition units only once when a contract is opened, without intending to purchase additional tuition units in the future. The recurring administrative cost to the fund would exceed any possible benefit if an account were set up and maintained indefinitely with only one tuition unit, and the single tuition unit would not provide any meaningful educational benefit to the beneficiary. For Pay-As-You-Go purchases, the board has maintained the minimum purchase requirement of only one tuition unit, under the assumption that a purchaser will be purchasing additional tuition units at some point in the future, so as to make the account worthwhile for both the beneficiary and the fund.

A staff member of the comptroller's office recommended lowering the minimum required payment in §7.124(h)(1) - (3) for additional Pay-As-You-Go or Automated Clearing House (ACH) pay-

ments from $25 to $15, because the tuition unit prices for Type III units will initially be lower than the $25 minimum specified in the original rule proposal, and it will be more cost effective to process ACH payments even if they are lower than $25. The board agrees with this comment and has lowered the required minimum payment threshold to $15 for additional Pay-As-You-Go purchases or ACH payments after enrollment. Allowing a lower minimum payment will enable more persons to sign up for regular ACH payments as a way to save for college.

The CPPP expressed support for §7.125(h) and (i), regarding redemption of units, to ensure flexibility for students. These provisions allow beneficiaries to redeem more than 100 tuition units in a year, and provide for the calculation of a per credit hour tuition unit cost, to allow beneficiaries to attend more or less credit hours than the specified 30 semester credit hours. No change was requested to the rule. The board agrees with this comment and has accordingly made no changes to these subsections.

The CPPP commented on §7.126(b)(3), suggesting a method for determining the projected date of high school graduation, using a date-of-birth-plus-18 methodology. The CPPP and RAISE Texas also requested that §7.126(b)(7) be clarified to request the purchaser to provide the appropriate year of gross income on the enrollment application. While the board agrees with the desired goals of the comments, no changes to the rules are required based on these comments. The plan manager envisions that the data processing system used for prepaid tuition contract management will automatically compute the graduation date based upon the date of birth of the beneficiary, similar to the methodology suggested by CPPP. In addition, the prepaid tuition contract application will request the purchaser to provide a current income range, clarifying the information required by the rule, so no rule change is required.

A staff member of the comptroller's office recommended a change to §7.127(d), regarding the residency requirement of the beneficiary or purchaser, to make it more consistent with the statutory requirements reflected in Education Code, §54.756(c). The board agrees with this comment. Education Code, §54.756 requires that at the time the purchaser enters into a prepaid tuition contract, either the beneficiary of the contract must be a resident of Texas, or the beneficiary must be a nonresident who is the child of a parent who is a resident of Texas at the time that parent enters into the contract. A change was made to §7.127(d)(2) to reflect the statutory requirements.

The CPPP expressed support for the proposed language in §7.130(d), which provides that no fee will be imposed for a change of beneficiary, to give purchasers flexibility. The board agrees with the comment, which is consistent with Education Code, §54.759(c), and accordingly has made no change to this rule.

The CPPP and RAISE Texas commented on §7.142(a)(1), and CPPP commented on subsection (a)(3), regarding the annual account statement, recommending that the annual account statement be clarified to include any matching contributions made to purchase tuition units. The CPPP also recommends providing on the account statement the semester equivalent of the number of tuition units held by a purchaser. The board declines to change the rule in response to these comments because no rule change is required to implement these recommendations, if the recommendations are determined to be implementable at a reasonable cost. These recommendations will be evaluated with the plan manager to determine the feasibility and cost of tracking and reporting matching contributions on a purchaser's individual account statement. The executive director will also work with the plan manager to explore the feasibility of clarifying on the annual account statement the approximate value in semester hours for the tuition units purchased.

The CPPP and RAISE Texas commented on §7.143(d), regarding soliciting and accepting donations to the Texas Save and Match program, and recommended the board consider using a nonprofit organization to stimulate and accept tax-deductible donations. The CPPP recommends using either an existing nonprofit organization, or consider the creation of a new nonprofit organization for this purpose. While the board agrees that nonprofit organizations might facilitate donations to the Save and Match program, no rule change is needed in response to this comment. This section allows the executive director or the board to solicit and accept grants or donations from any source. The use of nonprofit organizations to stimulate and accept donations can be considered by the executive director when developing operating procedures for the Save and Match program.

RAISE Texas commented on §7.143(e)(1), recommending that "entity" be added to the list of those authorized to contribute to the Save and Match program, in addition to a person. The board agrees with this comment and has added "entity" to §7.143(e)(1).

These rules are adopted under House Bill 3900, 80th Legislature, 2007, which requires the board to administer the prepaid tuition unit undergraduate education program, and Education Code, §54.752(b)(1), which authorizes the board to adopt rules to implement the program.

The new sections implement Education Code, Chapter 54, Subchapter H.

§7.121. Application.

(a) This subchapter applies to prepaid tuition contracts under the prepaid tuition unit undergraduate education program (Texas Tomorrow Fund II) to enable individuals to enter into a prepaid tuition contract with the board on behalf of a beneficiary for the purchase of one or more tuition units that the beneficiary is entitled to apply to the payment of the beneficiary's undergraduate tuition and required fees at an eligible educational institution.

(b) Applications shall be made available through the Prepaid Tuition Unit Undergraduate Education Program, Office of the Comptroller of Public Accounts, P.O. Box 13407, Austin, Texas 78711-3407; 111 East 17th Street, Room 1115, Austin, Texas 78711-1440, or by calling toll-free at 1-800-445-4723 (GRAD), or as otherwise provided by the board on the board's Internet web site.

(c) The rights of purchasers and beneficiaries are subject to the provisions of this subchapter, Education Code, Chapter 54, Subchapter H, Internal Revenue Code, §529, and the terms and conditions of the prepaid tuition contract. To the extent of irreconcilable conflict, the provisions of Internal Revenue Code, §529; Education Code, Chapter 54, Subchapter H; and this subchapter prevail over the prepaid tuition contract. Any amendment to Internal Revenue Code, §529; Education Code, Chapter 54, Subchapter H; or this subchapter that would apply to a prepaid tuition contract will automatically constitute an amendment to the prepaid tuition contract.

§7.122. Definitions.

The following words, terms, and phrases, when used in this subchapter, shall have the following meanings:

(1) "Accredited out-of-state institution of higher education" means a public or private institution of higher education that:

(A) is located outside this state; and

(B) is accredited by a recognized accrediting agency.

(2) "Beneficiary" means the person designated under a prepaid tuition contract as the person entitled to apply one or more tuition units purchased under the contract to the payment of the person's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education.

(3) "Board" means the Prepaid Higher Education Tuition Board.

(4) "Eligible educational institution" means a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education, that qualify as eligible educational institutions under Internal Revenue Code, §529.

(5) "Enrollment period" means the period established by the board during which a purchaser may enter into a contract with the board to purchase tuition units. The initial enrollment period is September 1 through the end of February. For beneficiaries who are newborn infants under one year of age at the time of enrollment, the initial enrollment period will be extended to cover the period of September 1 through July 31. These enrollment periods will apply annually thereafter subject to change by the board. The executive director may establish a provisional enrollment process to allow potential applicants to begin the enrollment process outside of the enrollment period with pricing to be established in the next enrollment period.

(6) "First payment due date" means the date the first payment is due after enrolling in the program and establishing a new prepaid tuition contract. The first payment due date will be specified in the prepaid tuition contract, and shall initially be established as May 1st. The first payment due date serves as the anniversary date for establishing the three-year holding period. The first payment due date may be changed subsequently by the board for future enrollment periods.

(7) "Fund" means the Texas Tomorrow Fund II.

(8) "General academic teaching institution" has the meaning assigned by Education Code, §61.003, except that the term does not include a public state college.

(9) "Market value" means an amount equal to the total purchase price of any unused tuition units, plus the portion of the total net earnings on assets of the Fund attributable to that amount (including any negative returns).

(10) "Matriculation" means enrollment as a member of the student body at an eligible educational institution.

(11) "Paid in full" means that all the required payments for the tuition units and any assessed fees under the prepaid tuition contract have been received and credited to the account.

(12) "Pay-As-You-Go" means purchasing tuition units at the price in effect for that type of tuition unit on the day payment is received for the tuition unit. Pay-As-You-Go includes paying for tuition units with a lump sum payment or multiple lump sum payments, without being obligated to pay for any additional tuition units.

(13) "Plan manager" means a professional investment manager that is under contract with the board to serve as a plan administrator and to invest the assets of the fund on behalf of the board.

(14) "Prepaid tuition contract" means a contract under which a person purchases from the board on behalf of a beneficiary one or more tuition units that the beneficiary is entitled to apply to the payment of the beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education.

(15) "Prepayment" means payment of the balance due or a portion of the balance due under a prepaid tuition contract, ahead of the schedule provided in the contract.

(16) "Private or independent institution of higher education," "public junior college," "public state college," "public technical institute," and "recognized accrediting agency" have the meanings assigned by Education Code, §61.003.

(17) "Program" or "Plan" means the prepaid tuition unit undergraduate education program. The board may select a different name for the program for marketing purposes.

(18) "Purchaser" means a person who enters into a prepaid tuition contract with the board on behalf of a beneficiary for the purchase of one or more tuition units.

(19) "Redemption" means the exchange of one or more tuition units to pay costs of tuition and required fees at an eligible educational institution.

(20) "Reduced Refund Value" means the lesser of:

(A) the amount paid by the purchaser or other contributor to purchase any unused tuition units under the contract on behalf of the beneficiary; or

(B) the current market value of the invested payments or contributions for any unused tuition units, as determined by the plan manager. Reduced Refund Value does not include any state provided or procured matching contributions or any earnings on state provided or procured matching contributions.

(21) "Refund Value" means an amount equal to the total purchase price of the unused tuition units to be refunded from the account, plus annual net earnings on the contributions made to the account to purchase the tuition units that are being refunded (including any negative returns), with the earnings rate to be set by the board at a rate that is up to two percent less than the actual investment return for the fund for each of the years the contract is in effect, provided that in no event shall the annual net earnings on the contributions ever exceed five percent annually, and provided further that for any year in which the investment return does not support payment of any earnings, the board may elect not to credit and pay any earnings on the contributions, to preserve the actuarial soundness of the fund. Refund Value does not include any state provided or procured matching contributions or any earnings on State provided or procured matching contributions.

(22) "Required fee" means a fee, other than a laboratory fee for a specific course, that is charged by a public or private institution of higher education to all students at the institution who are not exempt from the fee. For purposes of this subdivision, a fee is a required fee only to the extent that the fee is considered a qualified higher education expense under Internal Revenue Code, §529. Required fees are generally those fees imposed on all students as a condition of enrollment. Required fees do not include fees such as equipment usage fees required for particular courses, charges for room and board, book costs, or any optional fees.

(23) "Sales period" means the year long period from September 1 through August 31 during which a purchaser who has established a prepaid tuition contract may make purchases under the contract at the price(s) established under the contract, or at the price

established for tuition units applicable to the sales period if additional tuition units are purchased during the sales period.

(24) "Three-year holding period" means the period of time that must transpire before a beneficiary or purchaser may redeem a tuition unit to pay for qualified higher education expenses, as provided under §7.125(g) of this title (relating to Redemption of Tuition Units).

(25) "Transfer value" means the value of the prepaid tuition contract at the time of transfer, that is the lesser of:

(A) an amount equal to the cost, at the time of the transfer, of the tuition and required fees that would be covered by redemption of the number and type of tuition units to be transferred from the account (but not including any units resulting from any State provided or procured matching funds) if the beneficiary were redeeming the units at a general academic teaching institution or two-year institution of higher education as follows:

(i) for a Type I unit, at the general academic teaching institution that, in the sales year in which the unit was purchased, had the highest tuition and required fee cost;

(ii) for a Type II unit, at a general academic teaching institution that, in the sales year in which the unit was purchased, had tuition and required fee cost at the weighted average; and

(iii) for a Type III unit, at a two-year institution of higher education that, in the sales year in which the unit was purchased, had tuition and required fee cost at the weighted average; or

(B) an amount equal to the current market value of the unused tuition units to be transferred from the account, which is an amount equal to the total purchase price of the unused tuition units to be transferred from the account (but not including any state provided or procured matching contributions), plus the portion of the total net earnings on assets of the Fund attributable to that amount (including any negative returns), but not including any earnings on state provided or procured matching contributions, as determined by the plan manager.

(26) "Tuition" means the charges imposed by a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education, on undergraduates as a condition of enrollment, which are identified by such institution as tuition.

(27) "Tuition unit" means a portion of the cost of undergraduate resident tuition and required fees that may be prepaid, whose assigned value, when used to pay the cost of tuition and required fees at an eligible educational institution, is equal to:

(A) for a Type I tuition unit, one percent of the cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by the general academic teaching institution with the highest such tuition and fee costs for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(d);

(B) for a Type II tuition unit, one percent of the weighted average cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by general academic teaching institutions for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(e); or

(C) for a Type III tuition unit, one percent of the weighted average cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by two-year institutions of higher education for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(f).

(28) "Two-year institution of higher education" means a public junior college, a public state college, and a public technical institute, as those terms are defined in Education Code, §61.003.

(29) "Weighted average" with respect to tuition and required fees means:

(A) for Type II tuition units, a weighted average cost for undergraduate resident tuition and required fees of general academic teaching institutions for the applicable academic year, computed by the method specified in Education Code, §54.753(e); and

(B) for Type III tuition units, a weighted average cost for undergraduate resident tuition and required fees of two-year institutions of higher education for the applicable academic year, computed by the method specified in Education Code, §54.753(f).

§7.123. Tax Exempt Status Requirements.

(a) The provisions of this section are intended to meet the requirements of Internal Revenue Code, §529.

(b) A payment of an amount due to the fund for a prepaid tuition contract must be made in cash or cash equivalent. A person may not make a payment to the fund (regardless of whether such payment is a direct purchase, gift, contribution under the Texas Save & Match program, or other payment) to the extent that any such payment with respect to a beneficiary, when aggregated with the other Internal Revenue Code, 529 Plans for such beneficiary, would exceed the contribution limits of Internal Revenue Code, §529.

(c) The plan manager will monitor contributions to and withdrawals from the fund and any account within the fund to ensure that any applicable limits on contributions or withdrawals are not exceeded.

(d) The plan manager shall maintain a separate accounting for each beneficiary.

(e) The plan manager shall determine the earnings portion of each distribution, if any, in accordance with methods that are consistent with Internal Revenue Code, §529.

(f) The plan manager shall report the earnings portion of any distribution or refund on a statement to the purchaser or other distributee as appropriate, and to the Secretary of the United States Treasury, as may be required by the Internal Revenue Code, §529.

(g) The purchaser and beneficiary under the prepaid tuition contract, and any other contributor, may not:

(1) control or direct the investment of payments under the contract or any earnings of the fund; or

(2) use any interest in the contract as security or collateral for a loan or other obligation.

(h) The board and plan manager shall make such reports as the Secretary of the United States Treasury may require to maintain compliance with Internal Revenue Code, §529.

(i) Policies and procedures. As authorized under Education Code, Chapter 54, Subchapters F, G, and H, the board may adopt any policy or procedure, and such policy and procedure automatically amends each outstanding prepaid tuition contract, as necessary for:

(1) the prepaid tuition contract to obtain or maintain qualification as a qualified tuition program under Internal Revenue Code, §529;

(2) purchasers and beneficiaries to obtain and maintain the federal income tax benefits or favorable treatment that is provided by Internal Revenue Code, §529; or

(3) the prepaid tuition contract to obtain or maintain exemption from registration under federal securities law. If outstanding prepaid tuition contracts are automatically amended as a result of this rule, purchasers will be notified of the amendment through the Internet web site of the program.

§7.124. Prepaid Tuition Units: Purchase; Assigned Value; Types; Price.

(a) Under the program, a purchaser may prepay the costs of all or a portion of a beneficiary's undergraduate tuition and required fees at an eligible educational institution by entering into a prepaid tuition contract with the board to purchase one or more tuition units of a type described by this section at the applicable price established by the board for that type of unit for the year in which the unit is purchased.

(1) The portion of the beneficiary's undergraduate tuition and required fees for which a tuition unit may be redeemed is assigned to the tuition unit at the time of purchase.

(2) Tuition unit(s) may be redeemed to pay that portion of the tuition and fees at the general academic teaching institution or two-year institution of higher education in any academic year in which the unit is redeemed in accordance with this subchapter.

(3) The purchaser may purchase one type of unit or a combination of two or three types of units.

(b) The assigned value of a tuition unit, purchased as provided by this section, when used to pay the cost of tuition and required fees, is equal to one percent of the amount necessary for the academic year in which the unit is redeemed to cover the applicable cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester credit hours as follows:

(1) for a Type I tuition unit, the cost of undergraduate resident tuition and required fees charged by the general academic teaching institution with the highest such tuition and fee costs, determined as provided by subsection (d) of this section;

(2) for a Type II tuition unit, the weighted average undergraduate resident tuition and required fees charged by general academic teaching institutions, determined as provided by subsection (e) of this section; and

(3) for a Type III tuition unit, the weighted average undergraduate resident tuition and required fees of two-year institutions of higher education, determined as provided by subsection (f) of this section.

(c) Each year, the board will establish the price at which each type of tuition unit may be purchased during the next sales period and the percentage of the total cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester credit hours for which each type of tuition unit may be redeemed at each general academic teaching institution and two-year institution.

(1) The percentage will be based on the total cost of required tuition and fees at a particular general academic teaching institution or two-year institution of higher education in relation to the amount determined for the institution with the highest cost or weighted average cost, as applicable.

(2) The purchase price established for each type of unit will be equal to the applicable cost of tuition and required fees as determined under this section for the most recent academic year that began before the beginning of the sales period.

(3) The sales period to which those prices apply expires on the first anniversary of the date the units become available for purchase at the prices established for that year.

(4) Revisions to the purchase price established for each type of unit will be published in the *Texas Register* and on the board's Internet web site and shall apply to prepaid tuition contracts entered into on or after the effective date for the new price set by the board.

(d) The board shall base the purchase price of a Type I tuition unit on one percent of the cost of the undergraduate resident tuition and required fees for the applicable academic year at the general academic teaching institution with the highest such tuition and fee cost for that academic year.

(e) The board shall base the purchase price of a Type II tuition unit on one percent of the cost of the Weighted Average tuition and required fees of general academic teaching institutions for the applicable academic year. That cost is determined by:

(1) for each general academic teaching institution, multiplying the average amount of the institution's undergraduate resident tuition and required fees for an academic year consisting of 30 semester credit hours by the number of full-time equivalent undergraduate resident students at that institution;

(2) adding together the products computed under paragraph (1) of this subsection, for each institution; and

(3) dividing the sum determined under paragraph (2) of this subsection, by the total number of full-time equivalent undergraduate resident students at all general academic teaching institutions.

(f) The board shall base the purchase price of a Type III tuition unit on one percent of the cost of the Weighted Average tuition and required fees of two-year institutions of higher education for the applicable academic year, disregarding any portion of the tuition charged by a public junior college to a resident of this state who does not reside within the taxing jurisdiction of the junior college. That cost is determined by:

(1) for each two-year institution of higher education, multiplying the average amount of the institution's undergraduate resident tuition and required fees for an academic year consisting of 30 semester credit hours by the number of full-time equivalent undergraduate resident students at that institution;

(2) adding together the products computed under paragraph (1) of this subsection, for each institution; and

(3) dividing the sum determined under paragraph (2) of this subsection, by the total number of full-time equivalent undergraduate resident students at all two-year institutions of higher education.

(g) For the purposes of determining the cost of tuition and required fees at an eligible educational institution, if the tuition and required fees vary at an institution by the particular college or program area at the institution or campus, the tuition and required fees for those programs will be considered separately in calculating the weighted average costs for Type II and III tuition units and the price for Type I tuition units.

(h) The board will establish, in compliance with Internal Revenue Code, §529, the minimum amount that the purchaser is required to pay under the contract on behalf of a single beneficiary. The initial minimums set forth in this subsection may be periodically changed by the board as needed to maintain compliance with Internal Revenue Code, §529, or to maintain the actuarial soundness of the fund.

(1) The minimum number of tuition units that must be purchased to establish a new prepaid tuition contract using a Pay-As-You-

Go purchase is one. Additional tuition units or fractional units may be added to an existing prepaid tuition contract by periodic Pay-As-You-Go purchases of a minimum of $15 each.

(2) The minimum number of tuition units that must be contracted for purchase to establish a new prepaid tuition contract using an installment plan is 25 Type I tuition units or 50 Type II or III tuition units. Additional tuition units or fractional units beyond the initial installment contract amount may be purchased by periodic Pay-As-You-Go purchases of a minimum of $15 each and credited to the same beneficiary in a new or amended contract under the existing enrollment. The purchaser does not have to wait until a new enrollment period to add tuition units through Pay-As-You-Go purchases.

(3) The minimum for an Automated Clearing House (ACH) payment is $15.

(i) The maximum number of tuition units that may be purchased and assigned to a single beneficiary is 600 Type I units or an approximate equivalent in Type II or III units.

(j) At the time of the establishment of the account to which a purchaser's prepaid tuition contract money is assigned, the board may impose an administrative fee not to exceed $25. The administrative fee may be imposed only once for an account established for the same purchaser and beneficiary, regardless of the number of account upgrades, contracts, or payment plans later established by the purchaser for that same beneficiary. Money from that fee will be used directly in maintaining the actuarial soundness of the fund as required by Education Code, §54.770.

§7.125. Redemption of Tuition Units.

(a) In accordance with this subchapter, when a beneficiary under a prepaid tuition contract redeems tuition units to pay costs of tuition and required fees, the board shall apply money in the Fund, in the amount provided by Education Code, §54.765, to pay all or the applicable portion of the costs of the beneficiary's tuition and required fees at the general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education in which the beneficiary enrolls.

(1) Subject to subsection (c)(2) of this section, and the other provisions of this section, a beneficiary may redeem any type of tuition unit or partial tuition unit for attendance at an institution described by this section.

(2) A general academic teaching institution or two-year institution of higher education shall accept the amount transferred to the institution under Education Code, §54.765(c), when the unit or units are redeemed as payment for all or the applicable portion of the beneficiary's tuition and required fees.

(b) To pay for the entire cost of undergraduate resident tuition and required fees for an academic year consisting of 30 semester credit hours:

(1) redemption of 100 Type I tuition units (or an approximate equivalent amount of Type II or III units) is required at the general academic teaching institution with the highest tuition and fee cost as described by Education Code, §54.753(d);

(2) redemption of 100 Type II tuition units (or an approximate equivalent amount of Type I or III units) is required at a general academic teaching institution with the applicable tuition and fee cost at the Weighted Average as described by Education Code, §54.753(e); and

(3) redemption of 100 Type III units (or an approximate equivalent amount of Type I or II units) is required at a two-year institution of higher education with the applicable tuition and fee cost at the Weighted Average as described by Education Code, §54.753(f).

(c) The number of tuition units that must be redeemed to pay for the entire cost of tuition and required fees for an academic year at another general academic teaching institution or two-year institution of higher education may be higher or lower:

(1) in proportion to the amount that the cost of tuition and required fees at that institution is higher or lower than the amount determined for the institution with the highest cost or Weighted Average cost, as applicable; or

(2) if a more or less valuable type of tuition unit is redeemed.

(d) To assist purchasers in determining the number of tuition units a beneficiary must redeem to cover the costs of tuition and required fees at general academic teaching institutions and two-year institutions of higher education, each year the board shall prepare a tuition unit redemption chart and will post the chart on the board's Internet website. The chart will show for each general academic teaching institution and for each two-year institution of higher education the number of each type of units purchased that year that would be required to cover the cost of tuition and required fees, based on an academic year consisting of 30 semester credit hours.

(1) The exact amount of tuition units that will be required to attend a particular institution will depend upon the cost of tuition and required fees at the institution in the year of redemption.

(2) For Type I tuition units, the number of units required to attend a particular institution may be less than anticipated when purchased if that institution's costs are less than the general academic teaching institution with the highest tuition and fee cost in the year of redemption.

(3) For Type II and III tuition units, the number of units required to attend a particular institution may be more or less than anticipated when purchased, and will depend on whether that institution's costs are higher or lower than the Weighted Average cost in the year of redemption. To the extent the cost of a particular institution is higher than the Weighted Average cost, the beneficiary will have to redeem additional tuition units to cover the higher cost, or pay the amount of the difference as provided in subsection (e) of this section.

(e) If a beneficiary redeems fewer tuition units of the type or combination of types necessary to pay the total cost of the beneficiary's tuition and required fees at the general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education at which the beneficiary enrolls, the beneficiary is responsible for paying the amount of the difference between the amount of tuition and required fees for which the beneficiary pays through the redemption of one or more tuition units and the total cost of the beneficiary's tuition and required fees at the institution.

(f) A beneficiary who redeems Type III tuition units (or an approximate equivalent amount of Type I or II units) to attend a public junior college and who does not reside within the taxing jurisdiction of the junior college is responsible for paying any portion of the tuition charged by the junior college to persons who do not reside within that taxing jurisdiction.

(g) A beneficiary or purchaser may not redeem a tuition unit earlier than the third anniversary of the date the unit was purchased.

(1) For the purpose of calculating the three-year holding period for an initial Pay-As-You-Go purchase, the first payment due date after initially enrolling in the program is considered the date the

initial units were purchased. These units may not be redeemed to pay for tuition and required fees until the third anniversary after the payment due date.

(2) For installment plan payments, the three-year holding period is considered met if the purchaser enrolls in the program and the first payment due date is at least three years prior to any redemption of tuition units, and the installment plan is paid in full before redemption of any of the tuition units.

(3) Additional Pay-As-You-Go purchases start a new three-year holding period as of the date payment is received for the additional tuition units.

(4) Under the three-year holding period, the latest date that a purchaser could purchase tuition units to pay for a semester of undergraduate education using Pay-As-You-Go purchases is three years prior to the date of expected redemption of the tuition units, subject to the requirement that all tuition units under the contract must be used not later than the10th anniversary of the date the beneficiary is projected to graduate from high school, not counting time spent by the beneficiary as an active duty member of the United States armed services.

(5) If all of the tuition units in an account do not meet the three-year holding period, the purchaser may redeem those units or fractional units that meet the three-year holding period, and redeem the remaining tuition units in the account when the three-year holding period is met.

(h) A beneficiary may redeem more than 100 tuition units in one academic year of the type or combination of types as needed to pay the total cost of the beneficiary's tuition and required fees at an eligible educational institution.

(i) To accommodate part-time attendance or the enrollment in more or less semester hours than the contemplated 30 credit hours in an academic year, the board may calculate a per credit hour tuition unit cost for the eligible educational institution applicable to the year of redemption, whereby the number of tuition units required to be redeemed shall be in proportion to the amount that tuition and required fees to be charged to the beneficiary by the eligible educational institution are more or less costly than the cost for attending two semesters of 15 credit hours each or 30 total credit hours in an academic year.

(j) A beneficiary may redeem fractional tuition units as needed to pay the cost of the beneficiary's tuition and required fees at an eligible educational institution.

§7.126. Prepaid Tuition Contract.

(a) To apply for enrollment in the program, a purchaser shall complete and submit a prepaid tuition contract form, approved by the board.

(b) A purchaser shall provide the following information on the form:

(1) the name, address, social security number or tax identification number of the purchaser;

(2) name, date of birth and social security number of the beneficiary, or in the case of a newborn, provide proof of an application for a social security number through the Social Security Administration;

(3) the date the beneficiary is projected to graduate from high school;

(4) a certification indicating that the purchaser is eligible to enroll in the program because either the beneficiary or a parent of the beneficiary is a resident of this state, as provided in §7.127 of this title (relating to Purchaser; Beneficiary);

(5) how the purchaser intends to finance the prepaid tuition contract;

(6) the name of any person who shall have a right of survivorship with respect to the purchaser's rights under the prepaid tuition contract;

(7) the annual gross household income of the purchaser;

(8) the highest educational level achieved by the purchaser;

(9) the race or ethnicity of the beneficiary; and

(10) how the purchaser first learned about the program.

(c) The prepaid tuition contract shall specify:

(1) the name, address, social security number or tax identification number of the purchaser;

(2) the terms under which the purchaser must pay any amounts owed under the contract;

(3) the consequences of default;

(4) the name, date of birth, and social security number of the beneficiary under the contract, provided that the board may allow additional time for the purchaser to obtain the social security number of a newborn;

(5) the terms under which another person may be substituted as the beneficiary;

(6) the date the beneficiary is projected to graduate from high school;

(7) the name of any person designated by the purchaser who shall have a right of survivorship with respect to purchaser's rights under the prepaid tuition contract;

(8) the name of any person who may terminate or cancel the contract;

(9) the terms under which the contract may be terminated or cancelled;

(10) the terms under which the purchaser is entitled to a refund;

(11) the method by which the amount of the refund is computed; and

(12) other provisions the board considers necessary or appropriate.

(d) The prepaid tuition contract may provide for the purchase of additional tuition units in subsequent years at the then-current price of the additional units.

(e) The prepaid tuition contract may also provide for the purchase of additional units in subsequent years through the Texas Save and Match program or through gift or other contributions by persons on behalf of a beneficiary, at the then-current price of the additional units at the time a contribution is made.

§7.127. Purchaser; Beneficiary.

(a) A purchaser may be any person who is permitted to be a purchaser under Internal Revenue Code, §529. The purchaser is not required to be a resident of this state, except as provided by subsection (d)(2) of this section.

(b) A purchaser is the owner of the account to which the purchaser's prepaid tuition contract money is assigned.

(c) A prepaid tuition contract may be established by one purchaser at the time it is established during enrollment, and thereafter

it shall have only one purchaser as owner except when owned by more than one individual, trust, estate, or UGMA/UTMA custodian, guardian, corporation, non-profit entity, or other legal entity (or any combination thereof) as a result of a transfer by operation of law.

(d) At the time the purchaser enters into a prepaid tuition contract, the beneficiary of the contract must be:

(1) a resident of this state; or

(2) a nonresident who is the child of a parent who is both a resident of this state and the purchaser of the contract.

(e) Notwithstanding any provision of Education Code, Chapter 54, Subchapter B, tuition and required fees charged by a general academic teaching institution or two-year institution of higher education that are paid for with tuition units, shall be determined as if the beneficiary of that contract were a resident student.

§7.128. Contract Payment.

(a) Payments under prepaid tuition contracts may be made in single or periodic Pay-As-You-Go payments, or under an installment plan, or both. The first payment due date for a newly enrolled purchaser is May 1, or as may be otherwise established by the board for subsequent enrollment periods.

(b) For payments under a contract to be made in installments over a period longer than one year, those payments can be made in annual, or monthly installments, in accordance with any permitted installment plans established by the board.

(1) Monthly installment plans shall include as a minimum: monthly installments to matriculation, a 10-year installment plan, and a 5-year installment plan.

(2) Annual installment plans include annual installments to matriculation, a 5-year installment plan, or a 10-year installment plan.

(3) Installment payments shall be due on the 1st of the month.

(4) Installment payments shall include an implied interest component at a rate set by the board to ensure the actuarial soundness of the fund.

(5) Installment plans must be paid in full prior to redemption of any units purchased by the installment plan.

(6) Under an installment plan, the basic unit price will not change over the life of the installment agreement, unless the agreement is later amended. The tuition unit price for new installment plans to be entered into during later enrollment periods will be adjusted by the board to reflect the then effective base tuition unit price and an updated implied interest component at a rate applicable to the new installment plans.

(7) A purchaser may initially establish both an installment plan contract and a Pay-As-You-Go contract when enrolling in the program, but the contract payments will be tracked separately. The purchaser will receive one combined account statement reflecting all payments under the different payment plans for the same purchaser and same beneficiary.

(c) There shall be no prepayment penalty imposed if a purchaser pays off an installment plan ahead of the schedule outlined in the prepaid tuition contract. Prepayments may result in a credit toward any monies due to reflect that the prepaid tuition contract was paid off early. Prepayments may be applied to reduce the outstanding contract balance, reduce the amount or number of monthly payments, or to make monthly payments ahead of schedule, at the option of the purchaser. In the absence of direction from the purchaser, prepayments will be applied to reduce the outstanding contract balance.

(d) The price for tuition units purchased using Pay-As-You-Go payments shall be the tuition unit price established by the board in accordance with §7.124 of this title (relating to Prepaid Tuition Units: Purchase; Assigned Value; Types; Price), for the sales period in which the tuition unit was purchased. If additional Pay-As-You-Go payments are made to purchase additional tuition units under a pre-existing prepaid tuition contract, the prepaid tuition contract shall be automatically amended to incorporate the additional tuition units purchased and the additional tuition units shall be credited to the existing account.

(e) A purchaser may make payments under a prepaid tuition contract by check, money order, electronic funds transfer, or payroll deduction. A purchaser may change payment methods. Credit cards may not be used to purchase tuition units.

(f) A purchaser may make payments under a prepaid tuition contract by payroll deduction, under procedures developed by the board and the comptroller to facilitate payments.

(1) To facilitate the establishment of payroll deductions by public employees, the board may extend the enrollment period as necessary to accommodate the employee benefit open enrollment period of the state or a political subdivision of the state during which payroll deductions are normally established.

(2) A purchaser electing to make payments under a prepaid tuition contract by payroll deduction shall specify whether the payments should be applied to pay for purchases under an installment plan or to make regular Pay-As-You-Go purchases.

(3) The purchase price for tuition units to be purchased by payroll deduction shall be based on:

(A) for payments under an installment plan, the price in effect for the sales period when the first tuition unit payment is or was received, regardless of the date the employee enrolls in payroll deduction; or

(B) for Pay-As-You-Go purchases, the price in effect for the sales period when each payment is actually received.

(g) Upgrades. Upgrades to an existing prepaid tuition unit account are allowed. An upgrade of an account is defined as adding additional tuition units to the account beyond the units specified in the original or existing prepaid tuition contract, by amending the contract or adding a new contract to the account.

(1) Pay-As-You-Go purchases of additional tuition units can be added to an existing Pay-As-You-Go contract without amending the contract. A new three-year holding period for tuition unit redemptions begins for new Pay-As-You-Go purchases.

(2) Pay-As-You-Go purchases of additional tuition units can be added to an existing enrollment that has a pre-existing installment plan contract, at any time during the sales period. However, Pay-As-You-Go purchases will be under a new contract and tracked separately from the installment plan purchases for implementation of the three-year holding period. The purchaser will receive a single account statement reflecting all payment plans under the account.

(3) The payment timeframe of an existing installment plan contract may be extended by contract amendment so long as the amended contract calls for payment in full prior to redemption of any of the tuition units. Other upgrades to an existing installment plan will also be performed by contract amendment.

(4) An installment plan contract may be added to an existing account that is set up as a Pay-As-You-Go plan contract, but only

during an enrollment period. The new installment plan will be considered a separate contract from the Pay-As-You-Go contract. The installment plan for additional units will be priced at the tuition unit prices in effect on the date when the plan manager receives and accepts a signed new contract from the purchaser to acquire the additional tuition units. Both payment plans will be reflected on a single account statement for the purchaser.

(5) A purchaser can have multiple payment plans in a single beneficiary account but the aggregate amount should not exceed the limit of 600 Type I tuition unit equivalents per beneficiary.

(h) Downgrades. A prepaid tuition unit contract may be downgraded without terminating the contract. A downgrade of an account is defined as agreeing to purchase fewer tuition units than originally specified in the original contract.

(i) The board may impose a fee for a late payment under a prepaid tuition contract.

(j) The purchaser will also bear the cost if a purchaser's attempted payment is refused by a financial institution.

§7.129. Deferred Use of Prepaid Credit Hours.

(a) A prepaid tuition contract will allow a beneficiary:

(1) to elect to pay from a source other than tuition units purchased under the contract the beneficiary's tuition and required fees for some or all of the tuition and required fees to which the beneficiary is entitled to payment under the contract; and

(2) to defer to a subsequent semester or other academic term the right to payment of the beneficiary's tuition and required fees by using tuition units remaining under the contract.

(b) This section does not affect the date on which a prepaid tuition contract terminates and does not give the beneficiary the right to a payment under the contract after termination of the contract.

§7.130. Change of Beneficiary.

(a) The purchaser of a prepaid tuition contract may designate a different beneficiary in place of the original beneficiary subject to the following conditions:

(1) the new beneficiary must meet the requirements of a beneficiary under §7.127 of this title (relating to Purchaser; Beneficiary), on the date the designation is changed;

(2) the new beneficiary must meet the requirements of Internal Revenue Code, §529 (such as being a member of the family of the former beneficiary, as defined by §529(e)(2)), to prevent the change of beneficiary from being treated as a distribution under that law;

(3) documentation must be submitted evidencing the relationship between the replacement beneficiary and the former beneficiary; and

(4) the terms of the contract may be adjusted so that the purchaser is required to pay the amount the purchaser would have been required to pay had the purchaser originally designated the new beneficiary as the beneficiary, taking into account any payments made before the date the designation is changed.

(b) Amounts paid before the beneficiary is changed shall be credited against amounts due at the time of the change. If the amount due at the time of the change is less than the amount paid prior to the change, such amount shall be credited against other amounts due through the term of the contract. If the amount paid prior to the change exceeds the amounts due through the term of the contract, the amount in excess of the amounts due shall be refunded to the purchaser.

(c) A purchaser must submit a properly signed request form approved by the board to change a beneficiary.

(d) A fee will not be imposed in connection with the designation of a new beneficiary under this subchapter.

(e) The purchaser of a prepaid tuition contract may not sell the contract.

§7.131. Purchaser Obligations and Requests.

(a) The purchaser is the person who is obligated to make payments under a prepaid tuition contract.

(b) Unless otherwise provided in this subchapter, the purchaser shall execute all prepaid tuition contract changes, conversions, transfers, terminations and refund requests.

(c) Any request to change a purchaser, change a beneficiary, or terminate a contract, must be submitted in a writing signed by the purchaser.

(d) A purchaser may designate in writing to the board on the enrollment form, or in a separate written request, a person with a right of survivorship in the event of the purchaser's death. However, until the rights under the contract pass to the designee, such designee has no right to direct decisions regarding contract changes, conversions, transfers or termination. Without limitation on the foregoing, the contract may be modified or terminated by, or refund disbursed to, the purchaser without the consent or authorization of a designee of survivorship rights. It is the purchaser's responsibility to update the survivorship information as appropriate.

§7.132. No Promise or Guarantee of Admission.

Nothing in this subchapter or the program should be construed as a promise or guarantee that a beneficiary will be:

(1) admitted to any public or private institution of higher education;

(2) admitted to a particular public or private institution of higher education;

(3) allowed to continue enrollment at a public or private institution of higher education; or

(4) graduated from a public or private institution of higher education.

§7.133. Contract Termination.

(a) The prepaid tuition contract may be terminated by the board:

(1) if the board determines that a purchaser has misrepresented residency, age, or other information required by the board in connection with the purchase of a contract;

(2) upon default for failure to pay any amounts due under the prepaid tuition contract prior to the expiration of any applicable grace periods as outlined in §7.134 of this title (relating to Default and Delinquency Conversion), unless such contract is converted to a Pay-As-You-Go contract; or

(3) if the purchaser fails to provide a valid social security account number or other applicable tax identification number for the purchaser or beneficiary within six months of enrollment.

(b) At its option, a purchaser may voluntarily cancel a prepaid tuition contract upon submission of a proper written request signed by the purchaser.

(c) A prepaid tuition contract terminates automatically on the tenth anniversary of the date the beneficiary was projected to graduate

from high school, as indicated by the purchaser in the enrollment contract.

(1) For the purpose of this subsection, the date the beneficiary is projected to graduate from high school includes the projected completion of a nontraditional secondary education, such as obtaining a general education development certificate, certificate of high school equivalency, or other credentials equivalent to a public high school degree, as indicated by the purchaser in the enrollment contract.

(2) Time spent as an active duty member of the United States armed services shall toll the ten-year anniversary period.

(3) If there is a change of beneficiary, the ten-year anniversary period is calculated based on the projected high school graduation date of the new beneficiary, as indicated in the enrollment contract or change of beneficiary form.

(4) If a contract has been terminated automatically, the plan manager will make a reasonable effort to locate the purchaser for the purpose of processing a refund.

(5) Until the purchaser is located or the purchaser applies for a refund, any unused monies from the account will remain in the Fund to support the actuarial soundness of the Fund.

(6) Once a contract has been terminated automatically, the account will cease to accrue any further net earnings as of the date the contract has been terminated.

(d) Refunds for cancellations or terminations will be governed by §7.135 of this title (relating to Refunds).

§7.134. Default and Delinquency Conversion.

(a) An account is subject to a late payment penalty for payments not received within 15 days of the payment due date.

(b) If no payments are received within 90 days of the first payment due date under a newly established account, the account is in default and will be cancelled.

(c) Failure to make any payment within 30, 60, or 90 days of the due date will result in the plan manager sending out a delinquency notice. A late payment penalty will be assessed in each instance, and the failure to make timely payment will be considered a default.

(d) If a default has not been cured within 90 days of the outstanding payment default date, the plan manager will send out a default notice advising the purchaser that the contract will be converted in 30 days if not properly cured by the purchaser.

(e) A purchaser may cure the default status of its prepaid tuition contract prior to the expiration of 120 days after the payment default date, subject to payment of all the delinquent amounts and any fees specified in the board's fee schedule. A contract that is not cured within 120 days after default shall be converted from an installment plan to a "Pay-As-You-Go" contract reflecting the number of tuition units paid for at the time of the conversion, less any outstanding fees. Any future purchases under the contract will reflect the prices in existence at the time of purchase. If the purchaser wishes to establish another installment plan at a later date after a contract has been converted, the purchaser must wait until the next enrollment period to do so.

(f) Failure to make timely payments for 6 consecutive or nonconsecutive months out of a 12 month period may also result in termination of the installment plan and conversion of the contract to a Pay-As-You-Go contract.

(g) Any refund in the event of a default shall be limited to the Reduced Refund Value as governed by the provisions related to contract termination in §7.135 of this title (relating to Refunds).

§7.135. Refunds.

(a) Refunds shall be made in accordance with provisions of this subchapter and the prepaid tuition contract, in a manner that will not adversely affect the tax status of the program under applicable provisions of Internal Revenue Code, §529. Refunds shall be governed by this subchapter as amended and Internal Revenue Code, §529, as in effect on the date the request for refund is submitted to the plan manager.

(b) Earnings may be paid with a refund only if the board determines that such payment will not adversely affect the actuarial soundness of the fund to pay the costs of program administration and operations and to meet the obligations of the program, as provided by Education Code, §54.770. It is the board's intent that refund amounts will be based on the definitions of "Refund Value," "Reduced Refund Value," or "Transfer Value," in §7.122 of this title (relating to Definitions), as applicable.

(c) The purchaser is entitled to a refund following cancellation or termination of a prepaid tuition contract, subject to any limitations imposed by Internal Revenue Code, §529, this subchapter, and the provisions of the prepaid tuition contract.

(d) Refunds shall be made to the purchaser of the prepaid tuition contract or, in the event of the purchaser's death, the person designated in the enrollment contract or other legal document to have the right of survivorship.

(e) Should a beneficiary terminate his/her student status on or after the date on which the institution denies refunds to students withdrawing for a particular semester, no refund shall be paid under the prepaid tuition contract for amounts relating to such semester.

(f) If the prepaid tuition contract is cancelled due to the death or disability of the beneficiary, or due to the receipt of a scholarship by the beneficiary, the purchaser may elect to change the beneficiary or apply for a refund of the Refund Value of the account, less any fees due and payable to the program under the board's fee schedule. The administrative fee will be retained by the program.

(g) If the beneficiary redeems fewer tuition units to pay the cost of tuition and required fees than the number of units purchased on behalf of the beneficiary under a prepaid tuition contract, other than to defer redemption as permitted in accordance with Education Code, §54.758, the purchaser may request a refund of the Refund Value of the account, less any fees due and payable under the contract, or transfer the remaining units to another beneficiary in accordance with this subchapter. The administrative fee will be retained by the board.

(h) If the beneficiary decides not to attend an institution of higher education within a reasonable amount of time after graduating from high school, the purchaser may elect to:

(1) change the beneficiary to another eligible beneficiary;

(2) hold the tuition units in the account until the 10th anniversary of the date the beneficiary was projected to graduate from high school, not counting time spent by the beneficiary as an active duty member of the United States armed services; or

(3) cancel the contract and request a refund of the Refund Value of the account, less any fees due and payable to the program. The administrative fee will be retained by the board.

(i) If the prepaid tuition contract is terminated due to misrepresentation, failure to provide required information or default, the purchaser may apply for a refund of the Reduced Refund Value of the ac-

count, less any fees due and payable to the program under the board's fee schedule. The administrative fee will be retained by the program.

(j) If the prepaid tuition contract is terminated automatically due to expiration of the 10 year anniversary period specified in §7.133(c) of this title (related to Contract Termination), the purchaser may apply for a refund of the Refund Value of the account, less any fees due and payable to the program under the board's fee schedule. However, the Refund Value will be limited to include only net earnings that have accrued under the contract up until the date the contract has been terminated automatically.

(k) In the event of any other cancellation request not addressed separately in this subchapter:

(1) if the cancellation request is received prior to the third anniversary of the first payment due date, the purchaser may apply for a refund of the Reduced Refund Value of the account. The administrative fee will be retained by the board; or

(2) if the cancellation request is received on or following the third anniversary of the first payment due date, the purchaser may apply for a refund of the Refund Value of the account (for those tuition units held for three or more years) or the Reduced Refund Value (for tuition units held less than three years). The administrative fee will be retained by the board.

(l) A lump sum refund may be made within 60 days of receiving a properly completed signed request for refund from the purchaser on a form promulgated by the plan manager, along with any required supporting documentation. Proof of death, disability or scholarship shall be in a form acceptable to the board.

(m) Notwithstanding any other provision of this section, the purchaser may designate in the prepaid tuition contract a person who shall have a right of survivorship with respect to purchaser's rights under a prepaid tuition contract; provided that such designation shall in no way affect the purchaser's ability to modify or terminate the contract and receive a refund without the consent or authorization of the designee. The purchaser may change the designation at any time by properly completing and submitting to the plan manager a right of survivorship form. The purchaser shall provide any other information requested by the board in support of the designation. It is the purchaser's responsibility to provide the plan manager with current information for survivorship rights.

(n) Distributions or transfers to another qualified tuition plan are governed by §7.137 of this title (relating to Transfers Among 529 Plans) and Education Code, §54.7671.

(o) Refunds or distributions that exceed the qualified higher education expenses incurred by the beneficiary during the year of the distribution, or other nonqualified withdrawals, may subject the distributee to income tax liability on any earnings and a tax penalty, as provided by Internal Revenue Code, §529.

(p) The number of refunds per year for a single purchaser shall be limited to twice in a 12 month period and shall be for a minimum of 100% of the purchaser's tuition units or in increments of 25 units, whichever is less.

§7.136. Transfers to Institutions on Redemptions of Tuition Units.

(a) When a beneficiary enrolls at a general academic teaching institution or two-year institution of higher education and notifies the institution that payment will be made by redeemed tuition units, the comptroller will arrange for the transfer to the institution of the appropriate amount specified under Education Code, §54.765(c), (d) and (e).

(b) When a beneficiary enrolls at a private or independent institution of higher education or accredited out-of-state institution of higher education, upon request the comptroller will arrange for the transfer to the institution of the amount specified under Education Code, §54.765(f).

§7.137. Transfers Among 529 Plans.

(a) A purchaser may transfer money between an account under this subchapter and an account under another plan established by this state or by another state or other authorized entity in accordance with Internal Revenue Code, §529, to the extent and in the manner authorized by that section.

(b) The value of the account at the time of transfer is the Transfer Value less any fees due and payable under the contract.

(c) To apply for a transfer, the purchaser shall complete and submit a transfer request form promulgated by the board not later than 30 days prior to the desired effective date of the transfer. Upon request by the executive director, plan manager, or other designee, the purchaser shall provide any additional information necessary to properly effectuate the transfer.

(d) Any fees that are due and payable to the program under the board's fee schedule must be paid by the purchaser prior to the transfer.

(e) Transfers to another qualified tuition program for the benefit of a designated beneficiary are limited to one per 12-month period or as otherwise provided by Internal Revenue Code, §529.

§7.138. Recordkeeping for Certain Rollover Contributions.

(a) In the case of a rollover contribution from another qualified tuition plan, a Coverdell education savings account, or a qualified U.S. Savings Bond, the purchaser shall provide appropriate documentation and certifications to the plan manager to identify the source of the contribution, confirm that the contribution is a qualified rollover under Internal Revenue Code, §529, and to specify that portion of the contribution that is attributable to the purchaser's contributions or investment in the previous account and that portion of the rollover contribution that is attributable to earnings that were accumulated in the previous account. Rollovers must be completed within 60 days to avoid potential tax consequences.

(b) For a purchase of tuition units using a contribution from a direct transfer between 529 programs, such as a trustee-to-trustee rollover, the purchaser must arrange for the distributing program to provide to the plan manager a statement setting forth the earnings portion of the rollover distribution within 30 days after the distribution or by January 10th of the year following the calendar year in which the rollover occurred, whichever is earlier.

(c) Upon receipt of the rollover contribution, the plan manager will add the earnings portion of the rollover contribution to the earnings recorded under the prepaid tuition contract to which the rollover contribution is made.

(d) Until the plan manager receives appropriate documentation showing the earnings portion of the rollover contribution, the board will treat the entire amount of the contribution as earnings in the prepaid tuition contract receiving the distribution.

(e) For the purpose of this section, "appropriate documentation" means:

(1) in the case of a rollover contribution from a Coverdell education savings account, an account statement issued by the financial institution that acted as trustee or custodian of the education savings account that shows basis and earnings in the account;

(2) in the case of a rollover contribution from the redemption of qualified U.S. Savings Bonds, an account statement or Form

1099-INT issued by the financial institution that redeemed the bonds showing interest from the redemption of the bonds;

(3) in the case of a rollover contribution from another 529 program, a statement issued by the distributing 529 program that shows the earnings portion of the distribution; or

(4) other documentation acceptable to the board supported by the purchaser's certification.

§7.139. Actuarial Soundness of Fund.

(a) The board will administer the fund in a manner that is sufficiently actuarially sound to pay the costs of program administration and operations and to meet the obligations of the program.

(b) The board will annually evaluate the actuarial soundness of the fund.

(c) The board may adjust the terms of subsequent prepaid tuition contracts as necessary to ensure the actuarial soundness of the fund.

§7.140. Suspension of New Enrollment; Program Modification or Termination.

(a) On the request of the comptroller as the comptroller considers necessary to ensure the actuarial soundness of the fund, the board may temporarily suspend new enrollment in the program.

(b) If the comptroller determines that the program is financially infeasible, the comptroller shall notify the governor and the legislature and recommend that the program be modified or terminated.

§7.141. Effect of Program Termination on Contract.

(a) A prepaid tuition contract remains in effect after the program is terminated if, when the program is terminated, the beneficiary:

(1) has been accepted by or is enrolled at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education; or

(2) is projected to graduate from high school not later than the third anniversary of the date the program is terminated.

(b) A prepaid tuition contract terminates when the program is terminated if the contract does not remain in effect under subsection (a) of this section.

(c) For contracts that are terminated pursuant to subsection (b) of this section, the purchaser is entitled to a refund of the Refund Value, less any fees that are past due and payable to the program under the board's fee schedule.

§7.142. Statement Regarding Status of Prepaid Tuition Contract.

(a) Not later than January 1 of each year, the plan manager shall make available online without charge to each purchaser a statement of:

(1) the amount paid by the purchaser under the prepaid tuition contract;

(2) the total number of each type of tuition unit covered by the contract at any one time;

(3) the number of each type of tuition unit remaining under the contract;

(4) the number of each type of tuition unit that has met the three-year holding period;

(5) the value of the purchasers' tuition units if redeemed at any general academic teaching institution or two-year institution of higher education designated for that year by the purchaser in the time and manner required by the board, not to exceed five institutions, with such information being provided in the tuition unit redemption chart developed pursuant to §7.125(d) of this title (relating to Redemption of Tuition Units); and

(6) any other information the board determines is necessary or appropriate.

(b) As soon as feasible after the end of the calendar year, the plan manager shall provide a written statement without charge to each purchaser reflecting the information listed in subsection (a) of this section, covering activities in the account through the end of the calendar year.

(c) The plan manager shall provide a separate accounting for each designated beneficiary.

(d) The plan manager shall also provide a statement if tuition units are redeemed under the contract during the year, and if any other distributions are made under the contract that calendar year.

§7.143. Texas Save and Match Program.

(a) The board establishes the Texas Save and Match program under which money paid by a purchaser under a prepaid tuition contract may be matched with:

(1) contributions made by another person or entity to the Texas Save and Match program and used to purchase additional tuition units on behalf of the beneficiary; and

(2) money appropriated by the legislature for the Texas Save and Match program and used to purchase additional tuition units on behalf of certain beneficiaries.

(b) Beneficiaries eligible to receive matching contributions from money appropriated by the legislature for the Texas Save and Match program include:

(1) beneficiaries whose annual household income is below the state median family income, adjusted for household size;

(2) beneficiaries whose enrollment in the program would promote the participation goals and targets of the most recent revision of "Closing the Gaps," the state's master plan for higher education; or

(3) beneficiaries who meet other criteria that may be established by board rule.

(c) If a beneficiary does not qualify for a matching contribution from money appropriated by the legislature, the beneficiary may still receive a matching contribution that has been made and designated by another person or entity for that beneficiary.

(d) The board, or the executive director on behalf of the board, may solicit and accept gifts, grants, loans, and other aid from any source to benefit the Texas Save and Match program, the prepaid tuition program, other beneficiaries under the prepaid tuition program, or as otherwise indicated by the donor. Donations received by the board or executive director may be used to purchase tuition units, award scholarships, facilitate marketing or other implementation of the prepaid tuition program, or to fulfill other donor intent.

(e) Application Process and Forms.

(1) A person or entity desiring to make a matching contribution to a prepaid tuition contract shall complete and submit a matching contribution form promulgated by the executive director, along with any requested supporting documentation, in accordance with the instructions on the form.

(2) If money is appropriated by the legislature for the Texas Save and Match program, the board will establish an application

process for purchasers to apply for matching contributions from the money appropriated for that purpose.

(f) Beneficiaries may be selected for a matching contribution by:

(1) the person or entity making the contribution; or

(2) the executive director, upon application of the purchaser demonstrating that the beneficiary meets the eligibility criteria established by the board under subsection (b) of this section, or by the executive director under subsection (d) of this section, to the extent of available funds for that purpose.

(g) The total amount paid and contributed to a prepaid tuition contract on behalf of a single beneficiary may not exceed the value equivalent of 600 Type I tuition units or any other limit that may be established by board policy and Internal Revenue Code, §529. The plan manager shall disallow any matching contributions on behalf of a designated beneficiary if the additional contribution would result in exceeding any limits established under this subsection.

(h) A person or entity making a matching contribution and any designated beneficiary may not directly or indirectly direct the investment of any contributions to, or earnings on, the account.

(i) Matching contribution payments may be made by check, money order, or electronic funds transfer.

(j) The plan manager shall keep records of contributions made under the Texas Save and Match program.

(k) Timing of matching contributions.

(1) Matching contributions may be made at any time after a purchaser has established an account within an enrollment period, to match any payments made by the purchaser during the sales period.

(2) Matching contributions may be used to help meet the minimum tuition unit purchases required to establish an account.

(l) The executive director shall develop operating procedures for the Texas Save and Match program.

§7.144. Gift Contributions.

(a) A person or entity may purchase tuition units for a beneficiary designated in an existing prepaid tuition contract by paying an amount referred to as a "gift contribution."

(b) A gift contribution may purchase additional tuition units or, in the case of a prepaid tuition contract using the installment plan for purchases, the gift contribution may be applied to current or future installment payments covered by the prepaid tuition contract.

(c) If the prepaid tuition contract uses an installment plan for purchases, the gift contribution will be applied to the next payment(s) due under the installment plan, unless the plan manager receives other written instructions from the purchaser of the existing prepaid tuition contract. Gift contributions may be used to reduce principal under an installment plan, reduce the amount or number of monthly payments, or to purchase additional lump sum tuition units, at the option of the purchaser.

(d) If a gift contribution results in an account balance that exceeds the value equivalent of 600 Type I tuition units or any other limit that might be imposed under Internal Revenue Code, §529, the excess contribution amount will be returned to the contributor.

(e) Persons or entities may make gift contributions to an established prepaid tuition account at any time, including outside the enrollment period.

(f) The tuition unit price for any lump sum gift contributions will be the tuition unit price in effect for the sales period when the payment is actually received by the plan manager. If the gift contribution is applied to make installment plan purchases that are due under the contract, the gift contribution will be applied at the price established in the prepaid tuition contract for the installment payments.

(g) Tuition units purchased by gift contribution and any installment payments made by gift contribution that are credited to an existing prepaid tuition contract account will be owned by, and subject to the direction and control of, the purchaser of the existing prepaid tuition contract. Such tuition units will not be owned by, or under the direction or control of, the person or entity making the gift contribution.

(h) A person or entity making a gift contribution and any designated beneficiary may not directly or indirectly direct the investment of any contributions to, or earnings on, the account.

§7.145. Marketing Considerations.

(a) The program will be marketed in a manner that promotes the participation goals and targets of the most recent revision of "Closing the Gaps," the state's master plan for higher education.

(b) The program will seek strategies that promote enrollment in the program by persons likely to qualify for federal earned income tax credits.

(c) The executive director may establish workgroups as necessary to identify enrollment barriers, solicit input from key stakeholders, and recommend initiatives to enhance program participation, especially for purchasers and beneficiaries eligible for the Texas Save and Match program. The workgroups may include, without limitation, representatives from such agencies as the Health and Human Services Commission, Texas Workforce Commission, the Texas Higher Education Coordinating Board, other agencies, community organizations, and constituencies interested in promoting higher education.

(d) The executive director may use employees of the executive director to conduct or assist in conducting marketing efforts on behalf of the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2008.

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Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: August 27, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 475-0387

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 29. BENEFITS

SUBCHAPTER D. PLAN LIMITATIONS

34 TAC §§29.50 - 29.52, 29.55

The Board of Trustees (Board) of the Teacher Retirement System of Texas ("TRS") adopts the following amended rules regarding plan limitations based on the federal Internal Revenue Code,

as well as federal regulations and guidance: §29.50 relating to definitions; §29.51 relating to plan limitations on retirement benefits; §29.52 relating to adjustment to annual benefit limit; and §29.55 relating to limitation on contributions. The amended sections are adopted with changes to the proposed text as published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4493). The changes do not require a resubmission of the proposed rules.

With recent changes to federal laws and regulations governing qualified retirement plans, including the Pension Protection Act of 2006 and new regulations implementing Section 415 of the Internal Revenue Code of 1986, as amended, it is necessary to update the TRS plan rules governing limitations on annual benefits and contributions to reflect current federal requirements. The adopted amendments update the TRS plan rules to reflect current federal provisions and also to describe in more detail the standards and processes by which TRS applies the limitations to annual benefits and to contributions made for the purchase of special service credit.

The adopted amendments to §29.50 add a definition for the term "limitation year" to clarify that the TRS plan year of September 1 through August 31 also is the limitation year for the purpose of applying the annual limitations on benefits and contributions. The amendments also clarify the applicability of the annual benefit limits to benefits other than service retirement benefits, including disability retirement or pre-retirement member death benefits, and modify definitions to more specifically reference applicable federal regulations. Changes to the text of the proposed amended rule as published are made primarily to further clarify how the federal limitations apply to the TRS retirement plan. The changes include the following: inserting "post-tax" in relation to member contributions to clarify treatment of the portion of an accrued benefit derived from such contributions; clarifying that a lump sum incidental death benefit is not part of the "annual benefit"; clarifying that the definition of "annual compensation" is for the purpose of applying the plan limitations, not for computing benefits under the plan; and clarifying how "back pay" within the meaning of U.S Treasury Department regulations may be treated as "annual compensation" for limitation purposes.

The adopted amendments to §29.51 add the effective date of the federal limits on benefits and contributions and modify existing language to include a general reference to contribution limitations. Changes to the text of the proposed amended rule as published are made primarily to further clarify how the federal limitations apply to the TRS plan. The changes include the following: clarifying that annual additions with respect to a member must be aggregated for all defined contribution plans maintained by the member's Texas public education employer and that aggregated contributions must be reduced to the extent necessary for compliance; making minor wording changes for clarity; and expressly stating that a repayment of refunded contributions need not be taken into account for purposes of Section 415 of the Internal Revenue Code.

The adopted amendments to §29.52 add the effective date for the applicable federal limits on benefits, delete obsolete provisions no longer applicable under federal law, and add detailed provisions regarding how the benefit limitation, expressed as a straight life form of annuity (i.e., a standard annuity), is to be adjusted if the form of benefit payable to the TRS recipient is not a straight life annuity. The adopted amendments alternatively add detailed provisions regarding how the form of benefit payable, if not a straight life annuity (i.e., a standard annuity), is to be adjusted to an actuarially equivalent straight life annuity for the purpose of comparing the benefit payable to the federal limitation, which is expressed as a straight life annuity. Changes to the text of the proposed amended rule as published are made primarily to enhance the logical organization of the section, to eliminate possible confusion about inapplicable provisions, and to clarify other provisions and internal references. The changes include the following: in subsection (a)(1), specifically stating the annual benefit limit of $160,000 prior to annual adjustments; deleting subsection (a)(2) regarding actuarial adjustments to the limit for retirements after age 65 because those are not relevant to the TRS plan at this time and the provision is potentially confusing; revising subsection (g) to more closely match applicable federal regulations and to delete text moved to new subsection (j); making minor wording changes in subsection (h)(1) for clarity; and adding new subsection (j) based on text deleted from subsection (g), with the addition of appropriate internal references for clarity.

The adopted amendments to §29.55 expressly set forth the limitations on contributions for service credit purchases and the authority of TRS to refuse to permit a service credit purchase if the amount of the contribution would exceed the applicable limit. The adopted amendments also set forth in detail the Internal Revenue Code provisions that permit certain service credit to be considered "permissive" service credit and thus subject to more favorable contribution limitations than service credit that is not "permissive" service credit. The amendments reflect the changes under the Pension Protection Act of 2006 to the definition of "permissive" service credit. Additionally, the amendments expressly provide that only service credit authorized to be purchased under the TRS retirement plan may be purchased; the description of what is considered permissive service credit under federal tax law does not expand the types of service credit available for purchase under the TRS retirement plan. Changes to the text of the proposed amended rule as published are made primarily to make improvements to wording for clarity. The changes include the following: correcting a reference in subsection (d) to a "subsection" by changing the reference to a "section"; adding a reference in subsection (f) to service credit for work experience by a career or technology teacher, which was inadvertently omitted from the list of types of TRS service credit that are considered permissive service credit under the rule; and, in subsection (g), rewording the subsection for clarity.

No comments were received regarding the proposed amended sections.

Statutory Authority: The amended rules are adopted under the following statutes: §823.006, Government Code, which authorizes the retirement system to limit the purchase of service credit to the extent required by applicable limits on the amount of annual contributions a participant may make to a qualified plan under Sections 401(a) and 415(c), Internal Revenue Code of 1986; §825.102, Government Code, which authorizes the Board to adopt rules for the administration of the funds of the retirement system; and §825.506, Government Code, which authorizes the Board of Trustees to adopt rules to ensure that benefits paid to a retiree, or to a beneficiary of a member or retiree, do not exceed the limits provided by §415 of the Internal Revenue Code of 1986.

§29.50. Definitions.

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

(1) Annual additions--The sum of the following amounts credited to a member's account under any defined contribution plan (or a portion of a defined benefit plan treated as a defined contribution plan) maintained by the employer for the plan year:

(A) employer contributions;

(B) member contributions, including member contributions to a qualified defined benefit plan that have not been picked up under §414(h) of the Internal Revenue Code of 1986 but not including rollover contributions;

(C) forfeitures; and

(D) amounts allocated after March 31, 1984, to an individual medical benefit account, as defined in §415(1)(2) of the Internal Revenue Code, that is part of a pension or annuity plan maintained by the employer. Annual additions do not include amounts described in §415(1)(2) of that code for the purpose of computing the percentage limitation described in §415(c)(1)(B) of that code. For any plan year beginning before January 1, 1987, only that portion of the member contributions equal to the lesser of those member contributions in excess of 6.0% of annual compensation or one-half of the member's contributions to any qualified plan maintained by the employer is treated as annual additions.

(2) Annual benefit--A service retirement, disability retirement, or pre-retirement member death benefit calculated on the basis of service and average compensation under Tex. Gov't Code §824.203 or §824.204, whether paid to a retiree or to a beneficiary, and payable annually in the form of a straight life annuity (ignoring that portion of any joint and survivor annuity which constitutes a qualified joint and survivor annuity, as defined in §417 of the Internal Revenue Code) with no ancillary or incidental benefits or rollover contributions and exclusive of any portion of the benefit derived from post-tax member contributions or other contributions that are treated as a separate defined contribution plan under §417 of the Internal Revenue Code (but inclusive of any such contributions that are picked up by the employer pursuant to §414(h)(2) of the Internal Revenue Code, or that otherwise are not treated as a separate defined contribution plan). A lump sum incidental death benefit is not part of the annual benefit. If the benefit is payable in any other form, the determination as to whether the limitation described in §29.51 of this title (relating to Plan Limitations on Annual Benefits and Member Contributions) or §29.52 of this title (relating to Adjustment to Annual Benefit Limit) has been satisfied shall be made by adjusting such benefit so that it is actuarially equivalent to the annual benefit described in this section in accordance with the regulations issued by the U.S. secretary of the treasury.

(3) Annual compensation--For purposes of only applying plan limitations and not for computing benefits under Tex. Gov't Code §822.201 or 34 Tex. Admin. Code ch. 25, subch's B (relating to Compensation) and C (relating to Unreported Service or Compensation), all wages within the meaning of §3401(a) of the Internal Revenue Code relating to income tax withholding at source, but determined without regard to any rules that limit the remuneration included in wages based on the nature or location of the services performed and without regard to whether such wages are treated as compensation under any other provision of this chapter. For purposes of applying plan limitations, the definition of compensation where applicable will be compensation defined in Treasury Regulation §1.415(c)-2(d)(3), or successor regulations; provided, however, that the definition of compensation will exclude member contributions picked up under §414(h)(2) of the Internal Revenue Code, and for plan years beginning after December 31, 1997, compensation will include the amount of any elective deferrals, as defined in §402(g)(3) of the Internal Revenue Code and any amounts contributed or deferred by the employer at the election of the member and which is not includible in the gross income of the member by reason of §125 or §457 of the Internal Revenue Code, and for plan years beginning on and after January 1, 2001, §132(f)(4) of that code. Back pay, within the meaning of Treasury Regulation §1.415(c)-2(g)(8) shall be treated as compensation for the limitation year to which the back pay relates to the extent the back pay represents wages and compensation that would otherwise be included under this definition. For a limitation year beginning after January 1, 2007, compensation for the limitation year will also include compensation paid by the later of 2 1/2 months after an employee's severance from employment or the end of the limitation year that includes the date of the employee's severance from employment if

(A) the payment is regular compensation for services during the employee's regular working hours, or compensation for services outside the employee's regular working hours (such as overtime or shift differential), commissions, bonuses, or other similar payments, and absent a severance from employment the payments would have been paid to the employee while the employee continued in employment with the employer; or

(B) the payment is for unused accrued bona fide sick leave, vacation, or other leave that the employee would have been able to use if employment had continued.

(4) Code--The Internal Revenue Code of 1986, as amended.

(5) Defined contribution plan--A plan described in §414(i) of the Internal Revenue Code and, solely for purposes of this subchapter, employee contributions to any other qualified plan maintained by the employer, other than any picked-up contributions.

(6) Employer--The agents, agencies or political subdivisions of the State responsible for education, including the governing board of any school district created under the laws of the State, any county school board, the board of trustees, the State Board of Education, the Texas Education Agency, the board of regents of any college or university, or any other legally constituted board or agency of any public school.

(7) Limitation year--The limitation year for purposes of §415 of the Internal Revenue Code beginning on September 1 of each year and ending on the following August 31.

(8) Member contributions--Those contributions within the meaning of §411(c)(2)(C) of the Internal Revenue Code, but not any contributions picked up by the employer within the meaning of §414(h)(2) of that code.

(9) Plan year--The plan's accounting year beginning on September 1 of each year and ending on the following August 31.

§29.51. Plan Limitations on Annual Benefits and Member Contributions.

(a) Effective as of July 1, 1989, and notwithstanding any other plan provision in statute or rule, member contributions paid to, and annual benefits paid from, TRS may not exceed the annual limits on contributions and benefits, respectively, allowed by §415 of the Internal Revenue Code.

(b) Benefits provided to a member under this plan and under any other defined benefit plan or plans maintained by the member's employer under this plan shall be aggregated for purposes of determining whether the limitations in subsection (a) of this section are met. Annual additions with respect to a member under this plan and under any other defined contribution plan maintained by the member's employer under this plan shall be aggregated for purposes of determining whether the limitations of subsection (a) of this section are met. If the aggregate

benefits otherwise payable to any member from this plan and any other defined benefit plan or plans maintained by the employer would otherwise exceed the limitations of subsection (a) of this section, reductions in benefits and contributions are required to be made to the other plan to the extent necessary to enable each plan or plans to satisfy those limitations.

(c) A repayment of contributions, including interest, and payment of applicable reinstatement fees to the retirement system with respect to an amount previously refunded upon a cancellation of service credit under the retirement system shall not be taken into account for purposes of §415 of the Internal Revenue Code, in accordance with applicable Treasury regulations.

§29.52. Adjustment to Annual Benefit Limit.

(a) Before July 1, 1995, a member may not receive an annual benefit that exceeds the dollar amount and salary limits specified in §415(b) of the Internal Revenue Code, subject to the applicable adjustments in that section. On or after July 1, 1995, a member may not receive an annual benefit that exceeds the dollar amount specified in §415(b)(1)(A) of that code, subject to the applicable adjustments in §415(b) of that code.

(1) If the annual benefit begins before the member attains age 62, the Internal Revenue Code §415(b)(1)(A) limitation, as adjusted, shall be reduced in a manner prescribed by the U.S. secretary of the treasury pursuant to the provisions of §415 of the Internal Revenue Code, so that such limit (as so reduced) equals an annual straight life benefit (when such retirement income benefit begins) which is equivalent to a $160,000 (as adjusted) annual benefit beginning at age 62.

(2) The portion of a member's benefit that is attributable to the member's own contributions (other than picked-up contributions) is not part of the annual benefit subject to the limitations of this section. Instead, the amount of those member contributions is treated as an annual addition to a qualified defined contribution plan maintained by the employer.

(b) The dollar limitation on annual benefits provided by this section shall be adjusted annually as provided by §415(d) of the Internal Revenue Code and the regulations prescribed by the U.S. secretary of the treasury to reflect cost of living adjustments. The adjusted limitation is effective for TRS benefits for the TRS plan year that begins on or after the earliest allowable effective date of the changes under federal regulations.

(c) The limitation provided by this section for a member who has separated from service with a vested right to a pension shall be adjusted annually as provided by §415(d) of the Internal Revenue Code and the regulations prescribed by the U.S. secretary of the treasury. On and after July 1, 1995, in no event shall a member's annual benefit payable from TRS in any limitation year be greater than the limit applicable at the annuity starting date, as increased in subsequent years pursuant to §415(d) of that code and the regulations thereunder.

(d) If the form of benefit is not a straight life (standard annuity) or qualified joint and survivor annuity (Option 1, 2, or 5 with a spousal beneficiary), then the applicable limit described in subsection (c) of this section shall be determined by either reducing the §415(b) of the Internal Revenue Code limit applicable at the annuity starting date or adjusting the form of benefit to an actuarially equivalent straight life annuity benefit determined using the following assumptions that take into account the death benefits under the form of benefit:

(1) For a benefit paid in a form to which §417(e)(3) of the Internal Revenue Code does not apply (Option 1, 2, or 5 with a nonspouse beneficiary, or Option 3 or 4), the actuarially equivalent straight life annuity benefit which is the greater of (or the reduced §415(b) of that code limit applicable at the annuity starting date which is the lesser of when adjusted in accordance with the following assumptions):

(A) The annual amount of the straight life annuity (if any) payable to the participant under the plan commencing at the same annuity starting date as the form of benefit payable to the participant; or

(B) The annual amount of the straight life annuity commencing at the same annuity starting date that has the same actuarial present value as the form of benefit payable to the participant, computed using a 5 percent interest assumption (or the applicable statutory interest assumption) and the applicable mortality table described in §1.417(e)-1(d)(2) of the Income Tax Regulations (the mortality table specified in Revenue Ruling 98-1 (prior to 2003) or Revenue Ruling 2001-62 or any subsequent Revenue Ruling modifying the applicable provisions of Revenue Ruling 2001-62); or

(2) For a benefit paid in a form to which §417(e)(3) of the Internal Revenue Code applies (the deferred retirement option plan (DROP) or partial lump sum option (PLSO) portion of the benefit), the actuarially equivalent straight life annuity benefit which is the greatest of (or the reduced §415(b) of that code limit applicable at the annuity starting date which is the least of when adjusted in accordance with the following assumptions):

(A) The annual amount of the straight life annuity commencing at the annuity starting date that has the same actuarial present value as the particular form of benefit payable, computed using the interest rate and mortality table, or tabular factor, specified in the plan for actuarial experience;

(B) The annual amount of the straight life annuity commencing at the annuity starting date that has the same actuarial present value as the particular form of benefit payable, computed using a 5.5 percent interest assumption (or the applicable statutory interest assumption) and the applicable mortality table for the distribution under §1.417(e)-1(d)(2) of the Income Tax Regulations (the mortality table specified in Revenue Ruling 98-1 (prior to 2003) or Revenue Ruling 2001-62 or any subsequent Revenue Ruling modifying the applicable provisions of Revenue Ruling 2001-62); or

(C) The annual amount of the straight life annuity commencing at the annuity starting date that has the same actuarial present value as the particular form of benefit payable (computed using the applicable interest rate for the distribution under §1.417(e)-1(d)(3) of the Income Tax Regulations (the 30-year Treasury rate (prior to July 1, 2007, using the rate in effect for the month prior to retirement, and on and after July 1, 2007, using the rate in effect for the first day of the plan year with a one-year stabilization period)) and the applicable mortality table for the distribution under §1.417(e)-1(d)(2) of the regulations (the mortality table specified in Revenue Ruling 98-1 (prior to 2003) or Revenue Ruling 2001-62 or any subsequent Revenue Ruling modifying the applicable provisions of Revenue Ruling 2001-62), divided by 1.05.

(e) The following interest rate assumptions shall be used in computing the limitations under this section. For the purpose of determining the portion of the annual benefit that is attributable to member contributions, the factors described in §411(c)(2)(B) and (C) of the Internal Revenue Code and the regulations thereunder shall be used even though §411 of that code does not otherwise apply to the retirement system.

(f) An adjustment under §415(d) of that code may not be taken into account before the year for which that adjustment first takes effect.

(g) No adjustment is required for the value of qualified joint and survivor annuity benefits, disability retirement benefits, pre-retirement death benefits, post retirement medical benefits, or any other benefit not required under §415(b)(2) of the Internal Revenue Code and regulations thereunder to be taken into account for purposes of the limitation of §415(b)(1) of that Code.

(h) This plan may still pay an annual benefit to any member in excess of the member's maximum annual benefit otherwise allowed if:

(1) the member's annual benefit derived from the employer's contributions under all defined benefit plans of the employer subject to the limitations of §25.51 and §415 of the Internal Revenue Code does not in the aggregate exceed $10,000 for the limitation year or for any prior limitation year; and

(2) the member has not at any time participated in a defined contribution plan maintained by the employer. For purposes of this subsection, member contributions to the plan are not considered a separate defined contribution plan maintained by the employer.

(i) If a member has fewer than ten years of actual membership service credit in the plan at the time the member begins to receive benefits under the plan, the Internal Revenue Code §415(b)(1)(A) limitation, as adjusted, shall be reduced by multiplying the limitation by a fraction in which the numerator is the number of years of service credit and the denominator is 10; provided, however, that the fraction may not be less than one-tenth. If the member has fewer than ten years of employment with the employer, the $10,000 limitation of subsection (h) of this section shall be reduced in the same manner as provided in the preceding sentence, except the numerator shall be the number of actual years of employment with the employer rather than number of years of service credit.

(j) For a disability retirement benefit or a pre-retirement death benefit, the adjustment in subsection (a)(1) of this section is not required for payment made with respect to a member before the member reaches or would have reached age 62, and the adjustment in subsection (i) of this section is not required for payment made with respect to a member with fewer than ten years of service credit under TRS.

§29.55. Limitation on Contributions.

(a) Notwithstanding any other provision of law to the contrary, TRS may refuse a request by a member to make a contribution to the retirement system for the purchase of service credit if the amount of the contribution would exceed the limits provided in §415 of the Internal Revenue Code.

(b) A member may use an installment payment plan to the extent permitted under applicable law to avoid making a contribution in excess of the limits under §415(c) or §415(n) of the Internal Revenue Code.

(c) Effective for permissive service credit contributions made in limitation years beginning after December 31, 1997, if a member makes one or more contributions to purchase permissive service credit under TRS, then the requirements of §415 of the Internal Revenue Code will be treated as met only if:

(1) the requirements of §415(b) of the Internal Revenue Code are met, determined by treating the accrued benefit derived from all such contributions as an annual benefit for purposes of §415(b) of that code; or

(2) the requirements of §415(c) of the Internal Revenue Code are met, determined by treating all such contributions as annual additions for purposes of §415(c) of that code.

(d) For purposes of applying subsection (c)(1) of this section, the retirement system will not fail to meet the reduced limit under §415(b)(2)(C) of the Internal Revenue Code solely by reason of this section, and for purposes of applying subsection (c)(2) of this section, the system will not fail to meet the percentage limitation under §415(c)(1)(B) of that code solely by reason of this section.

(e) For purposes of subsection (c) of this section the term "permissive service credit" means service credit:

(1) specifically authorized by state law and recognized by the retirement system for purposes of calculating a member's benefit under the system;

(2) which such member has not received under the system, prior to the purchase of such service credit; and

(3) which such member may receive only by making a voluntary additional contribution, in an amount determined under the System, which does not exceed the amount necessary to fund the benefit attributable to such service credit.

(f) Effective for permissive service credit contributions made in years beginning after December 31, 1997, such term may include service credit for periods for which there is no performance of service, and, notwithstanding subsection (e)(2) of this section, may include service credited in order to provide an increased benefit for service credit which a member is receiving under the System. Permissive service credit shall include:

(1) military service credit under Tex. Gov't Code §823.302;

(2) developmental leave service credit under Tex. Gov't Code §823.402;

(3) membership waiting period service credit under Tex. Gov't Code §823.406;

(4) substitute service credit under §25.4 of this title (relating to Substitutes);

(5) out-of-state service credit under Tex. Gov't Code §823.401;

(6) unused leave service credit under Tex. Gov't Code §823.403;

(7) service credit for work experience by a career or technology teacher; and

(8) "additional service credit" under the service credit purchase option authorized by Tex. Gov't Code §823.405.

(g) For the retirement system to meet the requirements of subsection (c) of this section:

(1) more than five years of nonqualified service credit shall not be taken into account for purposes of subsection (c) of this section; and

(2) no nonqualified service credit shall be taken into account under subsection (c) of this section before the member has at least five years of participation under the system.

(h) For purposes of subsection (g) of this section, effective for permissive service credit contributions made in years beginning after December 31, 1997, the term "nonqualified service credit" means permissive service credit other than that allowed with respect to:

(1) service (including parental, medical, sabbatical, and similar leave) as an employee of the government of the United States, any state or political subdivision thereof, or any agency or instrumentality of any of the foregoing (other than military service or service

for credit which was obtained as a result of a repayment described in §415(k)(3) of the Internal Revenue Code);

(2) service (including parental, medical, sabbatical, and similar leave) as an employee (other than as an employee described in paragraph (1) of this subsection of an education organization described in §170(b)(1)(A)(ii) of the Internal Revenue Code which is a public, private, or sectarian school which provides elementary or secondary education (through grade 12), or a comparable level of education, as determined under the applicable law of the jurisdiction in which the service was performed;

(3) service as an employee of an association of employees who are described in paragraph (1) of this subsection; or

(4) military service (other than qualified military service under §414(u) of the Internal Revenue Code) recognized by TRS.

(i) In the case of service described in subsection (h)(1) - (3) of this section, such service will be nonqualified service if recognition of such service would cause a member to receive a retirement benefit for the same service under more than one plan. The Internal Revenue Code standards for qualified permissive service credit as reflected in subsection (h)(1) - (4) of this section do not expand the authorized types of service credit available to be purchased under the TRS plan.

(j) In the case of a trustee-to-trustee transfer after December 31, 2001, to which §403(b)(13)(A) or §457(e)(17)(A) of the Internal Revenue Code applies (without regard to whether the transfer is made between plans maintained by the same employer):

(1) the limitations of subsection (g) of this section will not apply in determining whether the transfer is for the purchase of permissive service credit; and

(2) the distribution rules applicable under federal law to TRS will apply to such amounts and any benefits attributable to such amounts.

(k) For an eligible member, the limitation of §415(c)(1) of the Internal Revenue Code shall not be applied to reduce the amount of permissive service credit which may be purchased to an amount less than the amount which was allowed to be purchased under the terms of the statutes and rules applicable to TRS as in effect on August 5, 1997. For purposes of this subsection, an eligible member is an individual who first became a member of TRS before September 1, 2000.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2008.

TRD-200804091
Pattie Featherston
Chief Operating Officer
Teacher Retirement System of Texas
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Proposal publication date: June 6, 2008
For further information, please call: (512) 542-6438

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE PROBATION COMMISSION

CHAPTER 341. TEXAS JUVENILE PROBATION COMMISSION STANDARDS

SUBCHAPTER I. ELECTRONIC DATA INTERCHANGE SPECIFICATIONS

37 TAC §341.60

The Texas Juvenile Probation Commission (TJPC) adopts, without changes, amendments to §341.60 relating to electronic data interchange specifications as published in the June 13, 2008 issue of the *Texas Register* (33 TexReg 4660) and will not be republished.

TJPC adopts this rule in an effort to reflect the increase in the number and types of programs operated by juvenile departments as well as a need to more precisely distinguish the characteristics of a juvenile, their disposition and the services they receive.

No public comment was received.

This standard is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this new standard.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2008.

TRD-200804282
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: August 31, 2008
Proposal publication date: June 13, 2008
For further information, please call: (512) 424-6710

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 101. ADMINISTRATIVE RULES AND PROCEDURES

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), adopts amendments and a repeal to the DARS rules in Title 40, Part 2, Chapter 101, Administrative Rules and Procedures, Subchapters A, B, C, D, F, and I.

Specifically, DARS is adopting amendments to Subchapter A, General Rules, §101.101, Definitions; Subchapter B, Purchase of Goods and Services, §101.201, Purchase for Individual Consumers, and §101.203, Standards for Facilities and Providers of Services; Subchapter C, Historically Underutilized Businesses, §101.551, Purpose, §101.553, Applicability, §101.555, Definitions, and §101.557, Adoption of Rules; Subchapter D, Councils and Committees, §101.601, Rehabilitation Council of Texas, §101.603, State Independent Living Council, and

§101.605, Early Childhood Intervention Advisory Committee. DARS adopts the amendments to Subchapter F that rename the subchapter "General Rules," remove the Division 2 designation and division title, but leave the Subchapter F rules unchanged. Additionally, DARS is adopting the repeal of Subchapter I, Administrative Rules and Procedures Pertaining to Early Childhood Intervention Services, Division 2, Agency Administration, §101.5641, Employee Training and Education. Sections 101.101, 101.201, 101.203, 101.551, 101.555, 101.557, 101.601, 101.603, 101.605 and 101.5641 are adopted without changes to the proposal as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4825) and will not be republished. Editorial changes were made to clarify the citations in §101.553, so this section is adopted with changes to the proposed text as published in the June 20, 2008, issue of the *Texas Register*. The text of the rule will be republished.

The amendments and repeal are adopted pursuant to the DARS four-year rule review of Chapter 101 as required by Texas Government Code, §2001.039. In accordance with Texas Government Code §2001.039, DARS conducted its four-year review of Chapter 101. As a result of the review, DARS determined that the reasons for initially adopting these rules continue to exist. However, the review identified areas where amendments and repeal were needed to update and/or clarify legal references and citations, remove obsolete language, and provide further clarification of rules provisions. Notice of the proposed rules review of Chapter 101 was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8863). Elsewhere in this issue of the *Texas Register*, DARS contemporaneously adopts the rule review of Chapter 101. Note that Subchapter E, Appeals and Hearing Procedures for Vocational Rehabilitation and Independent Living Programs, of Chapter 101, was also included in the notice of intent to review Chapter 101. As a result of the rules review of Subchapter E, HHSC has proposed to repeal and replace Subchapter E with new Subchapter J which is being adopted contemporaneously elsewhere in this issue of the *Texas Register*.

The following statutes and regulations authorize the adopted amendments and repeal: The Rehabilitation Act of 1973, as amended, 29 U.S.C. §701 et seq.; the regulations of the Department of Education, Rehabilitation Services Administration, 34 C.F.R. Parts 361, 363, 364, 365, 366, and 367, as amended; Texas Human Resources Code, Chapters 73, 81, 82, 91, 111, 116, and 117; Texas Health and Safety Code, Chapter 432; the Individuals with Disabilities Education Act, as amended, 20 U.S.C. §1400 et seq. and implementing regulations; 29 U.S.C. §§725 and 796d; 42 U.S.C. §§300x-3(a), 300x-4(e), and 15025; 34 C.F.R. Part 303, Subpart G; and Texas Government Code, Chapters 411, 551, 552, 559, 2001, 2155, and 2161.

No comments were received regarding adoption of the rules.

SUBCHAPTER A. GENERAL RULES

40 TAC §101.101

The amendment is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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SUBCHAPTER B. PURCHASE OF GOODS AND SERVICES

40 TAC §101.201, §101.203

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 424-4050

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SUBCHAPTER C. HISTORICALLY UNDERUTILIZED BUSINESSES

40 TAC §§101.551, 101.553, 101.555, 101.557

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§101.553. Applicability.

This subchapter applies to all contracts and purchase orders established under the requirements of Government Code, Chapter 2155. It also applies to all bids, proposals, offers, or other applicable expressions of interest over $100,000 as defined in Government Code, Chapter 2161, Subchapter F (relating to Subcontracting), and 34 TAC §20.14 (relating to Subcontracts).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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SUBCHAPTER D. COUNCILS AND COMMITTEES

40 TAC §§101.601, 101.603, 101.605

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
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For further information, please call: (512) 424-4050

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SUBCHAPTER I. ADMINISTRATIVE RULES AND PROCEDURES PERTAINING TO EARLY CHILDHOOD INTERVENTION SERVICES DIVISION 2. AGENCY ADMINISTRATION

40 TAC §101.5641

The repeal is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
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For further information, please call: (512) 424-4050

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CHAPTER 101. ADMINISTRATIVE RULES AND PROCEDURES

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), adopts the amendments to DARS rules in Title 40, Part 2, Chapter 101, Subchapter E, Appeals and Hearing Procedures for Vocational Rehabilitation and Independent Living Programs, by repealing the subchapter and replacing with new Subchapter J, Appeals and Hearing Procedures. The following divisions and sections in Title 40, Chapter 101, Subchapter E, are repealed: Chapter 101, Subchapter E, Division 1, §101.811 and §101.821; Division 2, §§101.851, 101.853, 101.855, 101.857, 101.859, 101.861, 101.863, 101.865, 101.867, 101.869, 101.871, 101.873, 101.875, 101.877, 101.879, 101.881, and 101.883 and Division 3, §§101.901, 101.903, 101.905, 101.907, 101.909, and 101.911. The following new rules are adopted: Division 1, General Rules, §§101.7001, 101.7003, 101.7005, 101.7007, 101.7009, 101.7011, 101.7013, 101.7015, 101.7017, 101.7019, 101.7021, 101.7023, 101.7025, 101.7027, 101.7029, 101.7031, 101.7033, 101.7035, 101.7037, 101.7039, 101.7041, 101.7043, 101.7045, 101.7047, and 101.7049; Division 2, Division for Blind Services and Division for Rehabilitation Services, §§101.7051, 101.7053, 101.7055, 101.7057, 101.7059, 101.7061, 101.7063, 101.7065, 101.7067, 101.7069, 101.7071 and 101.7073; Division 3, Division for Early Childhood Intervention Services, §§101.8011, 101.8013 and 101.8015; and Division 4, Office for Deaf and Hard of Hearing Services, §§101.8051, 101.8053, 101.8055, 101.8057, 101.8059, 101.8061, 101.8063, 101.8065, 101.8067, 101.8069, 101.8071, 101.8073, 101.8075, 101.8077, and 101.8079. Sections 101.811, 101.821, 101.851, 101.853, 101.855, 101.857, 101.859, 101.861, 101.863, 101.865, 101.867, 101.869, 101.871, 101.873, 101.875, 101.877, 101.879, 101.881, 101.883, 101.901, 101.903, 101.905, 101.907, 101.909, 101.911, 101.7001, 101.7003, 101.7009, 101.7011, 101.7013, 101.7015, 101.7017, 101.7019, 101.7021, 101.7023, 101.7025, 101.7027, 101.7029, 101.7031, 101.7033, 101.7035, 101.7039, 101.7041, 101.7045, 101.7049, 101.7051, 101.7055, 101.7057, 101.7059, 101.7065, 101.7067, 101.7071, 101.7073, 101.8013, 101.8015, 101.8051, 101.8053, 101.8055, 101.8057, 101.8063, 101.8065, 101.8071, 101.8073, 101.8077 and 101.8079 are adopted without changes to the proposal as published in the June 27, 2008, issue of the *Texas Register* (33 TexReg 4968) and will not be republished. Minor grammatical/editorial changes were made to §§101.7005, 101.7007, 101.7037, 101.7043, 101.7047, 101.7053, 101.7061, 101.7063, 101.7069, 101.8011, 101.8059, 101.8061, 101.8067, 101.8069 and 101.8075; therefore, these sections are adopted with changes to the proposed text as published in the June 27, 2008, issue of the *Texas Register*. The text of the rules will be republished.

The adoption consolidates all DARS administrative hearing rules under Chapter 101, new Subchapter J, in compliance with HB 2292, 78th Legislature, Regular Session. New Subchapter J, Appeals and Hearing Procedures, is extensively restructured and expanded from three divisions to four divisions in order to add appeals and hearing procedures specific to the Division for Early Childhood Intervention Services and the Office for Deaf and Hard of Hearing Services. In accordance with the requirements of Texas Government Code §2001.039, DARS has conducted a four-year review of Title 40, Chapter 101, Subchapter E, of the DARS rules. Notice of the proposed rule review of Title 40, Part 2, Chapter 101, including Subchapter E, was published in the November 30, 2007, issue of the *Texas*

Register (32 TexReg 8863). DARS determined that the reasons for initially adopting these rules continue to exist. However, the rule review identified the need to repeal and replace Subchapter E with an extensively restructured and expanded new Subchapter J for the reasons detailed above.

Elsewhere in this issue of the *Texas Register*, DARS contemporaneously adopts the rule review of Chapter 101.

The following sections in Title 40, Chapter 108 and 109, were published for repeal in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4849):

Chapter 108, Subchapter B, §108.63. The content of this section as amended is transferred to Chapter 101, Subchapter J, Division 3, as new §101.8011.

Chapter 109, Subchapter B, §§109.241, 109.243, and 109.245. The content of these sections as amended are transferred to Chapter 101, Subchapter J, Division 4, as new §§101.8057, 101.8059, and 101.8061.

The following statutes and regulations authorize the adopted rule changes: The Rehabilitation Act of 1973, as amended, 29 U.S.C. §701 et seq.; the regulations of the Department of Education, Rehabilitation Services Administration, 34 C.F.R. Parts 361, 363, 364, 365, 366, and 367, as amended; Texas Human Resources Code, Chapters 81, 82, 91, and 111; Texas Occupations Code, Chapter 53; The Individuals with Disabilities Education Act, as amended, 20 U.S.C. §1400 et seq. and implementing regulations; 34 C.F.R. Part 303, as amended; and the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, as amended.

No comments were received regarding adoption of the rules.

SUBCHAPTER E. APPEALS AND HEARING PROCEDURES FOR VOCATIONAL REHABILITATION AND INDEPENDENT LIVING PROGRAMS

DIVISION 1. GENERAL RULES

40 TAC §101.811, §101.821

The repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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DIVISION 2. DIVISION FOR BLIND SERVICES APPEALS AND HEARING PROCEDURES

40 TAC §§101.851, 101.853, 101.855, 101.857, 101.859, 101.861, 101.863, 101.865, 101.867, 101.869, 101.871, 101.873, 101.875, 101.877, 101.879, 101.881, 101.883

The repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. DIVISION FOR REHABILITATION SERVICES APPEALS AND HEARING PROCEDURES

40 TAC §§101.901, 101.903, 101.905, 101.907, 101.909, 101.911

The repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Department of Assistive and Rehabilitative Services
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SUBCHAPTER J. APPEALS AND HEARING PROCEDURES

DIVISION 1. GENERAL RULES

40 TAC §§101.7001, 101.7003, 101.7005, 101.7007, 101.7009, 101.7011, 101.7013, 101.7015, 101.7017, 101.7019, 101.7021, 101.7023, 101.7025, 101.7027, 101.7029, 101.7031, 101.7033, 101.7035, 101.7037, 101.7039, 101.7041, 101.7043, 101.7045, 101.7047, 101.7049

The new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§101.7005. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise. The use of the singular or plural case is not meant to be limiting unless the context clearly indicates otherwise.

(1) Act--The Rehabilitation Act of 1973 as amended, 29 U.S.C. §701, et seq.

(2) Appellant--An applicant, eligible individual, authorized representative, or parent who has initiated formal procedures under this subchapter.

(3) Applicant--A person who has applied for services but for whom an eligibility determination has not been made.

(4) Authorized representative--An attorney authorized to practice law in the State of Texas, or a person designated by a party to represent the party in hearing procedures. The term includes a parent or a person made legally responsible for the child by a court of competent jurisdiction.

(5) Commissioner--The chief executive officer of the Department of Assistive and Rehabilitative Services.

(6) Consumer--The term "consumer" refers to and includes a person who:

(A) under Division 2 of this subchapter, has been determined eligible for and is receiving services from the Department;

(B) under Division 3 of this subchapter, is a parent, child or the child's family; or

(C) under Division 4 of this subchapter, not only has been determined eligible for and receiving services from the Department, but is also an individual defined by §101.8055(d) of this subchapter (relating to Definitions).

(7) Department--The Department of Assistive and Rehabilitative Services (also referred to as "DARS"), its officers, employees, and agents.

(8) Discovery--The process by which a party, prior to any final hearing on the merits, may obtain evidence and other information which is relevant to a claim or defense in the appeal.

(9) Eligible individual--Any individual person determined by the Department to be eligible to receive vocational rehabilitation services.

(10) Hearing--A formal review conducted under this chapter. This term includes pre-hearing conferences.

(11) Impartial hearing officer (IHO)--A person who is appointed to conduct a hearing under this chapter.

(12) Parent--

(A) Under Division 2 of this subchapter, the term "parent" whether in the singular or plural shall mean a minor child's natural or adoptive parent, the spouse of the minor child's natural or adoptive parent, or the minor child's surrogate or foster parent, or the spouse of the surrogate or foster parent, or other person made legally responsible for the minor child by a court of competent jurisdiction.

(B) Under Division 3 of this subchapter, the meaning of term "parent" shall be the same as that in 34 C.F.R. §303.19.

(13) Party--A person or agency named or admitted to participate in a formal hearing.

(14) Person--Any individual, representative, corporation, or other entity, including any public or nonprofit corporation, or agency or instrumentality of federal, state, or local government.

(15) Record--The official record of a hearing, including all arguments, briefs, pleadings, motions, intermediate rulings, orders, evidence received or considered, statements of matters officially noticed, questions and offers of proof, objections and rulings on objections, proposed findings of fact, conclusions of law, hearing officer decision, any other decision, opinion, or report by the hearing officer or commissioner, and all Department memoranda or data, including consumer and applicant files, submitted to or considered by the impartial hearing officer.

§101.7007. Filing a Request for Review.

(a) Persons who may file a Request for Review.

(1) Under Division 2 of this subchapter, an applicant or eligible individual who is dissatisfied with a determination made by the staff of the Department that affects the provision of vocational rehabilitation services may request a review of the determination.

(2) Under Division 3 of this subchapter, a parent may initiate a hearing involving the identification, evaluation, or placement of or the provision of appropriate early intervention services to a child or child's family.

(3) Under Division 4 of this subchapter, a certificate holder.

(b) A request for a review brought:

(1) under Division 2 of this subchapter, shall be filed, as provided in §101.7059 of this subchapter (relating to Filings) with the Hearings Coordinator, DARS Legal Services;

(2) under Division 3 of this subchapter, shall be filed, as provided in §101.8011 of this subchapter (relating to Administrative Hearings Concerning Individual Child Rights) with the assistant commissioner for ECI or, with the Hearings Coordinator, DARS Legal Services, if that assistant commissioner so delegates; and

(3) under Division 4 of this subchapter, shall be filed as provided in §101.8063 and §101.8065 of this subchapter (relating to Filing a Request for Hearing and Filings).

§101.7037. Prepared Testimony.

In all proceedings and after service of copies upon all parties of record at such time as may be designated by the impartial hearing officer, the prepared testimony of a witness upon direct examination, either in narrative or question and answer form, may be incorporated in the record as if read or received as an exhibit, upon the witness being sworn and identifying the same. Such witness shall be subject to cross-examination and the prepared testimony shall be subject to a motion to strike in whole or in part.

§101.7043. Motion for Reconsideration.

(a) Any party to a hearing may file a motion for reconsideration within 20 days after the party is notified of the issuance of the

decision of the impartial hearing officer. The motion shall be filed as follows:

(1) for hearings held under Divisions 2 and 4 of this subchapter with the Hearings Coordinator, DARS Legal Services, and

(2) for hearings held under Division 3 of this subchapter with the assistant commissioner for ECI, or with the Hearings Coordinator, DARS Legal Services, if the assistant commissioner so designates.

(b) The motion for reconsideration must specify the matters in the decision of the impartial hearing officer which the party considers to be erroneous. Any response to the motion for reconsideration must be filed no later than thirty days after a party, or a party's attorney or representative, is notified of the issuance of the decision of the impartial hearing officer.

(c) The impartial hearing officer shall rule on the motion for reconsideration no later than 15 days after receipt of the motion, or after receipt of the response to the motion for reconsideration, whichever comes later. If the motion is granted, the IHO shall issue a decision upon reconsideration within an additional 15 days. If the impartial hearing officer fails to rule on the motion for reconsideration within 15 days, the motion is denied as a matter of law.

(d) Service. Service of the impartial hearing officer's decision or of a motion or response under this section shall be made by any of the following means to a party, a party's attorney, or representative:

(1) hand-delivery;

(2) courier-receipted delivery;

(3) regular first-class mail, certified, or registered mail;

(4) email or facsimile transmission before 5:00 p.m. on a business day to the recipient's current email address or telecopier number; or

(5) such other means as the impartial hearing officer may direct.

(e) Date of service. The date of service is the date of hand-delivery, of delivery by courier, of mailing, of emailing, or of facsimile transmission, unless otherwise required by law. Unless the contrary is shown, a decision, motion, or response that is sent by regular first-class mail shall be presumed to have been received within three (3) days of the date of post-marking, if enclosed in a wrapper addressed to the recipient's last known address with return address to the sender, stamped with the appropriate first-class postage, and deposited on the date post-marked with the U.S. Postal Service.

§101.7047. Mediation Procedures.

(a) An applicant, eligible individual, or parent who has initiated a proceeding under this subchapter may request mediation to resolve the dispute. The Department, with the consent of the applicant, eligible individual, or parent, may also originate the request for mediation.

(b) Mediation shall be voluntary on the part of the parties; must not be used to deny or delay the right of an individual to a hearing under this subchapter, or to deny any other right afforded by the Rehabilitation Act; and shall be conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(c) The Department shall bear all costs related to the mediation process.

(d) Upon receiving a request for mediation from the parties, the Hearings Coordinator shall select an individual from a list of qualified mediators who are knowledgeable in laws and regulations relating to the provision of vocational rehabilitation, independent living services, comprehensive rehabilitation services, or the provision of services by Early Childhood Intervention Services, whichever may be applicable to the dispute.

(e) Sessions in the mediation process shall be coordinated by the mediator in a timely manner at a location convenient to both parties in the dispute.

(f) All discussions that occur during the mediation sessions are confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. The mediator may require the parties to sign a confidentiality pledge prior to the commencement of the mediation process.

(g) Any agreement reached through the mediation process shall be documented in a written mediation agreement and signed by the parties to the dispute. The agreement then becomes a part of the consumer record.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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DIVISION 2. DIVISION FOR BLIND SERVICES AND DIVISION FOR REHABILITATION SERVICES

40 TAC §§101.7051, 101.7053, 101.7055, 101.7057, 101.7059, 101.7061, 101.7063, 101.7065, 101.7067, 101.7069, 101.7071, 101.7073

The new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§101.7053. Legal Authority and Scope.

(a) The following statutes and regulations authorize the procedures established by the chapter:

(1) The Rehabilitation Act of 1973, as amended, 29 U.S.C. §701 et seq. and regulations of the Department of Education, Rehabilitation Services Administration, 34 C.F.R. §361.57 et seq., as amended;

(2) Texas Human Resources Code Chapter 91 (concerning vocational rehabilitation services for the blind and visually-impaired);

(3) Texas Human Resources Code Chapter 111 (concerning vocational rehabilitation services for the disabled); and

(4) Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, as amended.

(b) The procedures in this Division 2 of this subchapter, apply to those determinations that concern the denial, reduction, suspension or termination of vocational rehabilitation services, independent living or comprehensive rehabilitation services by the Department and are available to any applicant or consumer who is dissatisfied with a determination made by staff of the Department.

(c) Ineligibility. The following may challenge a determination of ineligibility through the procedures of this Division 2:

(1) applicants who are found ineligible for vocational rehabilitation services; and

(2) previously eligible individuals who have been determined no longer eligible for vocational rehabilitation services under 34 C.F.R. §361.43.

(d) Unless a decision concerns the denial, reduction, suspension or termination of services, or concerns the nature or content of a consumer's Individualized Plan for Employment, or the delivery or quality of vocational counseling services or other services provided by DARS, decisions made in the course of providing services by the Department's staff are not determinations subject to review by appeal under the procedures of this subchapter.

(e) A person's decision to seek an informal resolution to matters about which the person is dissatisfied shall not prevent, compromise, or delay the person's access to formal resolution procedures in this Division 2.

(f) The Department shall not institute a suspension, reduction, or termination of vocational rehabilitation services being provided to an applicant or eligible individual, including evaluation and assessment services and the development of an Individualized Plan for Employment, pending a resolution of an applicant or eligible individual's appeal by mediation or hearing unless:

(1) the applicant or eligible individual requests a suspension, reduction or termination of services; or

(2) the Department has evidence that the applicant or eligible individual obtained the services through misrepresentation, fraud, collusion, or criminal conduct.

§101.7061. Discovery and Mandatory Disclosures.

(a) Written Discovery. Requests for disclosure of information shall be the only form of written discovery which the parties shall be entitled to make. Unless a party is ordered by the IHO during a pre-trial conference to disclose other information in addition to the items in this section, a party may request in writing that the other party disclose or produce the following:

(1) the names, addresses and phone numbers of persons having knowledge of relevant facts, including those who might be called as witnesses and any expert who might be called to testify;

(2) for any testifying expert:

(A) the subject matter on which the expert will testify;

(B) the expert's resume; and

(C) a brief summary of the substance of the expert's mental impressions and opinions and the basis for them; and all documents and tangible things reflecting such information;

(3) the issues and in general the factual basis for a party's claims and defenses in the appeal; and

(4) information concerning appellant's employment, including the appellant's job application with the appellant's current employer and any personnel evaluations.

(b) Subject to the provisions in this section, parties may obtain discovery regarding any matter which is relevant to a claim or defense in the appeal.

(c) All discovery requests should be directed to the party from which discovery is being sought.

(d) All disputes with respect to any discovery matter shall be filed with and resolved by the impartial hearing officer.

(e) All parties shall be afforded a reasonable opportunity to file objections and motions to compel with the impartial hearing officer regarding any and all discovery requests.

(f) Copies of discovery requests and documents filed in response thereto shall be filed on all parties, but should not be filed with the impartial hearing officer or the Hearings Coordinator unless directed to do so by the impartial hearing officer or when in support of objections, motions to compel, motions for protective order, or motions to quash.

(g) Any documents contained in any file of the Department related to the appellant are to be deemed admissible. The Department must, without awaiting either an order or a discovery request under subsection (a) of this section, provide to the appellant a complete copy of the appellant's record of services, as described in 34 C.F.R. §361.47, including any electronically-stored or preserved records.

§101.7063. Documentary Evidence and Official Notice.

(a) Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. On request, parties shall be given an opportunity to compare the original and the copy or excerpt.

(b) When numerous similar documents which are otherwise admissible are offered into evidence, the impartial hearing officer may limit the documents received to those which are typical and representative. The impartial hearing officer may also require that an abstract of relevant data from the documents be presented in the form of an exhibit, provided that all parties be given the right to examine the documents from which such abstracts were made.

(c) The following laws, rules, regulations, and policies are officially noticed:

(1) The Rehabilitation Act of 1973, as amended, 29 U.S.C. §701, et seq.;

(2) Department of Education regulations, 34 C.F.R. Part 361, 362, 363, 364, 365, and 367;

(3) Texas Human Resources Code, Chapter 91 and Chapter 111;

(4) Department of Assistive and Rehabilitative Services, Division for Blind Services' and Division for Rehabilitation Services' State Plan for Vocational Rehabilitation Services;

(5) Department of Assistive and Rehabilitative Services, Division for Blind Services, Vocational Rehabilitation and Independent Living Manuals; and Division for Rehabilitation Services, Rehabilitation Policy Manual;

(6) Texas Administrative Code, Title 40, Part 2, Department of Assistive and Rehabilitative Services.

(d) Official notice also may be taken of:

(1) all facts that are judicially cognizable; and

(2) generally recognized facts within the area of the Department's specialized knowledge.

§101.7069. Implementation of Final Decision.

If a party brings a civil action to challenge a final decision of an impartial hearing officer, the final decision involved shall be implemented pending review by the court.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
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DIVISION 3. DIVISION FOR EARLY CHILDHOOD INTERVENTION SERVICES

40 TAC §§101.8011, 101.8013, 101.8015

The new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§101.8011. Administrative Hearings Concerning Individual Child Rights.

(a) Purpose. This section is intended to bring the procedures for hearings of the Department into compliance with Part C of the Individuals with Disabilities Education Act, and the applicable federal regulations, 34 C.F.R. §303.1 et seq. This section supplements existing Department rules governing hearings and is intended to be applied together except where a conflict exists, in which case this section shall prevail.

(b) Definition. The term "public agency," when used in this section refers to the Department and any other political subdivision of the state responsible for providing early childhood services to eligible children and their families.

(c) Applicability. These sections shall apply to hearings under this Division 3 which involve the identification, evaluation, or placement of or the provision of appropriate early intervention services to the child and the child's family.

(d) Request for hearing.

(1) A parent may initiate a hearing on any matter described in subsection (c) of this section and in §101.7007 of this subchapter (relating to Filing a Request for Review).

(2) The request for hearing shall be in writing and filed as provided in §101.7007 of this subchapter with the ECI assistant commissioner. The request for hearing shall be deemed filed when actually received by the ECI assistant commissioner.

(e) Impartial hearing officer.

(1) Hearings shall be conducted by an impartial hearing officer appointed and selected as provided in §101.7011 of this subchapter (relating to Assignment of Impartial Hearing Officer) and §101.7015 of this subchapter (relating to Substitution of Impartial Hearing Officer). The hearing officer shall be a person who in addition to the qualifications listed in §101.7011 of this subchapter:

(A) is knowledgeable about the provision of ECI comprehensive services;

(B) is knowledgeable about the provisions of complaint management, needs of children and families, and the services available to the child and family;

(C) will listen to viewpoints about the complaint, examine information relevant to issue, and seek to reach timely resolution of the complaint; and

(D) will provide records of the proceedings, including written decision.

(2) The person shall not be an employee of the Department or any program involved in the provision of services or care to the child or the child's family, or have a personal or professional interest which would conflict with his or her objectivity in the hearing.

(3) A person is not an employee of an agency solely because the person is paid to implement the complaint resolution process.

(f) Hearing rights. In addition to those rights provided parties to a hearing under Division 1 of this subchapter (relating to General Rules), a party to a hearing shall have a right to:

(1) be accompanied and advised by counsel and by individuals with special knowledge or training with respect to early childhood intervention comprehensive services;

(2) prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(3) obtain a written or electronic verbatim record of the hearing; and

(4) obtain written findings of fact, conclusions of law, and decision.

(g) Hearing procedures. In addition to the procedures provided in Division 1 of this subchapter:

(1) The hearing officer shall afford the parties an opportunity for hearing after reasonable notice of not less than 10 days, unless the parties have agreed otherwise.

(2) The hearing officer may issue subpoenas and commissions to take depositions pursuant to the Government Code, Chapter 2001. Subpoenas and commissions to take depositions shall be issued in the name of the Department.

(3) The hearing officer shall issue a final decision no later than 30 days after a request for hearing is filed. A final decision must be in writing and shall include findings of fact and conclusions of law, separately stated. Findings of fact must be based exclusively on the evidence and on matters officially noticed pursuant to the Government Code, Chapter 2001. The final decision shall be transmitted to each party by the hearing officer.

(4) Hearings conducted under these sections will be closed to the public unless the parent requests that the hearing be open.

(h) Child's status during proceedings.

(1) During the pendency of any administrative proceeding regarding a complaint, unless the parties agree otherwise, the child involved in the complaint must continue to receive appropriate comprehensive services previously agreed upon.

(2) If the complaint involves an application for initial admission to a program, the child must receive those comprehensive services not in dispute.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. OFFICE FOR DEAF AND HARD OF HEARING SERVICES

40 TAC §§101.8051, 101.8053, 101.8055, 101.8057, 101.8059, 101.8061, 101.8063, 101.8065, 101.8067, 101.8069, 101.8071, 101.8073, 101.8075, 101.8077, 101.8079

The new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§101.8059. Grounds for Denying, Revoking, or Suspending an Interpreter's Certificate.

The Office may deny application; suspend or revoke certification; or otherwise discipline, reprimand, or place on probation a certificate holder for any of the following causes:

(1) violations of federal or state laws that are substantiated by credible evidence, whether or not there is a complaint, indictment, or conviction, such violations including, but not limited to, the following:

(A) any felony, including but not limited to homicide, rape, sexual abuse of a child, indecency with a child, injury to a child, aggravated assault, robbery, burglary, theft, forgery, bribery, and perjury;

(B) any misdemeanor involving moral turpitude that involves dishonesty, fraud, deceit, misrepresentation, deliberate violence, or that reflects adversely on the certificate holder's honesty, trustworthiness, or fitness to interpret under the scope of the person's certificate; or

(C) any offense involving theft or controlled substances;

(2) engaging in sexually inappropriate behavior with or comments directed at a consumer, including individuals who are part of the interpreted situation;

(3) using or being under the influence of drugs, whether or not controlled, or intoxicating liquors to an extent that affects the interpreter's professional competence;

(4) impersonating another person who holds an interpreter certification from the office;

(5) allowing another person to use their interpreter certification;

(6) representing oneself or another interpreter as having a level of certification different from the actual level of certification awarded by the Office, in excess of the actual level of certification;

(7) using fraud, deception, which includes, but is not limited to cheating, or misrepresentation in an application for certification, during the certification examination or evaluation, or in the certification maintenance or renewal process;

(8) violating or aiding in the violation of the Code of Professional Conduct described in §101.8061(a)(1) of this subchapter (relating to Codes of Professional Conduct and Ethics) or, with respect to certified court interpreters only, of the Code of Ethics and Professional Responsibility of Certified Court Interpreters described in §101.8061(a)(2) of this subchapter;

(9) being grossly incompetent or grossly negligent in performing the duties as an interpreter; or having demonstrated repeated and/or continuous negligence or irresponsibility in the performance of their duties;

(10) being adjudicated mentally incompetent by a court of competent jurisdiction;

(11) intentionally harassing, abusing, or intimidating, either physically or verbally, a consumer, including individuals who are part of the interpreted situation; a board member; evaluator; or any staff of the Department;

(12) intentionally divulging or using inappropriately any aspect of confidential information relating to the certification evaluation including content, topic, vocabulary, identity of individuals involved in the tests, skills, written test questions, and any other testing materials deemed confidential;

(13) failure to meet requirements for certification maintenance;

(14) engaging in the practice of interpreting while certification is suspended;

(15) falsification of re-certification documents by altering original letters, certificates issued through continuing education, or attendance verification; or

(16) violation of a statute, rule, or policy of the Office or Department.

§101.8061. Codes of Professional Conduct and Ethics.

(a) Applicable Codes of Conduct and Ethics.

(1) The Code of Professional Conduct of the National Association of the Deaf (NAD) and the Registry of Interpreters for the Deaf, Inc. (RID) shall govern the professional conduct of interpreters/transliterators certified by the Office.

(2) The Code of Ethics and Professional Responsibility of Certified Court Interpreters of the Office shall govern the professional conduct of court interpreters certified under Texas Government Code, Chapter 57.

(b) Willful violation of either the NAD-RID Code of Professional Conduct or the Code of Ethics and Professional Responsibility of Certified Court Interpreters is grounds for suspension or revocation of certification under §101.8059 of this subchapter (relating to Grounds for Denying, Revoking, or Suspending an Interpreter's Certificate).

(c) Copies of the Codes.

(1) Copies of the NAD-RID Code of Professional Conduct may be obtained from the National Association of the Deaf, from the Registry of Interpreters for the Deaf, Inc., or from the Office.

(2) Copies of the Code of Ethics and Professional Responsibility of Certified Court Interpreters may be obtained from the Office.

§101.8067. Discovery and Evidence.

(a) The provisions of Texas Government Code, Chapter 2001, shall govern discovery and the admissibility of evidence.

(b) All discovery requests should be directed to the party from which discovery is being sought.

(c) All disputes with respect to any discovery matter shall be filed with and resolved by the impartial hearing officer.

(d) All parties shall be afforded a reasonable opportunity to file objections and motions to compel with the impartial hearing officer regarding any and all discovery requests.

(e) Copies of discovery requests and documents filed in response thereto shall be filed on all parties, but should not be filed with the impartial hearing officer or the Hearings Coordinator unless directed to do so by the impartial hearing officer or when in support of objections, motions to compel, motions for protective order, or motions to quash.

§101.8069. Documentary Evidence and Official Notice.

(a) Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. On request, parties shall be given an opportunity to compare the original and the copy or excerpt.

(b) When numerous similar documents which are otherwise admissible are offered into evidence, the impartial hearing officer may limit the documents received to those which are typical and representative. The impartial hearing officer may also require that an abstract of relevant data from the documents be presented in the form of an exhibit, provided that all parties be given the right to examine the documents from which such abstracts were made.

(c) The following laws, rules, regulations, and policies are officially noticed:

(1) Texas Human Resources Code, Chapters 81 and 82;

(2) Texas Occupation Code, Chapter 53;

(3) Texas Administrative Code, Title 40, Part 2, Chapter 109, Office for Deaf and Hard of Hearing Services, Division for Rehabilitation Services, Department of Assistive and Rehabilitative Services; and

(4) where applicable, Texas Government Code, Chapter 57.

(d) Official notice also may be taken of:

(1) all facts that judicially cognizable; and

(2) generally recognized facts within the area of the Department's specialized knowledge.

§101.8075. Implementation of Final Decision.

If a party brings a civil action to challenge a final decision of an impartial hearing officer, the final decision involved shall be implemented pending review by the court.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 105. GENERAL CONTRACTING RULES

The Texas Health and Human Services Commission ("HHSC"), on behalf of the Texas Department of Assistive and Rehabilitative Services ("DARS"), adopts amendments to the DARS rules in Title 40, Part 2, Chapter 105, General Contracting Rules, Subchapter A, General Contracting Information, §105.1003, Definitions; Subchapter B, Contractor Requirements, §105.1013, General Requirements for Contracting; and Subchapter E, Adverse Actions, §105.1301, Adverse Actions. The rules are adopted without changes to the proposal as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4828) and will not be republished.

Specifically, these amendments update existing administrative contracting procedures and clarify the definition of "contract-related records" in §105.1003(7), contractor requirements in §105.1013(a) and (f), and reasons DARS may impose adverse actions in §105.1301(a).

In accordance with Texas Government Code, §2001.039, DARS conducted a four-year review of Title 40, Part 2, Chapter 105, of the DARS rules. Notice of the proposed rule review of Chapter 105 was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8863). DARS determined that the reasons for initially adopting these rules continue to exist. However, as a result of the review, DARS determined that amendments were needed to clarify and update existing administrative contracting procedures in accordance with state law as described above.

Elsewhere in this issue of the *Texas Register*, DARS contemporaneously adopts the rule review of Chapter 105.

The following statutes and regulations authorize the adopted amendments: Texas Government Code, Chapters 2155, 2252, 2261, and 2262.

No comments were received regarding adoption of the rules.

SUBCHAPTER A. GENERAL CONTRACTING INFORMATION

40 TAC §105.1003

The amendment is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. CONTRACTOR REQUIREMENTS

40 TAC §105.1013

The amendment is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. ADVERSE ACTIONS

40 TAC §105.1301

The amendment is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 106. DIVISION FOR BLIND SERVICES

The Texas Health and Human Services Commission ("HHSC"), on behalf of the Texas Department of Assistive and Rehabilitative Services ("DARS"), adopts amendments and repeals to DARS rules in Title 40, Part 2, Chapter 106, Division for Blind Services.

DARS adopts amendments to update and/or clarify legal references, remove obsolete language, and provide further clarification of the following rules: Subchapter C, Vocational Rehabilitation Program, §§106.507, 106.509, 106.513, 106.521, 106.527, 106.535, 106.551, 106.555, 106.557, 106.564, 106.568, 106.572, 106.582, 106.603, and 106.629; Subchapter D, Independent Living Programs, §§106.855, 106.859, and 106.933; Subchapter F, Blindness Education, Screening and Treatment Program, subchapter title and §§106.1103, 106.1105, and 106.1107; Subchapter G, Business Enterprises of Texas, §106.1227 and §106.1229; Subchapter I, Blind Children's Vocational Discovery and Development Program, §§106.1445, 106.1475, 106.1487, and 106.1489; Subchapter K, Memoranda of Understanding, §106.1607; Subchapter L, Advisory Committees and Councils, §106.1703; and Subchapter M, Donations, §106.1815. DARS adopts repeals of Subchapter C, Vocational Rehabilitation Program, §106.511; Subchapter K, Memoranda of Understanding, §106.1605; and Subchapter L, Advisory Committees and Councils, §106.1701 and §106.1705. Sections 106.509, 106.513, 106.521, 106.527, 106.535, 106.555, 106.557, 106.572, 106.582, 106.1103, 106.1227, 106.1445, 106.1475, 106.1487, 106.1489, 106.1607, 106.1703, 106.1815, 106.511, 106.1605, 106.1701 and 106.1705 are adopted without changes to the proposal as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4830) and will not be republished. Minor grammatical and/or editorial changes were made to §§106.507, 106.551, 106.564, 106.568, 106.603, 106.629, 106.855, 106.859, 106.933, 106.1105, 106.1107, and 106.1229; therefore these sections are adopted with changes to the text as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4830).

The amendments and repeals are adopted pursuant to the DARS four-year rule review of Chapter 106 as required by Texas Government Code, §2001.039. As the result of the review, DARS determined that the reasons for initially adopting these rules continue to exist. However, the review identified areas where amendments and repeals were needed to update and/or clarify legal references, remove obsolete language, and provide further clarification of rules provisions. Notice of the proposed rules review of Chapter 106 was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8864).

Elsewhere in this issue of the *Texas Register*, DARS contemporaneously adopts the rule review of Chapter 106.

The following statutes authorize the promulgation of the proposed rules: Rehabilitation Act of 1973, §§701 et seq. (as hereafter amended), the Randolph-Sheppard Act, Texas Government Code, §§2001.01 et seq., and Texas Human Resources Code, Chapters 22, 35, and 91 (as hereafter amended).

No comments were received regarding adoption of the rules.

SUBCHAPTER C. VOCATIONAL REHABILITATION PROGRAM

DIVISION 1. GENERAL INFORMATION

40 TAC §§106.507, 106.509, 106.513

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§106.507. Public Access to Forms and Documents.

(a) All forms and documents used in the administration of the Vocational Rehabilitation Program are available for viewing at any Division office, including the central office at 4800 North Lamar, Austin, Texas, between 8:00 a.m. and 5:00 p.m. on work days.

(b) The Division's rules are published on the Department of Assistive and Rehabilitative Services website at www.dars.state.tx.us.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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40 TAC §106.511

The repeal is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. BASIC PROGRAM REQUIREMENTS

40 TAC §§106.521, 106.527, 106.535

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. VOCATIONAL REHABILITATION SERVICES

40 TAC §§106.551, 106.555, 106.557, 106.564, 106.568, 106.572, 106.582

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§106.551. Goods and Services.

(a) The Division, as appropriate to the vocational rehabilitation needs of each eligible person, provides goods and services necessary to render a consumer employable, subject to certain limitations prescribed in this subchapter and application of Division 4 of this subchapter (relating to Order of Selection for Services), and Division 5 of this subchapter (relating to Consumer Participation in Cost of Services).

(b) Services are provided only when planned in advance and contained in the consumer's IPE.

(c) Subject to the limitation prescribed in subsection (b) of this section, the following vocational rehabilitation services are available on an as-needed basis:

(1) assessment to determine eligibility;

(2) assessment to determine vocational rehabilitation needs;

(3) vocational counseling and guidance;

(4) physical and mental restoration services;

(5) vocational and other training services, including personal and vocational adjustment training, books, tools, and other training materials, except that no training or training services in an institution of higher education (universities, colleges, community or junior colleges, vocational schools, technical institutes, or hospital schools of nursing) may be paid for with funds received under the provisions of the Act unless maximum efforts have been made by the Division and the individual to secure grant assistance in whole or in part from other sources to pay for that training;

(6) maintenance as defined in §106.559 of this title (relating to Maintenance);

(7) transportation as defined in §106.561 of this title (relating to Transportation);

(8) vocational rehabilitation services to family members of an applicant or eligible individual if necessary to enable the applicant or eligible individual to achieve an employment outcome;

(9) interpreter services and note-taking services for persons who are deaf and tactile interpreting for persons who are deaf-blind;

(10) reader services, rehabilitation teaching services, and orientation and mobility;

(11) recruitment and training services to provide new employment opportunities in the fields of rehabilitation, health, welfare, public safety, law enforcement, and other appropriate public services employment;

(12) job search, placement assistance, and job retention services;

(13) personal assistance services as defined in §106.574 of this title (relating to Personal Assistance Services);

(14) post-employment services as defined in §106.568 of this title (relating to Post-Employment Services);

(15) occupational licenses, tools, equipment, and initial stocks and supplies;

(16) transition services as defined in §106.576 of this title (relating to Transition Services;

(17) referral services;

(18) supported employment services as defined in §106.578 of this title (relating to Supported Employment Services);

(19) rehabilitation technology services as defined in §106.580 of this title (relating to Rehabilitation Technology Services); and

(20) technical assistance and other consultation services.

(d) If comparable services or benefits exist under any other program and are available to the consumer at the time needed to achieve the rehabilitation objectives in the individual's IPE, the Division shall use those comparable services or benefits to meet, in whole or in part, the cost of vocational rehabilitation services.

(e) If comparable services or benefits exist under any other program, but are not available to the consumer at the time needed to satisfy the rehabilitation objectives in the individual's IPE, the Division shall provide vocational rehabilitation services until those comparable services and benefits become available.

(f) The following services are exempt from a determination of the availability of comparable services and benefits:

(1) Assessment for determining eligibility and priority for services.

(2) Assessment for determining vocational rehabilitation needs.

(3) Vocational rehabilitation counseling, guidance, and referral services.

(4) Vocational and other training services, such as personal and vocational adjustment training, books (including alternative format books accessible by computer and taped books), tools, and other training materials in accordance with subsection (c)(5) of this section.

(5) Placement services.

(6) Rehabilitation technology.

(7) Post-employment services consisting of the services listed under subsection (b)(1) - (6) of this section.

(g) The requirements of subsection (e) of this section also do not apply if:

(1) the determination of the availability of comparable services and benefits under any other program would delay the provision of vocational rehabilitation services to any consumer who is determined to be at extreme medical risk, based on medical evidence provided by an appropriate qualified medical professional; or

(2) an immediate job placement would be lost due to a delay in the provision of comparable services and benefits.

§106.564. Interpreter Services and Note-taking Services for Individuals Who Are Deaf and Tactile Interpreting for Individuals Who Are Deaf-Blind.

If available, the division shall use interpreters certified by the Department of Assistive and Rehabilitative Services, Division for Rehabilitation Services, Office for Deaf and Hard of Hearing Services or by the Registry of Interpreters in the delivery of services to persons who are deaf or deaf-blind.

§106.568. Post-Employment Services.

(a) A consumer may be considered for post-employment services if he or she has been determined to be rehabilitated, is in need of help in maintaining employment, and has an employment-related problem that does not entail a complex rehabilitation effort or address a new and distinct substantial impediment to employment.

(b) Post-employment services must be incidental to the original impediment to employment, ancillary to the services provided through the consumer's Individualized Plan for Employment, and related to the previously planned vocational goal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. ORDER OF SELECTION FOR SERVICES

40 TAC §106.603

The amendment is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§106.603. Application.

(a) In determining whether to invoke an order of selection, the Assistant Commissioner for Blind Services shall apply the criteria set out in 29 U.S.C. §709, as amended, in 34 C.F.R. §361.36, and in the State Plan.

(b) The order of selection is applied after eligibility for services is determined.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
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DIVISION 5. CONSUMER PARTICIPATION IN COST OF SERVICES

40 TAC §106.629

The amendment is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§106.629. Maximum Allowable Amount.

(a) Economic resources in excess of the amount allowed by the division must be used to pay for the cost of vocational rehabilitation services. Maximum allowable amounts are contained in an Economic Resources Table available at any division office and may be obtained in accordance with §106.507 of this title (relating to Public Access to Forms and Documents).

(b) The maximum allowable amount may fluctuate according to relevant factors, such as established federal and state poverty levels, the funds available to the division for services, and the number of persons meeting the definition of family.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. INDEPENDENT LIVING PROGRAM

DIVISION 1. GENERAL INFORMATION

40 TAC §106.855, §106.859

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§106.855. Definitions.

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

(1) Act--The Rehabilitation Act of 1973, as amended.

(2) Blind (person who is)--A person whose visual acuity with best correction is 20/200 or less in the better eye, or a person with a limitation in the field of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees, which means a visual field of no greater than 20 degrees in the better eye.

(3) Comparable services and benefits--Services and benefits that are provided or paid for, in whole or in part, by other federal, state, or local public agencies, by health insurance, or by employee benefits; available to the consumer; and commensurate in quality and nature to the services that the consumer would otherwise receive from the Division.

(4) Consumer--A person who has been determined eligible by the Division for independent living services.

(5) Disability--A physical or mental impairment that substantially limits one or more major life activities.

(6) Family--The consumer, parent(s), and/or legal guardian(s) and all individuals residing in the household for whom the consumer, parent(s) and/or legal guardian(s) have legal and financial responsibility.

(7) Independent Living Plan (IL Plan)--A written record that documents all phases of the consumer's rehabilitation process as developed by the independent living worker and the consumer.

(8) Individual with a disability--An individual with a visual impairment whose ability to function independently in the family or community or whose ability to obtain, maintain, or advance in employment is substantially limited and for whom the delivery of independent living services will improve the ability to function, continue functioning, or move toward functioning independently in the family or community or to continue in employment, respectively.

(9) Individual with a significant disability--An individual with a disability as defined in paragraph (8) of this section:

(A) who has a severe physical or mental impairment that seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills) in terms of independent living;

(B) whose independent living program can be expected to require multiple independent living rehabilitation services over an extended period of time; and

(C) who has one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including

stroke and epilepsy), spinal cord conditions (including paraplegia and quadriplegia), sickle cell anemia, specific learning disability, end-stage renal disease, or another disability or combination of disabilities determined on the basis of an assessment for determining eligibility and independent living needs to cause comparable substantial functional limitation.

(10) Representative--A parent, legal guardian, or other representative appointed by the court to represent the individual or an advocate or other family member designated in writing by the individual to represent the individual.

(11) Transportation--Travel and related expenses that are necessary to enable a consumer to benefit from another independent living service and travel and related expenses for an attendant or aide if the services of that attendant or aide are necessary to enable an individual with a significant disability to benefit from that independent living service.

(12) Visual impairment--A visual acuity, with best correction, of 20/70 or less in the better eye, or a visual field of 30 degrees or less in the better eye, or a combination of both.

§106.859. Service Delivery.

(a) Oversight and monitoring of service delivery. Service delivery shall be monitored by trained personnel through the use of onsite visits and standard case review checklists. The checklist shall contain sufficient information to evaluate case documentation, timely service delivery, and client progress towards goals.

(b) Guidance to service delivery staff. Service delivery staff shall be provided with written guidelines and training on developing consumer service plans, measuring and documenting consumer progress toward an expected outcome, and the timely authorization of services. The guidelines shall include, but are not limited to, the following:

(c) Reasonable Timeframes for Service Delivery. The following timeframes shall serve as benchmarks to service delivery staff and monitoring staff in evaluating a consumer's progress towards the expected outcome in the service plan.

(1) An eligibility decision will normally be made within 60 days from the time an application for services has been completed unless exceptional and unforeseen circumstances beyond the control of the division precludes a determination.

(2) Once an individual is determined eligible, a plan of services will normally be developed and agreed to within 90 days.

(3) A consumer will normally complete all planned services within 18 months.

(4) Post-closure services will normally not exceed 6 months.

(d) Financial planning information. Quarterly budget information shall be provided to division field directors. Field directors will disseminate this information to all caseload carrying staff for financial planning purposes.

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DIVISION 5. CONSUMER PARTICIPATION IN COST OF SERVICES

40 TAC §106.933

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§106.933. Scope.

All goods and services provided under this chapter are subject to this subchapter except the following:

(1) diagnostics and evaluation services (includes maintenance and transportation);

(2) counseling, guidance, and referral services provided by Division staff;

(3) independent living worker services;

(4) orientation and mobility training;

(5) low vision evaluations;

(6) adaptive aids, appliances, and supplies under $50;

(7) interpreter services;

(8) Criss Cole Rehabilitation Center training (includes transportation to and from the center);

(9) services paid for or reimbursed by a source other than the division; and

(10) training in management of secondary disabilities or related health conditions.

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SUBCHAPTER F. BLINDNESS EDUCATION, SCREENING, AND TREATMENT PROGRAM

40 TAC §§106.1103, 106.1105, 106.1107

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§106.1105. Vision Screening Services.

(a) To be eligible to receive program vision screening services, an individual must be an adult resident of the state.

(b) Vision screening services may be provided through a contractor.

(c) Vision screenings shall be conducted by:

(1) Persons who have attended and completed vision screening training from the Texas Department of State Health Services and are currently certified as vision screeners; or

(2) Persons who have been trained by a vision screener currently certified by the Texas Department of State Health Services as a vision screener; or

(3) Persons who are eye care professionals licensed by the State of Texas (optometrists and ophthalmologists); or

(4) Persons who are trained and supervised by an eye care professional licensed by the State of Texas.

(d) Persons receiving vision screenings shall receive the screening results and, if necessary, a recommendation regarding the need for a follow-up examination by an eye care professional.

(e) When a referral is made for an eye examination to another agency or organization, the referral agency or organization's rules shall apply. A referral by the BEST program is not an endorsement of another agency, organization or eye care professional by the division.

§106.1107. Treatment Services.

(a) The purpose of treatment services is to prevent blindness by providing medical or surgical intervention to individuals at risk who are not covered under an adequate health benefit plan.

(b) To be eligible to receive treatment services from the program, an individual must be an adult resident of the state who:

(1) has been referred to the program by the individual's treating physician or optometrist;

(2) has certified to the physician or optometrist that the individual does not have health insurance or other available resources with which to pay for prescribed treatment to prevent blindness; and

(3) has been certified by the physician or optometrist as having a medically urgent eye condition that poses an imminent risk of permanent and significant visual loss if not treated with surgery or medical intervention.

(c) Medically urgent eye conditions shall include glaucoma, diabetic retinopathy, and detached retina. Any other medical condition, to qualify, must be determined to be medically urgent by both the referral's physician and the Division's ophthalmologic consultant or his designee.

(d) The BEST program is funded with voluntary donations. It is expected that service demand will exceed program resources. Therefore, funds may not be available for treatment services at the time an individual is referred for assistance.

(e) If an eligible individual is denied services by the program based on the inadequacy of donations to cover the cost of services, the physician may request that the individual be placed on a waiting list pending receipt of adequate funds. Individuals on the waiting list shall be served in order by referral date and time.

(f) All treatment services, including prescription drugs, must be approved in advance by the program to qualify for payment. All prescribed treatment services and requested payments must be itemized on the program's application form.

(g) Over-the-counter and nonprescription drugs are not covered by the program. Program assistance with the cost of eye-related drugs prescribed by a physician to prevent blindness shall be limited to the time the drugs are prescribed by the treating physician or optometrist or one year, whichever is less. The following are the procedures for payment for prescription drugs:

(1) Payments for approved prescription drugs shall be made only to the individual's pharmacy of choice.

(2) The Division shall pay for the prescription upon receiving an invoice.

(h) Payment for eye examinations that are a follow-up to a prescribed treatment paid for by the BEST Program and determined by a physician as medically necessary for chronic eye conditions such as glaucoma and diabetic retinopathy shall be limited to two examinations in the 12 months following surgery.

(i) Payments for treatment services shall be based on the division's adopted rate schedule for eye-related medical services as specified in Human Resources Code, §117.074, (also known as the division's Maximum Affordable Payment Schedule).

(j) Claims for payment must be received within 90 days from the date of each service. Claims received by the program that are lacking the information necessary for processing shall be denied as incomplete claims. The resubmission of the claim containing the necessary information must be received by the program within 60 days from the last denial date or payment will be declined. Excepted from this requirement is the payment for refills of drugs prescribed during the allowed period of one year.

(k) The program shall not pay cancellation charges, charges for missed appointments, or any other charge incurred other than for the actual provision of services.

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SUBCHAPTER G. BUSINESS ENTERPRISES OF TEXAS

40 TAC §106.1227, §106.1229

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§106.1229. Procedures for Resolution of Manager's Dissatisfaction.

(a) Appealable actions. These rules provide the procedures for licensees who are dissatisfied with a DARS/DBS action arising from the operation of BET.

(b) Actions not subject to appeal. The phrase "DARS/DBS action arising from the operation of BET" in subsection (a) of this section does not include the following actions of the DARS/DBS:

(1) the hiring, firing or discipline of DARS/DBS employees;

(2) the challenge of federal or state law, or rules previously approved by the Secretary of Education pursuant to the Randolph-Sheppard Act; or

(3) an action by the DARS/DBS unless it is alleged that the action is in violation of applicable law, these rules, the requirements of the BET manual, any proper and authorized instruction by DARS/DBS personnel, or is unreasonable. Unreasonable shall mean without rational basis or arbitrary and capricious.

(c) DARS/DBS discretion and sovereign immunity. The DARS/DBS does not waive its right and duty to exercise its lawful and proper discretion. The DARS/DBS does not waive its sovereign immunity.

(d) Remedies. Remedies available to resolve dissatisfaction shall correct the action complained of from the earlier time of:

(1) agreement by the parties as to an appropriate remedy, or

(2) a final resolution pursuant to the Randolph-Sheppard Act that the DARS/DBS acted in violation of applicable law, these rules, the requirements of the BET manual, any proper and authorized instruction by DARS/DBS personnel, or acted unreasonably.

(e) Informal procedures to review dissatisfactions. At the request of a licensee, the DARS/DBS shall arrange for and participate in informal meetings in an effort to quickly resolve a matter of dissatisfaction arising from the operation or administration of BET. The informal process is for the purpose of quickly and amicably resolving an issue in controversy. It is not for the purpose of denying or delaying the manager's right to pursue resolution of a matter through a full evidentiary hearing. At any point during the informal process, either party may elect to terminate the following procedures:

(1) A licensee may initiate informal procedures by notifying the DARS/DBS in writing through the BET Director that the licensee is dissatisfied with a matter arising from the operation or administration of BET. The written notice must describe with reasonable particularity the specific matter in controversy, the date the action occurred, or an approximate date if the exact date is not known, and the licensee's desired relief or remedy. If the licensee is dissatisfied with a series of the same or related actions over a period of time, the notice should describe to the best of the licensee's ability the timeframe of the events and include the date of the most recent event about which the licensee is dissatisfied.

(2) To ensure that informal resolution is possible in a timely manner, the licensee's request to initiate informal proceedings must be filed with the DARS/DBS no later than six months after the most recent event specified in the request. DARS/DBS shall within a reasonable time arrange a meeting at a location, date, and time satisfactory to all parties.

(3) The licensee must notify the DARS/DBS when filing a request for informal proceedings if the licensee will be represented by counsel during mediation. The DARS/DBS will be represented by counsel only when the licensee is represented by counsel.

(4) Meetings shall take place in an informal environment and shall be attended by the licensee, a BET staff person, and a neutral third party who shall serve as an informal mediator during the discussions.

(5) The neutral third party shall be a person certified in conducting mediations.

(6) The neutral third party's responsibility is to report to the DARS/DBS only that the effort to resolve the matter to the licensee's satisfaction was or was not successful. If an agreement is reached, then the actions agreed to with respect to the facility or licensee shall be forthwith taken.

(7) The provisions concerning mediation under Chapter 101, Subchapter J of this title (relating to Appeals and Hearing Procedures) shall not apply to or control the informal resolution procedures in this subchapter.

(f) Full evidentiary hearing. A manager has the right to request a full evidentiary hearing to resolve a dissatisfaction according to the following:

(1) A manager has the right to request a full evidentiary hearing without first going through mediated meetings described in subsection (e) of this section.

(2) A request for an evidentiary hearing must be made no later than the 20th business day after the occurrence of the agency action about which the manager complains. The Assistant Commissioner, upon request of the complaining party, may extend the time period for filing a grievance upon the showing of good cause by the complaining party for such additional period if such request is made no later than the 20th business day after the occurrence of the agency action about which the manager complains.

(3) A manager requesting a full evidentiary hearing after the conduct of mediated meetings described in subsection (e) of this section must request such hearing in writing no later than the 20th business day after receipt of the Assistant Commissioner's decision.

(4) A request for a full evidentiary hearing must be in writing and transmitted to the Assistant Commissioner. A request that is postmarked within the applicable time frame shall be considered timely delivered if properly posted.

(5) The request for a full evidentiary hearing must describe the specific action with reasonable particularity sufficient to provide notice as to the action which is alleged to be unreasonable or in violation of applicable law, these rules, the requirements of the BET manual, or any proper and authorized instruction by DARS/DBS personnel. The request must, to the best of the complainant's knowledge, contain the date the action occurred and the law or regulation must be reasonably identified if an action is alleged to be in violation of law, these rules, the requirements of the BET manual, or regulation. The request must also identify the desired relief or remedy.

(6) The manager may be represented in the evidentiary hearing by legal counsel or other representative of the manager's choice, at the manager's expense.

(7) Reader or other communication services, if needed, shall be arranged for the manager by the DARS/DBS upon request by the manager at least three business days prior to the hearing date.

(8) The manager shall be notified in writing of the time and place fixed for the hearing and of the manager's right to be represented by legal or other counsel.

(9) Selection of the Hearing Officer.

(A) The Hearings Coordinator, DARS Legal Services, shall select, on a random basis, a hearing officer from a pool of persons qualified according to these rules.

(B) The hearing officer shall be an impartial and qualified individual who:

(i) has no involvement either with the DARS/DBS action which is at issue or with the administration or operation of BET;

(ii) is not an employee of a public agency (other than an administrative law judge, hearing examiner, or employee of an institution of higher education);

(iii) has knowledge of the Randolph-Sheppard Act and any applicable state and federal regulations governing the appeal;

(iv) has received training specified by the Department with respect to the performance of official duties; and

(v) has no personal, professional, or financial interest that would be in conflict with the objectivity of the individual.

(C) An individual is not considered to be an employee of a public agency for the purposes of clause (ii) of this subparagraph (B) solely because the individual is paid by the agency to serve as a hearing officer.

(10) Hearings shall be conducted in accordance with the Randolph-Sheppard Act, Texas Government Code §2001.051 et seq., and these rules to the extent those procedures do not conflict with the Act and its implementing regulations or these rules.

(11) Licensees bringing complaints shall have the burden of proving their cases by the preponderance of evidence. Licensees shall present their evidence first. When a hearing is requested as a result of administrative action by the DARS/DBS against a licensee, the DARS/DBS shall have the burden of proving its case by a preponderance of the evidence and shall present its evidence first.

(12) Transcription of Proceedings.

(A) Unless precluded by law, the hearing shall be recorded electronically by tape recorder or similar device either by the hearing officer or by someone designated by the hearing officer. Such tape recording shall be the official record of the testimony adduced during the hearing. Any party, however, may request, at the party's expense, that the hearing be recorded by a court reporter if the request is made within ten (10) days of the date for the hearing.

(B) In lieu either of a recording of the testimony electronically or of the reporting of testimony by a court reporter, the parties to a hearing may agree upon a statement of the evidence, agree to use taped transcription as a statement of the testimonial evidence, or agree to the summarization of testimony before the hearing officer; provided, however, that proceedings or any part of them must be transcribed on written request of any party.

(C) Unless otherwise provided in this subchapter, the party requesting a transcription of any electronic recording of the proceedings shall bear the cost for the transcribing of any such electronically recorded testimony. Nothing provided for in this section limits the Department to a stenographic record of the proceedings.

(D) The record of the proceedings, including exhibits and any transcription shall be made available to the parties by the DARS/DBS no later than the 30th business day after the close of the hearing.

(13) The hearing officer shall issue a recommendation which shall set forth the principal issues and relevant facts adduced at the hearing and the applicable provisions of law, rule, the requirements of the BET manual, or any proper and authorized instruction by DARS/DBS personnel. The recommendation shall contain findings of fact and conclusions with respect to each of the issues, and the reasons and bases for the conclusions.

(14) In formulating a recommendation, the hearing officer shall not evaluate whether the DARS/DBS actions were wise, efficient, or effective. Rather, the hearing officer is limited to determining whether the DARS/DBS actions were unreasonable, or violated applicable law, these rules, the requirements of the BET manual, or any proper and authorized instruction by DARS/DBS personnel.

(15) Should the hearing officer find that the actions taken by the DARS/DBS were unreasonable, or violated applicable law, these rules, the requirements of the BET manual, or any proper and authorized instruction by DARS/DBS personnel, the hearing officer shall also recommend any prospective action necessary to correct the violations.

(16) The hearing officer's recommendation shall be made no later than the 30th business day after the receipt of the official transcript. The recommendation shall be delivered promptly to the Assistant Commissioner.

(17) The Assistant Commissioner shall review the recommendation of the hearing officer and forward a decision to the manager no later than the 20th business day after receipt of the hearing officer's recommendation. The Assistant Commissioner's decision shall include findings of fact and conclusions of law based on the evidence in the record and separately stated.

(18) Subject to the provisions of Texas Government Code §2001.144 and §2001.146, the Assistant Commissioner's decision shall be the final decision of the Department. Any such decision becomes the final decision of the Department if a timely motion for rehearing or reconsideration is not filed.

(g) Arbitration. A manager appealing the DARS/DBS decision must file a complaint with the Secretary of Education in conformity with the provisions of the implementing regulations at 34 CFR, part 395.13 of the Act, pertaining to arbitration of vendor complaints.

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SUBCHAPTER I. BLIND CHILDREN'S VOCATIONAL DISCOVERY AND DEVELOPMENT PROGRAM
DIVISION 3. SERVICES

40 TAC §106.1445

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DIVISION 4. ECONOMIC RESOURCES

40 TAC §106.1475

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DIVISION 5. ORDER OF SELECTION FOR PAYMENT OF SERVICES

40 TAC §106.1487, §106.1489

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SUBCHAPTER K. MEMORANDA OF UNDERSTANDING

40 TAC §106.1605

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40 TAC §106.1607

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SUBCHAPTER L. ADVISORY COMMITTEES AND COUNCILS

40 TAC §106.1701, §106.1705

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40 TAC §106.1703

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SUBCHAPTER M. DONATIONS

40 TAC §106.1815

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For further information, please call: (512) 424-4050

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CHAPTER 107. DIVISION FOR REHABILITATION SERVICES

The Texas Health and Human Services Commission ("HHSC"), on behalf of the Texas Department of Assistive and Rehabilitative Services ("DARS"), adopts new rules, amendments, and repeals to the DARS rules in Title 40, Part 2, Chapter 107, Division for Rehabilitation Services, Subchapter B, Vocational Rehabilitation Services Program; Subchapter F, Independent Living Services Program; Subchapter L, Comprehensive Rehabilitation Services; and Subchapter N, Memoranda of Understanding with Other State Agencies.

Specifically, in Subchapter B, Division 1, Provision of Vocational Rehabilitation Services, DARS adopts amendments to §§107.101, 107.107, 107.111, 107.115, 107.121, 107.123, 107.125, 107.129, 107.131, 107.133, 107.135, 107.137, and 107.139, and the repeal of §107.103; in Division 3, Comparable Benefits, an amendment to §107.173; in Division 4, Eligibility and Ineligibility, amendments to §§107.191, 107.195, and 107.197, and new §107.199; in Division 5, Methods of Administration of Vocational Rehabilitation, amendments to §§107.215, 107.219, 107.221, 107.223, and 107.225; in Subchapter F, amendments to §§107.801, 107.803, 107.805, 107.807, 107.809, 107.811, and new §107.806; in Subchapter L, amendments to §107.1201 and §107.1207; and in Subchapter N, an amendment to §107.1601, and the repeal of §§107.1607, 107.1609, and 107.1613. The rules are adopted without changes to the proposal as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4841) and will not be republished.

These new rules, amendments, and repeals are adopted pursuant to DARS' four-year rule review of Chapter 107, as required by Texas Government Code, §2001.039. Notice of the proposed rule review of Chapter 107 was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8864). As a result of the review, DARS determined that the reasons for initially adopting these rules continue to exist. However, the review identified areas where new rules, amendments, and repeals are needed to remove rules that apply only to DARS's legacy agency, to delete outdated memoranda of understanding, for greater clarity and consistency with state and federal statutes

and regulations, and for greater consistency with the vocational rehabilitation rules of the DARS Division for Blind Services.

Elsewhere in this issue of the *Texas Register*, DARS contemporaneously adopts the rule review of Chapter 107 and readopts the chapter with these new rules, amendments, and repeals.

The following statutes and regulations authorize the new rule, amendments, and repeals: the Rehabilitation Act of 1973, as amended, 29 U.S.C. §701 et seq., and Texas Human Resources Code, Chapters 111 and 117.

DARS, on behalf of HHSC, received one comment during the comment period.

Comment: The commenter, a representative of the Coalition for Nurses in Advanced Practice, recommended changing the proposed amendment to §107.113(d) (relating to Mental Restoration Services) to add Psychiatric-Mental Health Clinical Nurse Specialists and Psychiatric-Mental Health Nurse Practitioners licensed by the Texas Board of Nursing to the types of professionals that the DARS Division for Rehabilitation Services can utilize to provide mental restoration services. The commenter asserts that these professionals are fully competent to provide the mental health services required by DARS consumers.

Response: Section 107.113 is neither adopted nor withdrawn by this order. DARS will fully consider the comment and take appropriate action in the near future.

SUBCHAPTER B. VOCATIONAL REHABILITATION SERVICES PROGRAM

DIVISION 1. PROVISION OF VOCATIONAL REHABILITATION SERVICES

40 TAC §§107.101, 107.107, 107.111, 107.115, 107.121, 107.123, 107.125, 107.129, 107.131, 107.133, 107.135, 107.137, 107.139

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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40 TAC §107.103

The repeal is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. COMPARABLE BENEFITS

40 TAC §107.173

The amendment is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. ELIGIBILITY AND INELIGIBILITY

40 TAC §§107.191, 107.195, 107.197, 107.199

The amendments and new rule are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 5. METHODS OF ADMINISTRATION OF VOCATIONAL REHABILITATION

40 TAC §§107.215, 107.219, 107.221, 107.223, 107.225

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. INDEPENDENT LIVING SERVICES PROGRAM

40 TAC §§107.801, 107.803, 107.805 - 107.807, 107.809, 107.811

The amendments and new rule are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER L. COMPREHENSIVE REHABILITATION SERVICES

40 TAC §107.1201, §107.1207

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER N. MEMORANDA OF UNDERSTANDING WITH OTHER STATE AGENCIES

40 TAC §107.1601

The amendment is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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40 TAC §§107.1607, 107.1609, 107.1613

The repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 424-4050

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CHAPTER 108. DIVISION FOR EARLY CHILDHOOD INTERVENTION SERVICES

The Texas Health and Human Services Commission ("HHSC"), on behalf of the Texas Department of Assistive and Rehabilitative Services ("DARS"), adopts amendments to the DARS rules in Title 40, Part 2, Chapter 108, Division for Early Childhood Intervention Services. DARS adopts amendments to Subchapter A, Early Childhood Intervention Service Delivery, §§108.23, 108.29, and 108.47. DARS also adopts the repeal of §108.63 and §108.67 of Subchapter B, Procedural Safeguards and Due Process Procedures. The rules are adopted without changes to the proposal as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4849) and will not be republished.

The adopted amendments clarify the definitions of "Family Educational Rights and Privacy Act of 1974 (FERPA)", "Provider", and "Supplanting" in §108.23; the meanings of "program income" and "maintenance of effort" in §108.29; and the standards of conduct in the Early Intervention Specialist code of ethics in §108.47. These amendments are for the purpose of more clearly complying with other controlling federal laws and state statutes. The content of the repeal of §108.63 is being transferred to Chapter 101, Subchapter J, Division 3, as new §101.8011 which is contemporaneously adopted elsewhere in this issue of the *Texas Register*. Section 108.67, "Charges for Access to Public Records" is being repealed because the procedures are either required by statute (Texas Government Code Chapter 552), by rules of the Attorney General, or are published by DARS in compliance with those statutes and rules.

In accordance with the requirements of Texas Government Code §2001.039, DARS has conducted a four-year review of Title 40, Part 2, Chapter 108, of the DARS rules. Chapter 108 consists of Subchapter A, Early Childhood Intervention Service Delivery, §§108.21, 108.23, 108.25, 108.27, 108.29, 108.31, 108.33, 108.35, 108.37, 108.39, 108.43, 108.47, and 108.48; Subchapter B, Procedural Safeguards and Due Process Procedures, §§108.55, 108.57, 108.59, 108.61, 108.63, and 108.67; Subchapter D, General Provisions for Case Management Services for Infants and Toddlers with Developmental Disabilities, §§108.221, 108.223, 108.225, 108.227, 108.229, 108.231, 108.233, and 108.235; Subchapter E, Developmental Rehabilitation Services, §§108.261, 108.263, and 108.265; and Subchapter F, System of Fees, §§108.291, 108.293, and 108.295. DARS has determined that the reasons for initially adopting these rules continue to exist except for Subchapter B, §108.63 and §108.67, because of the reasons stated above. Notice of the proposed rule review of Chapter 108 was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8864).

Elsewhere in this issue of the *Texas Register*, DARS contemporaneously adopts the rule review of Chapter 108.

The adoption is authorized by the Texas Human Resources Code, Chapter 73; and The Individuals with Disabilities Education Act, as amended, 20 U.S.C. §1400 et seq. and its implementing regulations; 34 C.F.R. Part 303, as amended.

No comments were received regarding adoption of the rules.

SUBCHAPTER A. EARLY CHILDHOOD INTERVENTION SERVICE DELIVERY

40 TAC §§108.23, 108.29, 108.47

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
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SUBCHAPTER B. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES

40 TAC §108.63, §108.67

The repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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General Counsel
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For further information, please call: (512) 424-4050

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CHAPTER 109. OFFICE FOR DEAF AND HARD OF HEARING SERVICES

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), adopts new rules, amendments, and repeals to the rules of the Texas Department of Assistive and Rehabilitative Services, Title 40, Part 2, Chapter 109, Office for Deaf and Hard of Hearing Services.

Specifically, DARS is adopting the following new rules, amendments, and repeals with respect to Chapter 109:

Subchapter A, General Rules: an amendment to §109.101, Definitions; and new §109.105, Training Fees, Gifts, Grants, or Donations, and §109.107, Trilingual Interpreter Services;

Subchapter B, Board for Evaluation of Interpreters and Interpreter Certification: deletion of the designation of a "Division 1" and its title "Definitions and Board Operations," as there are no other divisions listed under Subchapter B; the repeal of §109.201, Definitions, §109.209, Fees for Interpreter Training, §109.211, Trilingual Interpreter Services, §109.241, Revocation or Suspension of Certificate, §109.243, Grounds for Denying, Suspending, or Revoking an Interpreter's Certificate, and §109.245, Code of Professional Conduct; amendments to §109.203, Obtaining Documents and Information from the Office, §109.205, Registry of Qualified Interpreters, §109.223, Provisional Certificate, §109.231, Validity of Certificates and Recertification, §109.233, Certificate Renewal, 109.235, Continuing Education Programs; and new §109.227, Certification, §109.229, Administration of Examination for Court Interpreter Certification, and §109.237, Disciplinary Actions;

Subchapter C, Certified Court Interpreters: the repeal of §109.301, Definitions, §109.313, Lists of Qualified Court Interpreters and Providers of Communication Access Realtime Translation Services, §109.315, Gifts, Grants, or Donations, §109.321, Certification, §109.327, Administration of Examinations, §109.329, Form for Certificates, §109.331, Procedures for Renewal of a Certificate, §109.333, Fees for Training, Examinations, Initial Certification and Certification Renewal, §109.335, Continuing Education Programs Required for Court Interpreter Initial Certification or Certification Renewal, §109.341, Code of Professional Conduct, §109.351, Denial, Suspension, or Revocation of Certificate, and §109.353, Disciplinary Actions; amendments to §109.303, Requirements for Interpreting Court Proceedings in Courts of the State of Texas, §109.311, Obtaining Documents and Information from the Office, §109.323, Qualifications of Certified Court Interpreters, §109.325, Training Programs for Certified Court Interpreters Managed by the Department or by Public or Private Educational Institutions, §109.337, Instructions for the Compensation of a Certified Court Interpreter and Designation of the Party or Entity Responsible for Payment of Compensation, §109.339, Administrative Sanctions Enforceable by the Department, §109.361, Prohibited Acts, §109.363, Enforcement, §109.365, Criminal Offense, §109.367, Actions Against Persons Not Certified as Court Interpreters, §109.371, Court Interpreter Qualifications in Civil Cases or Depositions Pursuant to Civil Practice and Remedies Code and §109.373, Court Interpreter Qualifications in Criminal Actions Pursuant to Code of Criminal Procedure; and the title of Subchapter C is amended to "Certified Court Interpreters General Rules";

Subchapter D, Specialized Telecommunications Assistance Program: amendments to §109.403, Statutory Authority, §109.405, Definitions, §109.407, Determination of Basic Equipment or Service, §109.411, Entities Authorized to Certify Disability, and §109.415, Determination of Voucher Value.

Sections 109.101, 109.105, 109.107, 109.201, 109.209, 109.211, 109.241, 109.243, 109.245, 109.203, 109.205, 109.223, 109.227, 109.229, 109.231, 109.233, 109.235, 109.301, 109.313, 109.315, 109.321, 109.327, 109.329, 109.331, 109.333, 109.335, 109.341, 109.351, 109.353, 109.303, 109.311, 109.323, 109.325, 109.337, 109.339, 109.361, 109.363, 109.365, 109.371, 109.373, 109.403, 109.405, 109.407, 109.411 and 109.415 are adopted without changes to the proposal as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4850) and will not be republished. Sections 109.237 and 109.367 are adopted with changes to the proposed text as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4850). The text of the rules will be republished. Editorial changes were made to correct the internal reference in §109.237(a) (from §101.1109 to §101.8059) and in §109.367(a)(3)(C) (from Subchapter E to Subchapter J).

The new rules, amendments, and repeals are adopted pursuant to Human Resources Code, Chapter 81; Texas Government Code, Chapter 57; Code of Criminal Procedure, Article 38; Civil Practices and Remedies Code, Chapter 21; and pursuant to DARS' four-year rule review of Chapter 109, which DARS conducted as required by Texas Government Code, §2001.039. As a result of the review, DARS determined that the reasons for originally adopting the rules continue to exist. However, the review identified areas where new rules, amendments, and repeals were needed to strengthen and clarify rules relating to DARS' Office for Deaf and Hard of Hearing Services and the services and programs that it administers on behalf of deaf and hard of hearing consumers, especially rules relating to DARS' interpreter certification programs. Notice of the proposed rule review of Chapter 109 was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8864).

Elsewhere in this issue of the *Texas Register*, DARS contemporaneously adopts the rule review of Chapter 109.

Note that the substantive contents of repealed §§109.201, 109.209, and 109.211, are being transferred and adopted contemporaneously elsewhere in this issue of the *Texas Register* in §109.101, Definitions, and new §109.105, Training Fees, Gifts, Grants, or Donations, and §109.107, Trilingual Interpreter Services, respectively, of Chapter 109, Subchapter A; and the substantive contents of repealed §§109.241, 109.243, and 109.245, are being transferred and adopted contemporaneously elsewhere in this issue of the *Texas Register* as new §101.8057, Revocation and Suspension of a Certificate, §101.8059, Grounds for Denying, Revoking, or Suspending an Interpreter's Certificate, and §101.8061, Codes of Professional Conduct and Ethics, respectively, of Title 40, Part 2, Chapter 101, Administrative Rules and Procedures, Subchapter J, Appeals and Hearing Procedures, Division 4, Office for Deaf and Hard of Hearing Services.

Note that the substantive contents of §§109.321, 109.327, and 109.353, of Subchapter C, are being transferred and adopted contemporaneously elsewhere in this issue of the *Texas Register* in new §109.227, Certification, §109.229, Administration of Examination for Court Interpreter Certification, and §109.237, Disciplinary Actions, respectively, of Chapter 109, Subchapter B.

Also note that the substantive contents of repealed §109.341 and §109.351, of Subchapter C, are being transferred and adopted contemporaneously elsewhere in this issue of the *Texas Register* as new §101.8059, Grounds for Denying, Revoking, or Suspending an Interpreter's Certificate, §101.8061, Codes of Professional Conduct and Ethics, respectively, of Title 40, Part 2, Chapter 101, Administrative Rules and Procedures, Subchapter J, Appeals and Hearing Procedures, Division 4, Office for Deaf and Hard of Hearing Services.

No comments were received regarding adoption of the rules.

SUBCHAPTER A. GENERAL RULES

40 TAC §§109.101, 109.105, 109.107

The amendments and new sections are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. BOARD FOR EVALUATION OF INTERPRETERS AND INTERPRETER CERTIFICATION

DIVISION 1. DEFINITIONS AND BOARD OPERATIONS

40 TAC §§109.201, 109.209, 109.211, 109.241, 109.243, 109.245

The repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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SUBCHAPTER B. BOARD FOR EVALUATION OF INTERPRETERS AND INTERPRETER CERTIFICATION

40 TAC §§109.203, 109.205, 109.223, 109.227, 109.229, 109.231, 109.233, 109.235, 109.237

The amendments and new sections are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§109.237. Disciplinary Actions.

(a) The Department or Office may take disciplinary action against a certificate holder who is found to be in violation of a statute, rule, or policy of the Office or Department, including any of the provisions of §101.8059 of this title (relating to Grounds for Denying, Revoking, or Suspending an Interpreter's Certificate).

(b) A disciplinary action may be composed of any one or combination of the following listed in paragraphs (1) - (6) of this subsection:

(1) revocation of a certification;

(2) suspension of a certification;

(3) probation of a suspended certification;

(4) refusal to renew a certification;

(5) issuance of a formal or informal reprimand; or

(6) with respect to certified court interpreters only, assessment of an administrative penalty under the law.

(c) All final disciplinary actions taken by the Department or by the Office shall be permanently recorded and made available upon request as public information. Except for an informal reprimand, all disciplinary actions may be released in a press release, and may be transmitted to the RID, as appropriate.

(d) An interpreter whose certification has expired for nonpayment of renewal fees continues to be subject to all statutory, rule, and procedural provisions of the Department governing certified interpreters until the certification is revoked by the Department or becomes nonrenewable under the law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. CERTIFIED COURT INTERPRETERS

40 TAC §§109.301, 109.313, 109.315, 109.321, 109.327, 109.329, 109.331, 109.333, 109.335, 109.341, 109.351, 109.353

The repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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SUBCHAPTER C. CERTIFIED COURT INTERPRETERS GENERAL RULES

40 TAC §§109.303, 109.311, 109.323, 109.325, 109.337, 109.339, 109.361, 109.363, 109.365, 109.367, 109.371, 109.373

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§109.367. Actions Against Persons Not Certified as Court Interpreters.

(a) The Office shall investigate complaints and may initiate disciplinary action against a person alleged to perform court interpretation without certification or authorization as provided by this subchapter. The following investigative process and resulting action listed in paragraphs (1) - (3) of this subsection will be followed by the Office to ensure affected individuals are afforded due process of law.

(1) Upon receipt of a formal or staff-initiated complaint, the information will be evaluated to determine if the evidence provides reasonable cause that a violation may have occurred.

(2) If reasonable cause does not exist, an investigation will not be initiated.

(3) If reasonable cause is found, then an investigation will be initiated by the Office staff to determine if a violation of law has occurred. The Office's investigative process will be as follows.

(A) The individual will be advised of the complaint and the specific section of the Act which appears to have been violated.

(B) The individual will be afforded the opportunity to respond to the complaint to show that the actions which precipitated the complaint are not in violation of the Act.

(C) If, after evaluation of the individual's response, a violation appears evident, the individual will be afforded the opportunity for a hearing as provided to certificate holders under Chapter 101, Subchapter J, Divisions 1 and 4 of this title (relating to General Rules and Office for Deaf and Hard of Hearing Services) or to resolve the complaint through a Department order, which may include the imposition of an administrative penalty.

(b) Authority: Texas Government Code, §§57.022(b)(8), 57.026, and 57.027.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. SPECIALIZED TELECOMMUNICATIONS ASSISTANCE PROGRAM

40 TAC §§109.403, 109.405, 109.407, 109.411, 109.415

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2008.

TRD-200804239
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Effective date: August 31, 2008
Proposal publication date: June 20, 2008
For further information, please call: (512) 424-4050

♦ ♦ ♦

PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 373. SUPERVISION

40 TAC §373.3

The Texas Board of Occupational Therapy Examiners adopts the amendment to §373.3, concerning Supervision of a Licensed Occupational Therapy Assistant, with changes to the proposed text as published in the May 9, 2008, issue of the *Texas Register* (33 TexReg 3726) and will be republished.

The amended section is adopted, in part, to clarify the manner in which a COTA/LOTA shall be documented in a supervision log.

Two comments were received from individuals. Both comments contended that the term "therapist" was not specific enough for the rule. The board substituted the designations COTA/LOTA.

The amendment is adopted under the Occupational Therapy Act, Title 3, Subchapter H, Chapter 454, Occupations Code, which provides 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, Subchapter H, Chapter 454 of the Occupations Code is affected by this amended section.

§373.3. Supervision of a Licensed Occupational Therapy Assistant.

(a) A COTA/LOTA shall provide occupational therapy services only under the supervision of a licensed occupational therapist.

(b) Supervision of a full time employed COTA or LOTA by the OTR or LOT includes:

(1) A minimum of six hours a month of frequent communication between the supervising OTR(s) or LOT(s) and the COTA or LOTA by telephone, written report, email, conference etc., including review of progress of patient's/client's assigned, plus

(2) A minimum of two hours of supervision a month of face-to-face, real time interaction with the OTR(s) or LOT(s) observing the COTA or LOTA providing services with patients/clients.

(3) These hours shall be documented on a COTA/LOTA Supervision Log for each employer. The OTR/LOT or employer may request a copy of the COTA Supervision Log. The COTA Supervision Log is kept by the COTA/LOTA and signed by an OTR/LOT when supervision is given.

(c) Licensees 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 includes face-to-face, real time interaction by the OTR(s) and LOT(s) observing the COTA or LOTA providing services with patients/clients. Those months where the licensee does not work as a COTA/LOTA, he or she shall write N/A in the COTA Supervision Log for that month.

(d) COTAs or LOTAs 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 OTR or LOT, as outlined for part-time employment in this section.

(e) The OTA must include the name of the supervising OT in each patient's treatment note.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2008.

TRD-200804097
John Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Effective date: August 26, 2008
Proposal publication date: May 9, 2008
For further information, please call: (512) 305-6900

♦ ♦ ♦

TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Department of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the proposal is adopted. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the proposal is adopted. The Administrative Procedure Act, Government Code, Chapters 2001 and 2002, does not apply to department action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Proposed Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

The Commissioner of Insurance (Commissioner) has received a petition from Safeco Insurance Companies (American States Insurance Company, American Economy Insurance Company, American States Insurance Company of Texas, and First National Insurance Company of America) (Safeco) proposing adoption of amendments to the *Texas Basic Manual of Rules, Classifications and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance* (Manual) concerning acquisition expense discounts. Safeco's petition (Reference No. W-0708-12) was filed on July 14, 2008.

Pursuant to Texas Insurance Code, Article 5.96(c), the Commissioner is considering this petition for adoption. The Commissioner will not act on the petition prior to September 16, 2008. The Commissioner will not hold a public hearing on the petition prior to taking action unless a hearing is requested by an interested person on or before September 15, 2008.

Safeco's petition is filed pursuant to the Texas Insurance Code, Article 5.96 and §2053.002. Article 5.96(a) authorizes the Commissioner to prescribe, promulgate, adopt, approve, amend, or repeal standard and uniform manual rules, rating plans, classification plans, statistical plans, and policy and endorsement forms for workers' compensation insurance. Section 2053.002 requires that, in setting workers' compensation insurance rates, an insurer shall consider, *inter alia*, operation expenses.

Safeco requests that the proposed amendments to the Manual be adopted and that the amendments become effective 15 days after the Commissioner's adoption order is published in the *Texas Register*.

Safeco proposes the following amendments to the Manual:

1.A. Amend Rule VI, titled "Rates and Premium Determination," by adding a new Section L, to be entitled "Acquisition Expense Discount." The proposed new section defines an acquisition expense discount as a "premium credit given to policyholders written by the same insurance carrier who are members of a common group or organization." The acquisition expense discount would allow insurers that can identify and document reduced acquisition expenses related to writing members of such a group or organization to pass the savings on to these policyholders. The acquisition expense discount would be applied in addition to the premium discount and would be applicable to minimum premium policies.

Each insurer electing to offer an acquisition expense discount would be required to file with the Texas Department of Insurance the discount in accordance with the Texas Administrative Code, Title 28, Chapter 5, Subchapter M, Filing Requirements. Each such insurer would be required to provide the following information:

a. The definition of the common group or organization to which the acquisition expense discount will apply;

b. The acquisition expense discount percentage; and

c. Documentation supporting the acquisition expense discount.

1.B. Amend Rule VI, Section E, titled "Minimum Premium," to state that the minimum premiums filed by the insurers shall be reduced by the acquisition expense discount, if applicable.

2. Amend the Procedures Appendix, Section A(6), titled "Policy Issuance," by adding to the list of items that must be included on the information page of the policy the acquisition expense discount factor, if any is applicable. Add the acquisition expense discount as new subsection (r) and re-designate the subsequent subsections as (s) through (x). The amount of the premium reduction, if applicable, would be shown on the information page of the policy.

3. Amend Rule III, Section E, titled "Calculation of Total Estimated Policy Cost" by adding to the list of items new item 19 for "Estimated Standard Premium After Premium Discount" and new item 20 for "Acquisition Expense Discount, If Applicable." Re-designate the subsequent items as (21) through (23). If the minimum premium is the total estimated policy cost, the acquisition expense discount would be applied to the minimum premium.

A copy of the full text of Safeco's petition and related exhibits of specific language for the proposed amendments to the Manual are available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104. For further information or to request copies of the petition and proposed revised schedule and table, please contact Sylvia Gutierrez at ChiefClerk@tdi.state.tx.us, (512) 463-6327 (Reference No. W-0708-12-I).

Comments on the proposed amendments may be submitted in writing by 5:00 p.m. on September 15, 2008, to Gene Jarmon, General Counsel and Chief Clerk, Texas Department of Insurance, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of the comment should be simultaneously submitted to Nancy Moore, Deputy Commissioner, WC Classification and Premium Calculation, Texas Department of Insurance, P.O. Box 149104, MC 105-2A, Austin, Texas 78714-9104. Any request for a public hearing must be submitted separately to the Office of Chief Clerk before the close of the public

comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

This notification is made pursuant to the Texas Insurance Code, Article 5.96, which exempts action taken under this article from the requirements of the Administrative Procedure Act (Government Code, Title 10, Chapter 2001).

TRD-200804366

Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 13, 2008

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 Board of Dental Examiners

Title 22, Part 5

The Texas State Board of Dental Examiners (Board) files this notice of intention to review 22 TAC Chapter 112, Visual Dental Health Inspections. This review is pursuant to §2001.039 of the Texas Government Code, pertaining to agency review of existing rules.

Comments relating to whether these rules should be repealed, readopted, or readopted with changes must be received within 30 days, and may be submitted to Sherri Sanders Meek, Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-0972.

To ensure consideration, comments must clearly specify the particular section of the rule to which they apply. General comments should be labeled as such. Comments should include proposed alternative language as appropriate.

Chapter 112. Visual Dental Health Inspections.

§112.1. Definitions.

§112.2. Visual Dental Health Inspection.

TRD-200804299
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Filed: August 12, 2008

♦ ♦ ♦

The Texas State Board of Dental Examiners (Board) files this notice of intention to review 22 TAC Chapter 114, Extension of Duties of Auxiliary Personnel, Dental Assistants. This review is pursuant to §2001.039 of the Texas Government Code, pertaining to agency review of existing rules.

Comments relating to whether these rules should be repealed, readopted, or readopted with changes must be received within 30 days, and may be submitted to Sherri Sanders Meek, Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-0972.

To ensure consideration, comments must clearly specify the particular section of the rule to which they apply. General comments should be labeled as such. Comments should include proposed alternative language as appropriate.

Chapter 114. Extension of Duties of Auxiliary Personnel, Dental Assistants.

§114.1. Permitted Duties.

§114.2. Registration of Dental Assistants

§114.3. Application of Pit and Fissure Sealants.

§114.4. Monitoring the Administration of Nitrous Oxide.

§114.10. Radiologic Procedures.

§114.11. Exemption.

§114.20. Radiologic Credential.

§114.21. Requirements for Dental Assistant Registration Courses and Examinations.

§114.22. Dental Assistant Course Objectives.

§114.23. Dental Assistant Course Integrity.

TRD-200804300
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Filed: August 12, 2008

♦ ♦ ♦

The Texas State Board of Dental Examiners (Board) files this notice of intention to review 22 TAC Chapter 115, Extension of Duties of Auxiliary Personnel, Dental Hygiene. This review is pursuant to §2001.039 of the Texas Government Code, pertaining to agency review of existing rules.

Comments relating to whether these rules should be repealed, readopted, or readopted with changes must be received within 30 days, and may be submitted to Sherri Sanders Meek, Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-0972.

To ensure consideration, comments must clearly specify the particular section of the rule to which they apply. General comments should be labeled as such. Comments should include proposed alternative language as appropriate.

Chapter 115. Extension of Duties of Auxiliary Personnel, Dental Hygiene.

§115.1. Definitions.

§115.2. Permitted Duties.

§115.3. Institutional Employment.

§115.4. Placement of Site Specific Subgingival Medicaments.

§115.5. Dental Hygienists Practicing in Long Term Care Facilities and School-Based Health Centers.

§115.20. Dental Hygiene Advisory Committee - Purpose and Composition.

TRD-200804301
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Filed: August 12, 2008

♦ ♦ ♦

The Texas State Board of Dental Examiners (Board) files this notice of intention to review 22 TAC Chapter 116, Dental Laboratories. This review is pursuant to §2001.039 of the Texas Government Code, pertaining to agency review of existing rules.

Comments relating to whether these rules should be repealed, readopted, or readopted with changes must be received within 30 days, and may be submitted to Sherri Sanders Meek, Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-0972.

To ensure consideration, comments must clearly specify the particular section of the rule to which they apply. General comments should be labeled as such. Comments should include proposed alternative language as appropriate.

Chapter 116. Dental Laboratories.

§116.1. Definitions.

§116.2. Exemptions.

§116.3. Registration and Renewal.

§116.4. Requirements.

§116.5. Certified Dental Technician Required.

§116.6. Continuing Education.

§116.10. Prosthetic Identification.

§116.20. Responsibility.

TRD-200804302
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Filed: August 12, 2008

♦ ♦ ♦

The Texas State Board of Dental Examiners (Board) files this notice of intention to review 22 TAC Chapter 117, Faculty and Students in Accredited Dental Schools. This review is pursuant to §2001.039 of the Texas Government Code, pertaining to agency review of existing rules.

Comments relating to whether these rules should be repealed, readopted, or readopted with changes must be received within 30 days, and may be submitted to Sherri Sanders Meek, Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-0972.

To ensure consideration, comments must clearly specify the particular section of the rule to which they apply. General comments should be labeled as such. Comments should include proposed alternative language as appropriate.

Chapter 117. Faculty and Students in Accredited Dental Schools.

§117.1. Exemptions.

§117.2. Dental Faculty Licensure.

§117.3. Dental Hygiene Faculty Licensure.

TRD-200804303
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Filed: August 12, 2008

♦ ♦ ♦

Adopted Rule Reviews

Department of Assistive and Rehabilitative Services

Title 40, Part 2

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (DARS) adopts the review of Chapter 101, Administrative Rules and Procedures.

Texas Government Code, Chapter 2001 (the Administrative Procedure Act), §2001.039, Agency Review of Existing Rules, requires that each state agency review and consider for readoption each rule adopted by that agency.

The proposed review was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8863).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 101, Administrative Rules and Procedures.

TRD-200804352
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: August 13, 2008

♦ ♦ ♦

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (DARS) adopts the review of Chapter 105, General Contracting Rules.

Texas Government Code, Chapter 2001 (the Administrative Procedure Act), §2001.039, Agency Review of Existing Rules, requires that each state agency review and consider for readoption each rule adopted by that agency.

The proposed review was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8863).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 105, General Contracting Rules.

TRD-200804353
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: August 13, 2008

♦ ♦ ♦

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (DARS) adopts the review of Chapter 106, Division for Blind Services.

Texas Government Code, Chapter 2001 (the Administrative Procedure Act), §2001.039, Agency Review of Existing Rules, requires that each state agency review and consider for readoption each rule adopted by that agency.

The proposed review was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8863).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 106, Division for Blind Services.

TRD-200804354
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: August 13, 2008

♦ ♦ ♦

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (DARS) adopts the review of Chapter 107, Division for Rehabilitation Services.

Texas Government Code, Chapter 2001 (the Administrative Procedure Act), §2001.039, Agency Review of Existing Rules, requires that each state agency review and consider for readoption each rule adopted by that agency.

The proposed review was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8863).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 107, Division for Rehabilitation Services.

TRD-200804355
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: August 13, 2008

♦ ♦ ♦

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (DARS) adopts the review of Chapter 108, Division for Early Childhood Intervention Services.

Texas Government Code, Chapter 2001 (the Administrative Procedure Act), §2001.039, Agency Review of Existing Rules, requires that each state agency review and consider for readoption each rule adopted by that agency.

The proposed review was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8863).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 108, Division for Early Childhood Intervention Services.

TRD-200804356
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: August 13, 2008

♦ ♦ ♦

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (DARS) adopts the review of Chapter 109, Office for Deaf and Hard of Hearing Services.

Texas Government Code, Chapter 2001 (the Administrative Procedure Act), §2001.039, Agency Review of Existing Rules, requires that each state agency review and consider for readoption each rule adopted by that agency.

The proposed review was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8863).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 109, Office for Deaf and Hard of Hearing Services.

TRD-200804357
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: August 13, 2008

♦ ♦ ♦

Texas Education Agency

Title 19, Part 2

The State Board of Education (SBOE) adopts the review of 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials, Subchapter A, General Provisions; Subchapter B, State Adoption of Instructional Materials; Subchapter C, Local Operations; Subchapter D, Special Instructional Materials; and Subchapter E, Disposition of Instructional Materials, pursuant to the Texas Government Code, §2001.039. The SBOE proposed the review of 19 TAC Chapter 66, Subchapters A - E, in the June 13, 2008, issue of the *Texas Register* (33 TexReg 4689).

The SBOE finds that the reasons for adopting 19 TAC Chapter 66, Subchapters A - E, continue to exist and readopts the rules. The SBOE received no comments related to the rule review requirement.

No changes are necessary as a result of the review.

This concludes the review of 19 TAC Chapter 66.

TRD-200804162
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: August 8, 2008

♦ ♦ ♦

State Securities Board

Title 7, Part 7

Pursuant to the notice of proposed rule review published in the *Texas Register* (33 TexReg 4532), June 6, 2008, 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 115, Securities Dealers and Agents, and Chapter 116, Investment Advisers and Investment Adviser Representatives.

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 Government Code.

No comments were received regarding the readoption of Chapters 115 and 116.

This concludes the review of 7 TAC Chapters 115 and 116.

TRD-200804133
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Filed: August 7, 2008

♦ ♦ ♦

Pursuant to the notice of proposed rule review published in the *Texas Register* (33 TexReg 2043), March 7, 2008, the State Securities Board (Board) has reviewed and considered for readoption, revision, or repeal, all sections of the following chapter of Title 7, Part 7, of the Texas Administrative Code, in accordance with Texas Government Code, §2001.039: Chapter 133, Forms.

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 this chapter, without changes, pursuant to the requirements of the Government Code.

As part of the review process, the Board is proposing to repeal §133.21 and §133.22. Notices of the proposed repeals will be published in the Proposed Rules section of the *Texas Register*, in accordance with the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001.

No comments were received regarding the readoption of Chapter 133.

This concludes the review of 7 TAC Chapter 133.

TRD-200804132
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Filed: August 7, 2008

♦ ♦ ♦

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: 1 TAC §355.8065(f)(4)(B)

$$\left((1/2 \times \text{Available Fund}) \times \frac{\text{Hospital's Medicaid Days} \times \text{Weight}}{\text{Weighted Medicaid Days}}\right)$$

+

$$\left((1/2 \times \text{Available Fund}) \times \frac{\text{Hospital's Low Income Days} \times \text{Weight}}{\text{Weighted Low Income Days}}\right)$$

Figure: 28 TAC §21.3107(a)

NOTICE OF COVERAGE FOR ACQUIRED BRAIN INJURY

Your health benefit plan coverage for an acquired brain injury includes the following services:

- Cognitive rehabilitation therapy
- Cognitive communication therapy
- Neurocognitive therapy and rehabilitation
- Neurobehaviorial, neurophysiological, neuropsychological and psychophysiological testing and treatment
- Neurofeedback therapy and remediation
- Post-acute transition services and community reintegration services, including outpatient day treatment services or other post-acute care treatment services
- Reasonable expenses related to periodic reevaluation of the care of an individual covered under the plan who has incurred an acquired brain injury, has been unresponsive to treatment, and becomes responsive to treatment at a later date, at which time the cognitive rehabilitation services would be a covered benefit.

The fact that an acquired brain injury does not result in hospitalization or acute care treatment does not affect the right of the insured or the enrollee to receive the preceding treatments or services commensurate with their condition. Post-acute care treatment or services may be obtained in any facility where such services may legally be provided, including acute or post-acute rehabilitation hospitals and assisted living facilities regulated under the Health and Safety Code.

Figure: 30 TAC §101.379(c)(2)(A)

$$\text{Flow Control Limit} = \sum [B + (C_1 - C_2) + (D_1 - D_2) + E]$$

Where:

B = the 2009 annual flow control limit prescribed in the Dallas-Fort Worth Eight-Hour Ozone Attainment Demonstration State Implementation Plan Revision for the 1997 eight-hour ozone standard;

C_1 = the estimated emission reductions associated with fleet turnover from mobile sources during the previous calendar year control period;

C_2 = the emission reduction associated with the contingency requirement for the current control period;

D_1 = Discrete Emissions Reduction Credits (DERCs) certified on or after March 1, 2009, and approved for use in the previous calendar year control period;

D_2 = DERCs certified on or after March 1, 2009, and used in the previous calendar year control period; and

E = DERCs certified before March 1, 2009, and approved for use in the previous calendar year control period that remain unused.

Figure: 30 TAC §217.32(a)(3)

Table B.1. - Design Organic Loadings and Flows for a New Facility

Source	Remarks	Daily Wastewater Flow (gallons/person)	Wastewater Strength (mg/l BOD_5)
Municipality	Residential	75-100	200-350
Subdivision	Residential	75-100	200-350
Trailer Park (Transient)	2½ Persons per Trailer	50-60	250-300
Mobile Home Park	3 Persons per Trailer	50-75	300
School	Cafeteria & Showers Cafeteria/No Showers	20 15	300 300
Recreational Parks	Overnight User Day User	30 5	200 100
Office Building or Factory	A facility must be designed for the largest shift	20	300
Hotel/Motel	Per Bed	50-75	300
Restaurant	Per Meal	7-10	1000*
Restaurant with bar or cocktail lounge	Per Meal	9-12	1000*
Hospital	Per Bed	200	300
Nursing Home	Per Bed	75-100	300
Alternative Collection Systems (Subchapter D)	Per Capita	75	N/A
*Based on a restaurant with a grease trap			

Figure: 30 TAC §217.53(k)(3)

Equation B.1.

$$PS = C \times RSC \times \left(\frac{8.337}{D} \right)$$

Where:

PS = Pipe stiffness in pounds per square inch (psi)
C = Conversion factor, (0.80)
RCS = Ring stiffness constant
D = Mean pipe diameter in inches

Figure: 30 TAC §217.53(l)(2)(A)

Table C.1 - Minimum and Maximum Pipe Slopes

Size of Pipe *(inches)*	**Minimum Slope** *(%)*	**Maximum Slope** *(%)*
6	0.50	12.35
8	0.33	8.40
10	0.25	6.23
12	0.20	4.88
15	0.15	3.62
18	0.11	2.83
21	0.09	2.30
24	0.08	1.93
27	0.06	1.65
30	0.055	1.43
33	0.05	1.26
36	0.045	1.12
39	0.04	1.01
>39	*	*
* For pipes larger than 39 inches in diameter, the slope is determined by Manning's formula to maintain a velocity greater than 2.0 feet per second and less than 10.0 feet per second when flowing full.		

Figure: 30 TAC §217.53(l)(2)(B)

Equation C.2. Manning's Formula.

$$V = \frac{1.49}{n} \times R_h^{0.67} \times \sqrt{S}$$

Where:

V = velocity (ft/sec)

n = Manning's roughness coefficient (0.013)

R_h = hydraulic radius (ft)

S = slope (ft/ft)

Figure: 30 TAC §217.57(a)(1)(B)(ii)

Equation C.3.

$$T = \frac{(0.085 \times D \times K)}{Q}$$

Where:

T = time for pressure to drop 1.0 pound per square inch gauge in seconds
K = 0.000419HDHL, but not less than 1.0
D = average inside pipe diameter in inches
L = length of same pipe size being tested, in feet
Q = rate of loss, 0.0015 cubic feet per minute per square foot internal surface

Figure: 30 TAC §217.57(a)(1)(C)

Table C.3. - Minimum Testing Times for Low-Pressure Air Test

Pipe Diameter *(inches)*	**Minimum Time** *(seconds)*	**Maximum Length for Minimum Time** *(feet)*	**Time for Longer Length** *(seconds/foot)*
6	340	398	0.855
8	454	298	1.520
10	567	239	2.374
12	680	199	3.419
15	850	159	5.342
18	1020	133	7.693
21	1190	114	10.471
24	1360	100	13.676
27	1530	88	17.309
30	1700	80	21.369
33	1870	72	25.856

Figure: 30 TAC §217.60(b)(7)

Table C.4. - Minimum Pump Cycle Times

Pump Horsepower	**Minimum Cycle Times** *(minutes)*
< 50	6
50-100	10
> 100	15

Figure: 30 TAC §217.60(b)(8)

Equation C.5.

$$V = \frac{T \times Q}{4 \times 7.48}$$

Where:

V = Active volume (cubic feet)
Q = Pump capacity (gallons per minute)
T = Cycle time (minutes)
7.48 = Conversion factor (gallons/cubic foot)

Figure: 30 TAC §217.152(g)(3)

Equation F.1.

$$SWD = 160Q + 4$$

Where:

SWD = side water depth required (feet)
Q = annual average flow in million gallons per day, as determined in §217.31(a) of this title (relating to Applicability)

Figure: 30 TAC §217.155(a)(3)

Equation F.2.

$$O_2R = \frac{1.2(BOD_5) + 4.3(NH_3 - N)}{BOD_5}$$

Where:

O_2R = Oxygen requirement, lb O_2/ lb BOD_5
BOD_5 = BOD_5 concentration, mg/L
NH_3-N = Ammonia nitrogen, mg/L

Table F.3 - Minimum O_2R for Lower BOD_5 Loadings

Process	O_2R, pounds (lbs) O_2/lb BOD_5
Conventional Activated Sludge Systems that are not Intended to Nitrify	1.2
Conventional Activated Sludge Systems that are Intended to Nitrify and Extended Aeration Systems (including all Oxidation Ditch Treatment Systems)	2.2

Figure: 30 TAC §217.155(b)(1)

Table F.4. - Minimum Airflow Requirements for Diffused Air

Process	Airflow/BOD_5 load *standard cubic feet (SCF)/day/lb*
Conventional Activated Sludge Systems that are not Intended to Nitrify	1800*
Conventional Activated Sludge Systems that are Intended to Nitrify; and, Extended Aeration Systems	3200*
*These values were calculated using Equation F.3 in Figure: 30 TAC §217.155(b)(2)(A)(iv) with the following assumptions: a transfer efficiency of 4.0% in wastewater for all diffused air activated sludge processes; a diffuser submergence of 12 feet; a wastewater temperature of 20°C; and the oxygen requirements in Figure: 30 TAC §217.155(a)(3), Table F.3.	

Figure: 30 TAC §217.155(b)(2)(A)(iv)

Equation F.3.

$$FTE = (T_e) \times (\frac{WOTE}{CWOTE}) \times 1.024^{T-20} \times (\frac{C_f}{C_t})$$

Where:

T_e = Test Efficiency
FTE = Field Transfer Efficiency (decimal)
WOTE = Wastewater Oxygen Transfer Efficiency (decimal)
CWOTE = Clean Water Oxygen Transfer Efficiency (decimal)
T = Temperature (degrees C)
C_f = Oxygen Saturation in Field (Includes temperature, dissolved solids, pressure, etc.)
C_t = Oxygen Saturation in Test Conditions

Figure: 30 TAC §217.155(b)(2)(C)

Equation F.4.

$$RAF = \frac{(PPD\ BOD_5) \times (O_2/lb\ BOD_5)}{WOTE \times 0.23 \times 0.075 \times 1440}$$

Where:

RAF = Required Airflowrate (standard cubic feet per minute (SCFM))
PPD BOD_5 = Influent Organic Load in Pounds per Day
0.23 = lb 0_2/lb air @ 20° C
1440 = minutes/day
0.075 = lb air/cubic foot (cf)
WOTE = Wastewater Oxygen Transfer Efficiency (decimal)
If the design inlet temperature is above 24° C, the specific weight of air must be adjusted to the specific weight at the intake temperature.

Figure: 30 TAC §217.155(b)(2)(D)

Table F.5. - Diffuser Submergence Correction Factors

Diffuser Submergence Depth *(feet)*	Airflow Rate Correction Factor
8	1.82
10	1.56
12	1.00
15	0.91
18	0.73
20	0.64

Figure: 30 TAC §217.155(b)(5)(A)(i)

Table F.6. - Minimum Diffuser Submergence Depth

Design Flow *(mgd)*	Minimum Submergence Depth *(feet)*
<0.01	8.0
0.01 to 0.10	9.0
>0.10	10.0

Figure: 30 TAC §217.182(c)

Table G.1. - Typical Design Loadings

	Standard Rate	Intermediate Rate	High Rate	High Rate	Roughing
Media	***Rock***	***Rock***	***Rock***	***Manufactured***	***Either***
Hydraulic Loading: mgd/acre	1-4	4-10	10-40	15-90	60-180
Hydraulic Loading: gpd/sf	25-90	90-230	230-900	350-1000	1400-4200
*Organic Loading: lb BOD_5/acre-feet/day	200-1000	700-1400	1000-1300	--	--
*Organic Loading: lb BOD_5/day/1000cf	5-25	15-30	30-150	up to 300	≥100
HBOD_5 Removal (%)	80-85	0-70	40-80	65-85	40-85
*Does not include recirculation H Includes subsequent settling					

Figure: 30 TAC §217.182(g)(3)

Table G.2 - Trickling Filter Dosing Intensity Ranges (SK)

BOD_5 loading *kilogram (kg)/m^3/day*	**Design SK** *mm/pass*	**Flushing SK** *mm/pass*
0.25	10-100	≥200
0.50	15-150	≥200
1.00	30-200	≥300
2.00	40-250	≥400
3.00	60-300	≥600
4.00	80-400	≥800

Figure: 30 TAC §217.182(g)(4)

Equation G.1.

$$SK = \frac{(q + r) \times (1000mm/m)}{(a) \times (n) \times (60)}$$

Where:

SK = dosing intensity, millimeter (mm)/pass of an arm

Q = influent flow/filter top surface area, in cubic meters (m^3)/ square meter (m^2)/hour

R = recycle flow/filter top surface area, m^3/m^2/hour

A = number of arms

N = revolutions per minute

Figure: 30 TAC §217.182(n)(5)

Equation G.2.

$$MAFR = \frac{(R_A) \times (L) \times (P_F)}{1440 \text{min}/day}$$

Where:

MAFR = Minimum airflow rate, scfm

R_A = Aeration rate, scf/lb, Table G.3

L = Loading rate, lb/day, Table G.3

P_F = Loading peaking factor

Table G.3 - Aeration Rate and Loading Rate Factors

Filter Application	R_A (scf/lb BOD_5)	L (lb BOD_5/1000 cf/day) Loading on the filter
Roughing Filter at 75-200 lb BOD_5/1000 cf/day	1080	BOD_5
Secondary Treatment Filter at 25-50 lb BOD_5/1000 cf/day	1200	BOD_5
Combined or Tertiary Filter	2400	1.25 * BOD_5 + 4.6 * total Kjeldahl nitrogen (TKN)

Figure: 30 TAC §217.249(t)(4)(B)

Table J.2. - Minimum Detention Times for Aerobic Digesters

Temperature (Degrees Celsius)	Total Detention Time
15°	60 days
20°	40 days

Figure: 30 TAC §217.250(e)(2)(A)(ii)

Table J.3. - Surface Area Requirements for Sludge Drying Beds

Stabilization Process	Pounds Digested Dry Solids *per square foot per year*
Anaerobic Digestion	20.0
Aerobic Digestion	15.0

Figure: 30 TAC §217.250(e)(4)(A)

Table J.4. - Filtration Rates

Type of Treatment	**Pounds of Dry Solids** *per square foot per hour (minimum-maximum)*
Primary	4-6
Primary and Trickling Filter	3-5
Primary and Activated Sludge	3-4

Figure: 31 TAC §13.17(a)

NEW OIL AND GAS PIPELINE EASEMENT RATES -- BASE YEAR 2008
10-YEAR TERM

Size	GLO Proposed Rates All rates based on price per rod				
	Region 1	Region 2	Region 3	Damages	Non-State O&G
Up to 13"	$ 14	$ 25	$ 20	$ 18	$ 126
13" & Greater	$ 36	$ 59	$ 48	$ 24	$ 126
TERM	10 YEARS				

NOTES TO PSF RATES:

1) **Minimum amount for a pipeline contract is $670.**
2) **New fees are $350 per event of application, renewal, assignment, or amendment.**
3) **Rates for PSF acquired properties and properties within a municipality or its extraterritorial jurisdiction are negotiated, based on the appraised value of the property.**
4) **Perpetual easements are charged at three times the 10-year term rate.**
5) **Damages are charged per rod, and are applied to new easements only – not for renewals.**
6) **Damages for acquired properties and critical habitat may be negotiated as a single rate per rod (not added to the base damages rate) and are applied only to new easements – not for renewals.**
7) **Damages fees will not be assessed for lines that are directionally drilled under state lands.**
8) **Base rates are adjusted on September 1 yearly, according to the actual change in the CPI-U. An annual increase may not exceed 3% of the previous year rate.**

NEW OIL AND GAS PIPELINE EASEMENT RATES -- BASE YEAR 2008
20-YEAR TERM

Size	GLO Proposed Rates All rates based on price per rod				
	Region 1	Region 2	Region 3	Damages	Non-State O&G
Up to 13"	$ 19	$ 34	$ 27	$ 18	$ 172
13" & Greater	$ 50	$ 80	$ 65	$ 24	$ 172
TERM	20 YEARS				

NOTES TO PSF RATES:

1) Minimum amount for a pipeline contract is $1340.
2) New fees are $350 per event of application, renewal, assignment, or amendment.
3) Rates for PSF acquired properties and properties within a municipality or its extraterritorial jurisdiction are negotiated, based on the appraised value of the property.
4) Perpetual easements are charged at two times the 20-year term rate.
5) Damages are charged per rod, and are applied to new easements only – not for renewals.
6) Damages for acquired properties and critical habitat may be negotiated as a single rate per rod (not added to the base damages rate) and are applied only to new easements – not for renewals.
7) Damages fees will not be assessed for lines that are directionally drilled under state lands.
8) Base rates are adjusted on September 1 yearly, according to the actual change in the CPI-U. An annual increase may not exceed 3% of the previous year rate.

PIPELINE EASEMENTS REGIONS MAP

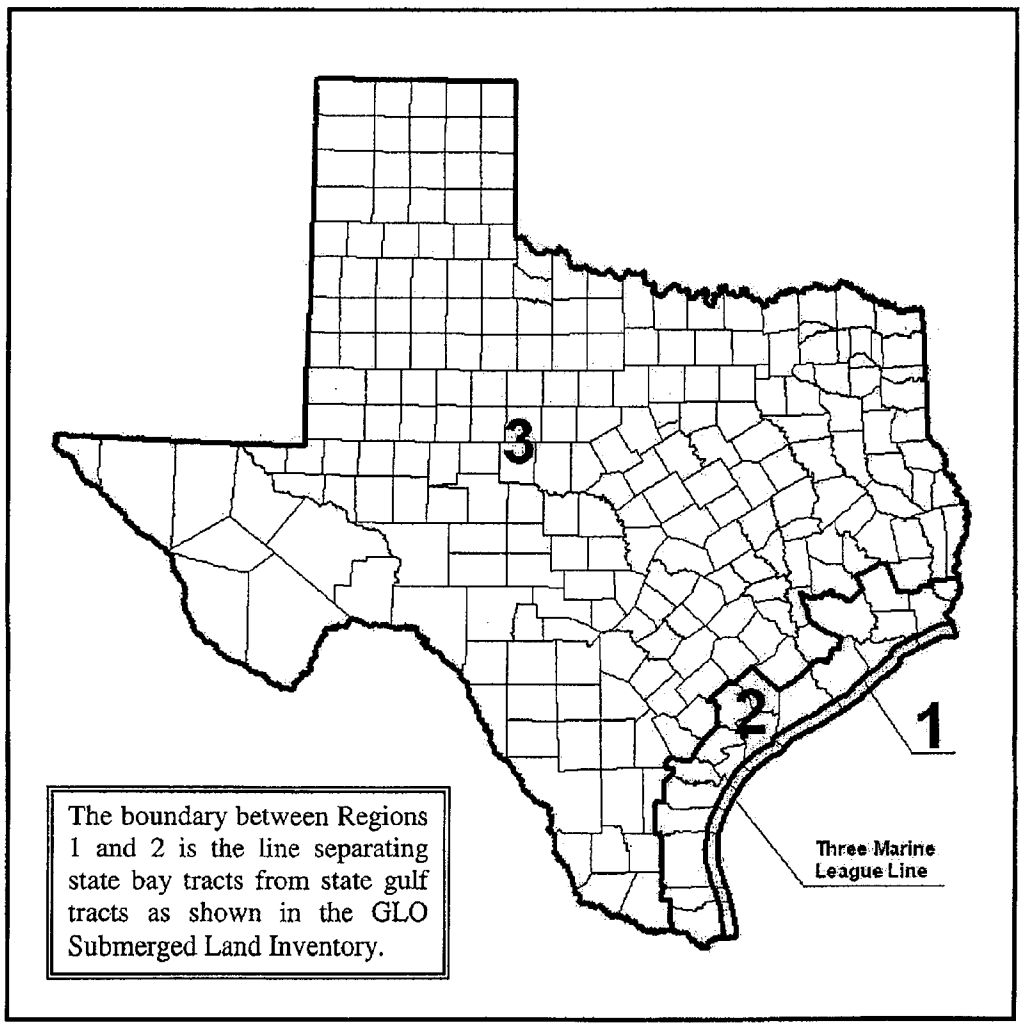

Figure: 31 TAC §65.72(b)(2)(D)(i)

Location (County)	Daily Bag	Minimum Length (Inches)	Special Regulation
Bass: largemouth, smallmouth, spotted and Guadalupe bass, their hybrids, and subspecies.			
In all waters in the Lost Maples State Natural Area (Bandera).	0	No limit	Catch and release only.
Bass: largemouth and smallmouth			
Lake Toledo Bend (Newton, Sabine and Shelby).	8 (in any combination with spotted bass)	14	Possession limit is 10.
Bass: largemouth.			
Conroe (Montgomery and Walker), Fort Phantom Hill (Jones), Granbury (Hood), Possum Kingdom (Palo Pinto, Stephens, Young), Proctor (Comanche), and Ratcliff (Houston).	5	16	
Lake Nacogdoches (Nacogdoches)	5		It is unlawful to retain largemouth bass of 16 inches or greater in length. Largemouth bass 24 inches or greater in length may be retained in a live well or other aerated holding device for purposes of weighing, but may not be removed from the immediate vicinity of the lake. After weighing, the bass must be released immediately back into the lake unless the department has instructed that the bass be kept for donation to the ShareLunker Program.
Lakes Aquilla (Hill) , Bellwood (Smith), Braunig (Bexar), Bright (Williamson), Brushy Creek (Williamson), Bryan (Brazos), Calaveras (Bexar), Casa Blanca (Webb), Cleburne State Park (Johnson), Cooper (Delta and Hopkins), Fairfield (Freestone), Gilmer (Upshur), Jacksonville (Cherokee), Marine Creek Reservoir (Tarrant), Meridian State Park (Bosque), Old Mount Pleasant City (Titus), Pflugerville (Travis), Rusk State Park (Cherokee), and Welsh (Titus).	5	18	
Nelson Park Lake (Taylor) and Buck Lake (Kimble).	0	No limit	Catch and release and only.
Lakes Alan Henry (Garza) and O.H. Ivie (Coleman, Concho, and Runnels).	5	No limit	It is unlawful to retain more than two bass of less than 18 inches in length.

Purtis Creek State Park Lake (Henderson and Van Zandt), and Raven (Walker).	0	No limit	Catch and release only except that any bass 24 inches or greater in length may be retained in a live well or other aerated holding device for purposes of weighing, but may not be removed from the immediate vicinity of the lake. After weighing, the bass must be released immediately back into the lake unless the department has instructed that the bass be kept for donation to the ShareLunker Program.
Lakes Bridgeport (Jack and Wise), Burke-Crenshaw (Harris), Caddo (Marion and Harrison), Davy Crockett (Fannin) , Grapevine (Denton and Tarrant), Georgetown (Williamson), Madisonville (Madison), San Augustine City (San Augustine), and Sweetwater (Nolan).	5	14 - 18 inch Slot limit	It is unlawful to retain largemouth bass between 14 and 18 inches in length.
Lakes Athens (Henderson), Bastrop (Bastrop), Buescher State Park (Bastrop), Houston County (Houston), Joe Pool (Dallas, Ellis, and Tarrant), Mill Creek (Van Zandt), Murvaul (Panola), Pinkston (Shelby), Timpson (Shelby), Town (Travis), and Walter E. Long (Travis).	5	14 - 21 inch Slot limit	It is unlawful to retain largemouth bass between 14 and 21 inches in length. No more than 1 bass 21 inches or greater in length may be retained each day.
Lakes Fayette County (Fayette), Gibbons Creek Reservoir (Grimes), Monticello (Titus), and Ray Roberts (Cooke, Denton, and Grayson).	5	14 - 24 inch Slot limit	It is unlawful to retain largemouth bass between 14 and 24 inches in length. No more than 1 bass 24 inches or greater in length may be retained each day.
Lake Fork (Wood, Rains and Hopkins).	5	16 - 24 inch Slot limit	It is unlawful to retain largemouth bass between 16 and 24 inches in length. No more than 1 bass 24 inches or greater in length may be retained each day.
Bass: smallmouth.			
Lakes O. H. Ivie (Coleman, Concho, and Runnels), Alan Henry (Garza), and Devil's River (Val Verde) from State Highway 163 bridge crossing near Juno downstream to Dolan Falls.		18	
Lake Meredith (Hutchinson, Moore, and Potter).	3	12 - 15 inch Slot limit	It is unlawful to retain smallmouth bass between 12 and 15 inches in length.
Bass: spotted.			
Lake Alan Henry (Garza).	3	18	

Lake Toledo Bend (Newton, Sabine and Shelby).	8 (in any combination with largemouth bass)	No limit	Possession Limit is 10.
Bass: striped and white bass, their hybrids, and subspecies.			
Lake Toledo Bend (Newton, Sabine and Shelby).	5	No limit	No more than 2 striped bass 30 inches or greater in length may be retained each day.
Lake Texoma (Cooke and Grayson).	10 (in any combination)	No limit	No more than 2 striped or hybrid striped bass 20 inches or greater in length may be retained each day. Striped or hybrid striped bass caught and placed on a stringer, in a live well or any other holding device become part of the daily bag limit and may not be released. Possession limit is 20.
Red River (Grayson) from Denison Dam downstream to and including Shawnee Creek (Grayson).	5 (in any combination)	No limit	Striped bass caught and placed on a stringer, in a live well or any other holding device become part of the daily bag limit and may not be released.
Lake Possum Kingdom (Palo Pinto, Stephens, Young) and Trinity River (Polk and San Jacinto) from the Lake Livingston dam downstream to the F.M. Road 3278 bridge.	2 (in any combination)	18	
Bass: white.			
Lakes Texoma (Cooke and Grayson) and Toledo Bend (Newton, Sabine, and Shelby).	25	No limit	
Carp: common.			
Lady Bird Lake (Travis)	No limit	No limit	It is unlawful to retain more than one common carp of 33 inches or longer per day.
Catfish: channel and blue catfish, their hybrids, and subspecies.			
Lake Livingston (Polk, San Jacinto, Trinity, and Walker).	50 (in any combination)	12	Possession limit is 50. The holder of a commercial fishing license may not retain channel or blue catfish less than 14 inches in length.
Trinity River (Polk and San Jacinto) from the Lake Livingston dam downstream to the F.M. Road 3278 bridge.	10 (in any combination)	12	No more than 2 channel or blue catfish 24 inches or greater in length may be retained each day.
Lake Texoma (Cooke and Grayson).	15 (in any combination)	12	

North Concho River (Tom Green) from O.C. Fisher Dam to Bell Street Dam, South Concho River (Tom Green) from Lone Wolf Dam to Bell Street Dam.	5 (in any combination)	No limit	
Community fishing lakes.	5 (in any combination)	No limit	
Bellwood (Smith), Dixieland (Cameron), and Tankersley (Titus).	5 (in any combination)	12	
Catfish: flathead.			
Lake Texoma (Cooke and Grayson) and the Red River (Grayson) from Denison Dam to and including Shawnee Creek (Grayson).	5	20	
Crappie: black and white crappie, their hybrids and subspecies.			
Lake Toledo Bend (Newton, Sabine, and Shelby).	50 (in any combination)	10	Possession limit is 50. From December 1, through the last day in February, there is no minimum length limit. All crappie caught during this period must be retained.
Lake Fork (Wood, Rains, and Hopkins) and Lake O'The Pines (Camp, Harrison, Marion, Morris, and Upshur).	25 (in any combination)	10	From December 1, through the last day in February, there is no minimum length limit. All crappie caught during this period must be retained.
Lake Texoma (Cooke and Grayson).	37 (in any combination)	10	Possession limit is 50.
Drum, red.			
Lakes Braunig and Calaveras (Bexar), Coleto Creek Reservoir (Goliad and Victoria), Fairfield (Freestone), and Tradinghouse Creek (McLennan).	3	20	No maximum length limit.
The Trinity River below Lake Livingston in Polk and San Jacinto Counties.	500 (in any combination)	No limit	Possession limit 1,000 in any combination.
Trout: Rainbow and brown trout, their hybrids, and subspecies.			
Guadalupe River (Comal) from the second bridge crossing on the River Road upstream to the easternmost bridge crossing on F.M. Road 306.	1	18	
Walleye.			
Lake Texoma (Cooke and Grayson).	5	18	

Figure: 31 TAC §523.3(j)(2)

Date of Initial Operation of Facility	**Plan Submission Date**
January 1, 2002, or later	Before receipt of birds
September 1, 2001 to December 31, 2001	Before January 1, 2002
January 1, 1993 to August 31, 2001	Before January 1, 2002
January 1, 1988 to December 31, 1992	Before January 1, 2003
January 1, 1983 to December 31, 1987	Before January 1, 2005
December 31, 1982 or earlier	Before January 1, 2008

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Request for Proposals - Home-Delivered Meal Grants Performance Monitoring

1. Purpose

The Texas Department of Agriculture (TDA) is inviting proposals for performance monitoring services. TDA seeks a highly skilled contractor to conduct a comprehensive performance review of governmental and 501(c)(3) nonprofit organizations that received funding through TDA's Texans Feeding Texans: Home-Delivered Meal Grant Program, under terms and conditions established by this Request for Proposal (RFP) and TDA. The contractor chosen by TDA must be experienced, with strong references and have a current license with the Texas State Board of Public Accountancy. The contractor firm also must demonstrate experience in using the Generally Accepted Government Auditing Standards (GAGAS) and must be able to provide the services described in the time frame provided in this RFP. Respondents must execute the scope of this RFP, Affirmations and RFP Acceptance, and complete other items listed in Section 6, Form of Response, of this RFP.

2. Program Overview

The Texans Feeding Texans: Home-Delivered Meal Grant Program was established by House Bill 407 during the 80th Regular Session of the Texas Legislature. The Legislature appropriated $20,000,000 to the Program to help defray the costs of providing home-delivered meals that are not fully funded by the Department of Aging and Disability Services or an Area Agency on Aging.

Under Texas Agriculture Code (Code), §12.042, the Home-Delivered Meal Grant Program provides funding for the purpose of supplementing and extending services related directly to home-delivered meal services.

An organization is eligible to receive a grant under the Program if it:

a. administers a home-delivered meal program and is a direct provider of home-delivered meals to Elderly persons and/or persons with a Disability;

b. (if a nonprofit private organization) has a volunteer board of directors;

c. practices nondiscrimination;

d. has an accounting system or fiscal agent approved by the county where it provides meals;

e. has a system to prevent the duplication of services to clients;

f. has received a grant from the county in which the organization is delivering meals;

g. has submitted an application to the Texas Department of Agriculture; and

h. agrees to use funds received only to supplement or extend existing home-delivered meal services.

Additionally, the following requirements must be met by the grantee:

a. Each meal to which grant funds from TDA are applied must meet 1/3 of the recommended dietary allowance (RDA) for adults and the Dietary Guidelines for Americans, or shall adhere to federal meal pattern requirements;

b. Grantee must follow procedures and maintain facilities that comply with all applicable federal, state, and local laws and regulations related to fire, health, sanitation, and safety, and obtain all necessary permits, including all food preparation, handling, and service activities;

c. Grantee must provide meals in accordance with the service requirements outlined in Title 40 Texas Administrative Code, §55.27(a) and (c), or other applicable local, state or federal regulations relating to the delivery, transportation packaging of home-delivered meals, or the handling of undelivered meals;

d. Grantee must document that persons receiving a meal are Homebound Elderly persons (60 years old or older) or Homebound persons with a Disability; and

e. Grantee shall retain all financial records, supporting documents, statistical records, and all other records relating to any grant funds received.

During FY 2008, the first year of funding, $9.5 million was granted to eligible organizations. Ninety-eight applications were received by TDA and ninety-five applications were ultimately funded. Grantees are required to submit bi-annual grant reports by August 31, 2008 and February 28, 2009.

3. Additional Resources and Information on TDA and/or the Home-Delivered Meal Grant Program for Response to this RFP

a. Texas Agriculture Code §12.042

b. Texas Administrative Code, Title 4, Part 1, Chapter 1, Subchapter O

c. TDA, Home-Delivered Meal Grant Program, and other TDA-administered grant programs at: www.tda.state.tx.us.

4. Desired Outcomes:

a. Selection of a contractor to develop and conduct a comprehensive monitoring activity of TDA's Texans Feeding Texans: Home-Delivered Meal Grantees that will include:

i. Risk assessment of grantees;

ii. Verification of information supplied in initial applications;

iii. Verification that grantee has all current licenses necessary to administer a home-delivered meal program;

iv. Verification that proper paperwork is being maintained to report nutritional content of the meals being served and counted;

v. Verification of the number of meals being served;

vi. Review of documentation to determine that meals served with grant funds are going to qualifying homebound elderly and/or disabled individuals;

vii. Verification that grant funds are expended on appropriate expenditures; and

viii. Reporting information back to TDA regarding any findings.

b. The services provided by the selected contractor should produce the following results:

i. Identify non-compliance with TDA Grant Agreement, executed by TDA and grantee in conjunction with payment of grant funds; and

ii. Verify accuracy of information supplied by Grantees for both grant qualification and grant funds expenditure.

5. Scope

This RFP covers work completed by the selected firm in two parts.

Part I - Planning:

Within 30 days after any award that results from this RFP, the selected applicant is to develop a detailed monitoring plan and schedule for conducting the performance review activities. This plan is to incorporate a discussion of and rationale for all elements of the project, including associated priorities, timelines and budget estimates, with a focus on the desired outcomes as previously discussed in Section 4, Desired Outcomes.

The contractor will communicate with TDA staff administering the programs to access information regarding the programs, current home-delivered meal grantees, and relevant agency records.

Part II - Conducting Performance Monitoring:

Once the monitoring plan is received and approved by TDA, the contracted firm is responsible for working with the TDA staff to conduct and complete the performance monitoring within the required time frame. The contracted firm will also need to:

a. Keep TDA informed of monitoring activity status via semi-monthly reports; and

b. Provide comprehensive results of all efforts according to schedule and as requested throughout the project.

The terms of this RFP also include the General Terms and Conditions set forth in Attachment 1 to this RFP.

The performance monitoring final report must be issued by August 31, 2009.

6. Form of Response

a. Detailed Plan of the Monitoring Activities

Provide a detailed plan of how you or your firm would conduct proposed monitoring activities. This plan should include the relevant methods, procedures, phases, dates, and estimated hours that the contractor will incur in each phase of monitoring.

b. Overview of the Company

Provide a description of the company, including general experience and history in performing monitoring activities, date founded, number and location of offices, and number of professionals and employees in each office, total number of professionals and employees in the company, description of specialty practice areas and company philosophy. Describe structure of company ownership (e.g., publicly held corporation, partnership, etc.) any parents, affiliates or subsidiaries of the company.

c. Qualifications

List recent experience of the firm or professionals to be assigned to the project. Be sure to address qualifications with regard to the qualifications needed for this assignment as detailed in Sections 1, Purpose, and 4, Desired Outcomes. If relying on experience as a professional while at a different company, please indicate the name, address and contact information of the company. Please select and discuss one project that you feel best demonstrates your ability to provide the services specified in this RFP. (Please limit your discussion to no more than two pages.) If your response to this RFP is on behalf of a firm, please submit a copy of the firm's last peer review report.

d. Resumés

Provide brief resumés for each professional employee who will be assigned to the project. Indicate the individuals' years of experience in conducting monitoring activities, any relevant licenses they hold and how any particular area of expertise would benefit TDA. Also, demonstrate current compliance with CPE requirements. Specify who would be assigned as the primary day-to-day contact for TDA and indicate the role they played in the projects listed above.

e. HUB Business Practices

Please describe your company's previous experience and involvement working with Historically Underutilized Businesses (HUB) certified companies (if your company is not HUB certified) or as a HUB certified company.

Please describe efforts made by your company to encourage and develop the participation of minorities and women.

f. HUB Subcontracting Plan

In accordance with Texas Government Code §2161.252 regarding this procurement, TDA has determined that opportunities for HUB Subcontracting are probable. As such, all firms submitting a response to this RFP must fully complete the HUB Subcontracting Plan (HSP) forms which can be found at: http://www.window.state.tx.us/procurement/prog/hub/hub-forms/HUBSubcontractingPlan.pdf. Any responses that do not have these completed forms will be considered non-responsive and will not be considered for an award of this RFP.

g. Evidence of Insurability

The selected applicant shall be responsible for insurance and bonding and must furnish to TDA within ten (10) working days of being selected to perform this RFP, proof of insurance and bonding as follows: Insurance for professional liability, errors, omissions, or negligence arising in connection with duties under this RFP.

h. Conflict of Interest

Please disclose any conflicts of interest. Disclose all contractual or informal business arrangements/agreements, including fee arrangements and consulting agreements between your Company and the TDA, TDA's staff, or any entity that provides services to TDA. Applicants will likewise be required to disclose any business relationships or other possible conflicts of interest regarding monitoring of any grantees.

i. References

Please provide names, addresses, and phone numbers of at least three references.

j. Fee Structure

Please provide your fee structure, including if applicable, hourly rates, flat fees, and other known expenses. Also provide an estimate of the total project cost.

7. Agreement Term

The agreement term is from date of execution by both parties until August 31, 2009. TDA retains the right to terminate the agreement for any reason and at any time, upon the payment of then earned fees and expenses. At the termination date of this project, the current vendor shall cooperate fully to transfer all publications, documents, property, equipment, and/or other material in which TDA retains ownership rights, and any other material related to work under this RFP.

8. Proposal Modification

Any proposal may be modified or withdrawn, at any time prior to the proposal due date. No material changes will be allowed after the expiration of the proposed due date; however, non-substantive correction or deletions may be made with the approval of TDA. TDA also reserves the right to make amendments to the RFP.

9. Time Schedule

Proposals are due no later than **October 1, 2008.** Proposal responses, modifications or addenda to an original response received by TDA after the specified time and date for closing will not be considered. Each firm is responsible for ensuring that its response reaches TDA before the proposed due date. Companies should submit one unbound original and three copies of their proposal to: Karen Reichek, Grants Coordinator, **IN RESPONSE TO RFP: Monitoring of Home-Delivered Meal Grants,** Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, Street Address: 1700 N. Congress, Stephen F. Austin Bldg., 11th Floor, Austin, Texas 78701.

A duly authorized representative of the company must execute the response submitted to this RFP. An unsigned proposal will not be accepted. All proposals become the property of the TDA. Proposals must set forth accurate and complete information as required by this RFP. Oral modifications will not be considered. Questions regarding this RFP should be submitted, in writing, to Karen Reichek, Grants Coordinator, at the address listed above or by fax, (888) 223-9048. The commissioner and TDA staff will review the responses to this RFP.

10. Basis of Award

The selection will be based on demonstrated competence, experience, knowledge and qualifications, as well as the proposed fee for each portion of the RFP as determined by TDA. By this RFP, however, TDA has not committed itself to employ a monitoring firm nor does the suggested scope of service or term of agreement below require that the firm be employed for any or all of those purposes. TDA is not bound to accept the lowest-priced proposal. TDA reserves the right to make those decisions after receipt of proposals and TDA's decision on these matters is final. TDA reserves the right to negotiate individual elements of any proposal and to reject any and all proposals. TDA reserves the right to meet with and negotiate regarding terms with one or more applicants.

11. Cost Incurred in Responding

All costs directly or indirectly related to preparation of a response to the RFP or any oral presentation required to supplement and/or clarify the RFP which may be required by TDA shall be the sole responsibility of, and shall be borne by the applicant.

ATTACHMENT 1 - GENERAL TERMS AND CONDITIONS

1.1 Indemnification.

The contractor agrees to defend, indemnify, and hold harmless the State of Texas, all of its officers, agents and employees from and against all claims, actions, suits, demands, proceedings costs, damages, and liabilities, arising out of, connected with, or resulting from any acts or omissions of the contractor or any agent, employee, subcontractor, or supplier of contractor in the execution or performance of this RFP.

1.2. Failure of Indemnification Provisions.

If for any reason the contractor fails to cooperate with the Texas Office of the Attorney General and/or the foregoing indemnification is insufficient to hold the customer harmless, then the contractor shall reimburse TDA for all amounts paid or payable by TDA as a result of such claims, which shall include, for example, costs of the Texas Office of the Attorney General of defending against any claims. The reimbursement, indemnity and contribution obligations of the contractor under this section shall extend upon the same terms and conditions to TDA employees, officers, agents, successors, assigns, licensees and customers and shall be binding upon and inure to the benefit of any successors, assigns, heirs and personal representatives, and the relevant provisions will survive the termination of any contract awarded to an applicant responding to this RFP.

1.3 Indemnification by TDA of Contractor.

TDA can neither agree to hold the contractor harmless nor agree to indemnify the contractor, and any provisions to the contrary are void.

1.4 TDA Duties.

The contractor's obligations under paragraph 1.2 above may be limited to the extent that the TDA (i) does not promptly notify the contractor in writing of any claim, (ii) does not provide the contractor with all reasonable assistance for the defense or settlement of such claims, except as it relates to the responsibilities of the Texas Office of the Attorney General, and (iii) does not cooperate with the Texas Office of the Attorney General in defense of such claim.

1.5 Force Majeure.

Except as otherwise provided, neither awarded contractor nor TDA shall be liable to the other for any delay in, or failure of performance, of any requirement contained in this RFP caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance in the exercise of reasonable diligence until after the causes of delay or failure have been removed. Force majeure is defined as those causes generally recognized under Texas law as constituting impossible conditions. Each party must inform the other in writing, with proof of receipt, within three (3) business days of the existence of such force majeure, or otherwise waive this right as a defense.

1.6 Application of Law; Venue; Dispute Resolution.

This procurement shall be governed by and construed in accordance with the laws of the State of Texas. Venue for any action arising hereunder shall be in the state district courts of Travis County, Texas, and pursuant to the dispute resolution provisions in Chapter 2260, Texas Government Code. This RFP shall be binding upon any successor or permitted assignee. In the event of any default, dispute or nonpayment, the parties shall, in addition to and without limitation on the remedies provided under the terms of this RFP, be liable for those damages commonly available to the prevailing party under Texas law.

1.7 Assignment or Subcontract.

Absent the express written consent of TDA, the awarded contractor may not assign or subcontract any right or duty under this RFP.

1.8 Provision for Direct Deposit.

The electronic funds transfer (EFT) provisions of Texas law are found at Texas Government Code, Chapter 403. Certain payments from the State may be directly deposited into the contractor's bank account or may be made by warrant. Contractors eligible for, and who wish to be paid by direct deposit, must complete the form titled "Direct Deposit Authorization" and return it as soon as possible to: Comptroller of Public Accounts, Attention: Budget and Internal Accounting Division, Accounts Payable Section, LBJ State Office Building, 111 E. 17th Street, Austin, Texas 78774.

The Comptroller's office will become the "custodial agency" and in that capacity, the internal Accounts Payable Section will be responsible for initial direct deposit set up and any future changes to your direct deposit information. Consequently, it will not be necessary to register with each state agency for this purpose. Direct deposit payments will begin after the contractor's financial institution processes and accepts

a test transaction that will be sent by the Comptroller's office to the contractor's bank.

The Claims Division of the Comptroller of Public Accounts oversees the statewide direct deposit program. For questions regarding the statewide process, contact the Claims Payment Processing Section, 1-800-531-5441, ext. 5-0965 or (512) 475-0965, or send an email message to: claims.division@cpa.state.tx.us.

1.9 Texas Family Code Eligibility.

Under §231.00, Texas Family Code (relating to child support), the vendor or applicant certifies that the individual or business entity named in this contract, bid or application is not ineligible to receive the specified grant, loan, or payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate. All applicants and respondents to this RFP understand and acknowledge that pursuant to §231.006 of the Texas Family Code, a child support obligor who is more than 30 days delinquent in paying child support and a business entity in which the obligor is a sole proprietor, partner, shareholder, or owner with an ownership interest of at least 25 percent is not eligible to receive payments from state funds under a contract to provide property, materials, or services. Further, if selected, the applicant will provide the name and social security number of the individual or sole proprietor and each partner, shareholder, or owner with an ownership interest of at least 25 percent of the business entity submitting the bid or application.

1.10 Texas Government Code Eligibility.

Under §2155.004, Texas Government Code (relating to certain taxes), contractor represents that the contractor is eligible to receive this agreement and that any resulting agreement may be terminated and payment withheld if this representation is inaccurate.

1.11 Liability for Taxes.

Contractor represents that it shall pay all taxes or similar amounts resulting from this agreement, including, but not limited to, any federal, State, or local income, sales or excise taxes of contractor or its employees. TDA shall not be liable for any taxes resulting from this Agreement.

1.12 Suspension or Debarment; Compliance with State Laws and Rules.

Contractor represents that as the respondent to this RFP, and any of its principals, are eligible to participate in any resulting agreement and have not been subjected to suspension, debarment, or similar ineligibility determined by any federal, state or local governmental entity. Contractor further represents that the contractor is in compliance with the State of Texas statutes and rules relating to procurement and that contractor is not listed on the federal government's terrorism watch list as described in Executive Order 13224. Entities ineligible for federal procurement are listed at http://www.epls.gov.

1.13 Audits or Investigations by State Auditor's Office or TDA.

The contractor understands that acceptance of funds under this RFP acts as acceptance of the authority of the State Auditor's Office (SAO), any successor agency to SAO or TDA to conduct an audit or investigation in connection with those funds. Contractor further agrees to cooperate fully with the SAO, SAO's successor or TDA in the conduct of the audit or investigation, including providing all records requested and providing the State Auditor or TDA with access to any information the State Auditor or TDA considers relevant to the investigation or audit. Contractor will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through subcontractor and the requirement to cooperate is included in any subcontract awards.

1.14 Access to Information by State Auditor.

The contracted firm understands that in addition to the State Auditor's access to information as provided by paragraph 1.13, above, the State Auditor will receive a copies of the contract between the agency and the contractor, and the contractor's final report. The State Auditor also has access to working papers related to procured services and all draft and final reports and memoranda of discussions with agency management.

1.15 Release of Information and Open Records.

All proposals shall be deemed, once submitted, to be the property of TDA and subject to the Texas Public Information Act (Act). Under the Act, information submitted in response to this RFP may not be released by TDA during the proposal evaluation process or prior to the awarding of an agreement. After the evaluation process is completed by TDA and an agreement is awarded, proposals and information included therein may be subject to public disclosure under the Act.

1.16 Media releases.

TDA is the only entity authorized to issue news releases relating to this RFP and performance hereunder by contractor.

TRD-200804344
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: August 12, 2008

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Office of the Attorney General

Notice of Settlement of Enforcement Suit under the Texas Solid Waste Disposal Act and Texas Clean Air Act

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code and Health and Safety Code. Before the State may settle a judicial enforcement action, pursuant to §7.110 of the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Texas Solid Waste Disposal Act or Texas Clean Air Act.

Case Title and Court: *The State of Texas vs. Conner Steel Products, Ltd.*, No. GV07000799 in the 53rd District Court of Travis County, Texas.

Nature of Defendant's Operations: The State's enforcement lawsuit alleges violations of the Texas Solid Waste Disposal Act and the Texas Clean Air Act at the Defendant's tank manufacturing facility in San Angelo, and seeks civil penalties, and attorney's fees.

Proposed Settlement: The proposed Agreed Final Judgment orders the Defendant to pay a civil penalty in the amount of $99,000.00 and attorney's fees of $23,775.00. In addition, it orders the Defendant to fund a Supplemental Environmental Project in the amount of $50,000, involving a project for household hazardous waste collection in Tom Green County.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed judgment, should be directed to David Preister, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 7811-2548, (512) 463-2012, facsimile (512) 320-0052. Written com-

ments must be received within 30 days of publication of this notice to be considered.

For more information regarding this publication, contact Cindy Hodges, Agency Liaison, at (512) 936-1841.

TRD-200804286
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: August 11, 2008

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of August 1, 2008, through August 7, 2008. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on August 13, 2008. The public comment period for this project will close at 5:00 p.m. on September 12, 2008.

FEDERAL AGENCY ACTIONS:

Applicant: Sandalwood Oil and Gas, L.P.; Location: The project is located adjacent to Carancahua Bayou, southeast of the intersection of FM 2004 and FM 646, on Hall's Bayou Ranch, in Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Hitchcock, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 301049; Northing: 3241115. Project Description: The applicant proposes to place fill material and/or wooden mats or boards onto 1.18 acres of wetlands to construct a drilling pad, an access road and a production facility in order to drill for, and produce, petroleum resources. If the well is productive, the applicant will reduce the size of the work space to a 0.53-acre production facility. To compensate for the permanent impacts to wetlands, the applicant proposes to create approximately 0.53 acres of wetlands approximately 0.25 miles south and east of the proposed project area. CCC Project No.: 08-0198-F1. Type of Application: U.S.A.C.E. permit application #SWG-2007-01447 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Railroad Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy the consistency certifications for inspection, may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200804358
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: August 13, 2008

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 08/18/08 - 08/24/08 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 08/18/08 - 08/24/08 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200804307
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 12, 2008

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East Texas Council of Governments

Public Notice

The East Texas Council of Governments (ETCOG) is re-issuing a Request for Proposal (RFP) to select a credentialed Information and Communication Technology (ICT) provider. Modifications have been made to the original RFP in an effort to foster competition. There are twelve (12) ICT functions listed in the RFP. The RFP is available to view online at www.etcog.org. Proposals are due to ETCOG on September 8, 2008 at 5:00 p.m. CDT.

NOTE: Any corrections, alterations or answers to questions concerning the RFP will be posted at the aforementioned web site. It is the responsibility of the proposer to review the web site periodically for corrections, alterations or answers to questions.

ETCOG is an Equal Opportunity Employer. Auxiliary aids and services are available upon request. Telephone: (903) 984-8641 or TDD (800) 725-2989.

TRD-200804136
David A. Cleveland
Executive Director
East Texas Council of Governments
Filed: August 7, 2008

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on

the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 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. Section 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 **September 22, 2008**. Section 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) 239-1864 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 September 22, 2008**. 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, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Archdiocese of San Antonio; DOCKET NUMBER: 2008-0705-EAQ-E; IDENTIFIER: RN102748019; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: commercial construction site; RULE VIOLATED: 30 Texas Administrative Code (TAC) §213.4(j)(1), by failing to obtain approval of a modification to the March 8, 2000, water pollution abatement plan; PENALTY: $750; ENFORCEMENT COORDINATOR: Lauren Smitherman, (512) 239-5223; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Armstrong Hardwood Flooring Company; DOCKET NUMBER: 2008-0456-AIR-E; IDENTIFIER: RN100213065; LOCATION: Center, Shelby County; TYPE OF FACILITY: hardwood floor manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), New Source Review Permit (NSRP) Numbers 49096 and 21144, Special Condition (SC) 1, and Texas Health and Safety Code (THSC), §382.085(b), by failing to operate within permitted emission limits; 30 TAC §§122.143(4), 122.145(2)(C), and 122.146(2), Federal Operating Permit (FOP) Number O-01124, General Terms and Conditions, and THSC, §382.085(b), by failing to submit a semi-annual deviation report and an annual compliance certification; and 30 TAC §116.110(b), NSRP Number 21144, SC 6, and THSC, §382.085(b), by failing to obtain a permit amendment prior to altering operations; PENALTY: $46,075; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(3) COMPANY: Chevron Phillips Chemical Corporation LP; DOCKET NUMBER: 2008-0551-AIR-E; IDENTIFIER: RN100825249; LOCATION: Old Ocean, Brazoria County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §101.20(1) and (3) and §116.715(a), NSR Flexible Air Permit Number 22690/PSD-TX-751M1, SC Numbers 1 and 15, 40 Code of Federal Regulations (CFR) §60.18(c)(2), and THSC, §382.085(b), by failing to comply with permitted emissions limits and failing to maintain a flame present at all times on a flare; PENALTY: $7,000; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: ESHAAN INVESTMENTS, L.L.C. dba Metro Food 2; DOCKET NUMBER: 2008-0616-PST-E; IDENTIFIER: RN101431526; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks for releases; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide release detection; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to have the line leak detectors tested; and 30 TAC §115.246(5) and THSC, §382.085(b), by failing to maintain all required Stage II records at the station and make them immediately available for review; PENALTY: $4,246; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: Exxon Mobil Corporation; DOCKET NUMBER: 2008-0681-AIR-E; IDENTIFIER: RN102212925; LOCATION: Baytown, Harris County; TYPE OF FACILITY: chemical manufacturing company; RULE VIOLATED: 30 TAC §116.715(a), Permit 3452, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(a)(1) and THSC, §382.085(b), by failing to submit the initial notification for the emissions event; PENALTY: $7,384; Supplemental Environmental Project (SEP) offset amount of $2,954 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: Flint Hills Resources, LP; DOCKET NUMBER: 2008-0568-AIR-E; IDENTIFIER: RN100217389; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §§101.20(3), 116.715(a) and (c)(7), and 122.143(4), NSRP Number 16989/PSD-TX-794, SC 1, FOP Number O-01317, Special Terms and Conditions (STC) Number 16, and THSC, §382.085(b), by failing to prevent the failure of the governor valve and subsequent shutdown of the light olefins unit; 30 TAC §§101.20(3), 116.715(a) and (c)(7), and 122.143(4), NSRP Number 16989/PST-TX-794, SC 1, FOP Number O-01317, STC Number 16, and THSC, §382.085(b), by failing to prevent a contractor from inadvertently closing the air supply valve to the hydrogen feed valve; and 30 TAC §§101.20(3), 116.715(a) and (c)(7), and 122.143(4), NPRP Number 16989/PST-TX-794, SC 1, FOP Number O-01317, STC Number 16, and THSC, §382.085(b), by failing to prevent excess emissions; PENALTY: $25,850; SEP offset amount of $10,340 applied to South East Texas Regional Planning Commission-West Port Arthur Home Energy Efficiency Program; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(7) COMPANY: Gulf South Pipeline Company, LP; DOCKET NUMBER: 2008-0558-AIR-E; IDENTIFIER: RN100218494; LOCATION: Goodrich, Polk County; TYPE OF FACILITY: pipeline compressor station; RULE VIOLATED: 30 TAC §122.143(4), FOP Number O-00455, SC (b)(2), (b)(8)(A)(iv), and (b)(8)(B)(iv), and THSC, §382.085(b), by failing to perform quarterly opacity observation for all stationary vents; and 30 TAC §§122.143(4), 122.145(2)(A) - (C), and 122.146(1) and (5)(C)(i) - (v), FOP Number O-00455, SC (b)(2), and THSC, §382.085(b), by failing to report quarterly opacity observation deviations on a semi-annual report; PENALTY: $7,800; SEP offset amount of $3,120 applied to Texas Association of Resource

Conservation and Development Areas, Inc. ("RC&D") - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: Aaron Houston, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(8) COMPANY: Hess Corporation; DOCKET NUMBER: 2008-0867-AIR-E; IDENTIFIER: RN103758470; LOCATION: Gaines County; TYPE OF FACILITY: natural gas processing plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F), NSR Permit Number 8414, SC 1, and THSC, §382.085(b), by failing to maintain carbon monoxide emissions; PENALTY: $1,975; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(9) COMPANY: Houston Refining LP; DOCKET NUMBER: 2008-0894-AIR-E; IDENTIFIER: RN100218130; LOCATION: Houston, Harris County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.20(3) and §116.715(a), Air Permit Number 2167 and PSD-TX-985, SC Numbers 1 and 26, and THSC, §382.085(b), by failing to prevent excess hydrogen sulfide in the refinery fuel gas and prevent unauthorized emissions; PENALTY: $10,000; SEP offset amount of $4,000 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10) COMPANY: Mobil Chemical Company Inc.; DOCKET NUMBER: 2008-0665-AIR-E; IDENTIFIER: RN100211903; LOCATION: Beaumont, Jefferson County; TYPE OF FACILITY: polyethylene manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), FOP Number O-01243, SC Number 10A, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $2,725; SEP offset amount of $1,090 applied to Jefferson County-Southeast Texas Regional Air Monitoring Network; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(11) COMPANY: Pete Terrazas; DOCKET NUMBER: 2008-0556-WQ-E; IDENTIFIER: RN105368377; LOCATION: Fort Stockton, Pecos County; TYPE OF FACILITY: residential apartment construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(12) COMPANY: Texas Petrochemicals LP; DOCKET NUMBER: 2008-0662-IWD-E; IDENTIFIER: RN102800315; LOCATION: Baytown, Harris County; TYPE OF FACILITY: industrial wastewater; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0002485000, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for five-day biochemical oxygen demand (BOD_5), pH, total suspended solids, total organic carbon, oil and grease, and flow; 30 TAC §305.125(17) and TPDES Permit Number WQ0002485000, Monitoring and Reporting Requirements Number 1, by failing to timely submit monitoring results; and 30 TAC §305.125(1) and §319.5(b) and TPDES Permit Number WQ0002485000, Effluent Limitations and Monitoring Requirements Number 1, by failing to measure for each parameter specified in the permit; PENALTY: $17,213; SEP offset amount of $6,885 applied to RC&D - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Mark Oliver, (512) 239-3308; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: City of Troup; DOCKET NUMBER: 2008-0808-PWS-E; IDENTIFIER: RN101404317; LOCATION: Troup, Smith County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.43(c)(8), by failing to maintain the facility's storage tanks in strict accordance with current American Water Works Association standards; 30 TAC §290.45(b)(1)(D)(iv) and THSC, §341.0315(c), by failing to provide an elevated storage capacity of 100 gallons per connection; 30 TAC §290.44(d), by failing to operate the system to maintain a minimum pressure of 35 pounds per square inch; 30 TAC §290.44(h)(1)(A), by failing to install a backflow prevention assembly or an air gap at all residences and establishments where an actual or potential contamination hazard exists; and 30 TAC §290.44(h)(4), by failing to test all backflow prevention assemblies on an annual basis; PENALTY: $3,815; ENFORCEMENT COORDINATOR: Epifanio Villareal, (210) 490-3096; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(14) COMPANY: Union Carbide Corporation; DOCKET NUMBER: 2008-0807-AIR-E; IDENTIFIER: RN102181526; LOCATION: Seadrift, Calhoun County; TYPE OF FACILITY: chemical plant; RULE VIOLATED: 30 TAC §116.115(c)(1), NSR Permit Number 48653, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $5,250; ENFORCEMENT COORDINATOR: Bryan Elliott, (512) 239-6162; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(15) COMPANY: Wendland Manufacturing Corporation; DOCKET NUMBER: 2008-0572-MLM-E; IDENTIFIER: RN100676220; LOCATION: San Angelo, Tom Green County; TYPE OF FACILITY: steel tank manufacturing; RULE VIOLATED: 30 TAC §§331.3(a) and (c), 331.7(a), 335.2(a), and 335.4, 40 CFR §144.11, and the Code, §26.121(a) and §27.011, by failing to prevent unauthorized use of underground injection wells to dispose of industrial solid waste; and 30 TAC §331.10(d) and 40 CFR §144.26, by failing to submit the inventory information for the Class V injection wells; PENALTY: $6,420; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (325) 655-9479.

TRD-200804295
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 12, 2008

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Enforcement Orders

An agreed order was entered regarding Debbie Lewis dba Chaparral Courts, Docket No. 2005-1161-PWS-E on August 7, 2008 assessing $11,840 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Kerens, Docket No. 2005-1166-MWD-E on August 7, 2008 assessing $3,300 in administrative penalties with $660 deferred.

Information concerning any aspect of this order may be obtained by contacting Pam Campbell, Enforcement Coordinator at (512) 239-4493, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Triple A Dump Truck Service, L.L.C., Docket No. 2006-0076-MSW-E on August 7, 2008 assessing $4,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Abdul Aziz dba Pro Cleaners and dba Vogue Cleaners, Docket No. 2006-0762-DCL-E on August 7, 2008 assessing $2,370 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JNCHO Inc. dba Comet Cleaners, Docket No. 2006-0932-DCL-E on August 7, 2008 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Mike Meyer, Enforcement Coordinator at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gary Gene Crupper, Docket No. 2006-1443-AIR-E on August 7, 2008 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cullen Texaco, Inc. dba Cullen Texaco, Docket No. 2006-1517-PST-E on August 7, 2008 assessing $22,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lorraine Donaldson, Docket No. 2006-2173-MSW-E on August 7, 2008 assessing $19,760 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding David D. Smith Construction, Inc., Docket No. 2006-2175-MSW-E on August 7, 2008 assessing $18,525 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Fiorano Ventures, L.L.C., Docket No. 2007-0509-EAQ-E on August 7, 2008 assessing $24,000 in administrative penalties with $4,800 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Thomas Steel Drums, Inc., Docket No. 2007-0515-MLM-E on August 7, 2008 assessing $13,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding John Paul Dodson and William Dodson, Docket No. 2007-0585-PST-E on August 7, 2008 assessing $7,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Texas Industrial Scrap Iron & Metal Company, Inc., Docket No. 2007-0641-MLM-E on August 7, 2008 assessing $26,775 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gary Shiu, Staff Attorney at (713) 767-3500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Husnain Aftab Enterprises, Inc. dba Jr Mini Mart, Docket No. 2007-0698-PST-E on August 7, 2008 assessing $4,725 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gary Shiu, Staff Attorney at (713) 767-3500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Sonora, Docket No. 2007-1016-MWD-E on August 7, 2008 assessing $8,950 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3048, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Lawrence Jackson, Docket No. 2007-1245-MLM-E on August 7, 2008 assessing $5,840 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gary Shiu, Staff Attorney at (713) 767-3500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Derdeyn/Ford, Inc. dba Tejas Village, Docket No. 2007-1372-MLM-E on August 7, 2008 assessing $5,647 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of San Augustine, Docket No. 2007-1407-MWD-E on August 7, 2008 assessing $5,200 in administrative penalties with $1,040 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Armortex, Inc., Docket No. 2007-1560-AIR-E on August 7, 2008 assessing $31,954 in administrative penalties with $6,390 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Walter Lloyd Smith, Sr., Docket No. 2007-1685-PST-E on August 7, 2008 assessing $28,600 in administrative penalties with $27,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hardin County, Docket No. 2007-1745-MSW-E on August 7, 2008 assessing $6,060 in administrative penalties with $1,212 deferred.

Information concerning any aspect of this order may be obtained by contacting Colin Barth, Enforcement Coordinator at (512) 239-0086, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of San Angelo, Docket No. 2007-1766-WQ-E on August 7, 2008 assessing $17,120 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Rose City, Docket No. 2007-1817-MLM-E on August 7, 2008 assessing $9,230 in administrative penalties with $1,846 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, 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 The Dow Chemical Company, Docket No. 2007-1843-IHW-E on August 7, 2008 assessing $51,600 in administrative penalties with $10,320 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Citgo Refining and Chemicals Company L.P., Docket No. 2007-1853-AIR-E on August 7, 2008 assessing $2,425 in administrative penalties with $485 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding El Paso Independent School District, Docket No. 2007-1858-AIR-E on August 7, 2008 assessing $790 in administrative penalties with $158 deferred.

Information concerning any aspect of this order may be obtained by contacting Aaron Houston, Enforcement Coordinator at (409) 899-8784, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Tyler, Docket No. 2007-1900-PWS-E on August 7, 2008 assessing $5,295 in administrative penalties with $1,059 deferred.

Information concerning any aspect of this order may be obtained by contacting Richard Croston, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Aqua Texas, Inc., Docket No. 2007-1913-PWS-E on August 7, 2008 assessing $360 in administrative penalties with $72 deferred.

Information concerning any aspect of this order may be obtained by contacting Christopher Keffer, Enforcement Coordinator at (512) 239-5610, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Glen Rose, Docket No. 2007-1933-MWD-E on August 7, 2008 assessing $1,990 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Boyd, Docket No. 2007-1945-PWS-E on August 7, 2008 assessing $2,580 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator at (512) 239-1482, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Citation Corporation, Docket No. 2007-1952-AIR-E on August 7, 2008 assessing $13,300 in administrative penalties with $2,660 deferred.

Information concerning any aspect of this order may be obtained by contacting Aaron Houston, Enforcement Coordinator at (409) 899-8784, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Postmus Dairy, L.L.C. dba Postmus Dairy, Docket No. 2007-1976-AGR-E on August 7, 2008 assessing $7,200 in administrative penalties with $1,440 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Leo Kopecky dba Leo's Stop N Shop, Docket No. 2007-1978-PST-E on August 7, 2008 assessing $7,875 in administrative penalties with $1,575 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Deer Park Refining Limited Partnership, Docket No. 2007-2001-AIR-E on August 7, 2008 assessing $10,000 in administrative penalties with $2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, 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 Huntsman Petrochemical Corporation, Docket No. 2007-2006-AIR-E on August 7, 2008 assessing $29,482 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Aaron Houston, Enforcement Coordinator at (409) 899-8784, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Longhorn Glass Manufacturing, L.P, Docket No. 2007-2024-AIR-E on August 7, 2008 assessing $46,860 in administrative penalties with $9,372 deferred.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding C W & A, Inc., Docket No. 2007-2028-PST-E on August 7, 2008 assessing $4,800 in administrative penalties with $960 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ali Gullu Corporation dba Four Star Citgo 4, Docket No. 2007-2034-PST-E on August 7, 2008 assessing $2,310 in administrative penalties with $462 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Riviera Water Control and Improvement District, Docket No. 2008-0004-MWD-E on August 7, 2008 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrew Hunt, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas State Technical College, Docket No. 2008-0055-MLM-E on August 7, 2008 assessing $6,406 in administrative penalties with $1,281 deferred.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator at (512) 239-2558, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ysleta Independent School District, Docket No. 2008-0066-AIR-E on August 7, 2008 assessing $1,140 in administrative penalties with $228 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding VIVEK LLC dba Sam Food Mart, Docket No. 2008-0069-PST-E on August 7, 2008 assessing $8,000 in administrative penalties with $1,600 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sunoco, Inc. (R&M), Docket No. 2008-0070-AIR-E on August 7, 2008 assessing $11,100 in administrative penalties with $2,220 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Honeywell International Inc., Docket No. 2008-0077-AIR-E on August 7, 2008 assessing $2,025 in administrative penalties with $405 deferred.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 767-3550, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shell Chemical LP, Docket No. 2008-0079-AIR-E on August 7, 2008 assessing $10,000 in administrative penalties with $2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 767-3500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Roger Collins, Docket No. 2008-0101-IHW-E on August 7, 2008 assessing $920 in administrative penalties with $184 deferred.

Information concerning any aspect of this order may be obtained by contacting John Shelton, Enforcement Coordinator at (512) 239-2563, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Eggemeyer Land Clearing, L.L.C., Docket No. 2008-0106-MSW-E on August 7, 2008 assessing $2,100 in administrative penalties with $420 deferred.

Information concerning any aspect of this order may be obtained by contacting Colin Barth, Enforcement Coordinator at (512) 239-0086, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EBAA Iron, Inc., Docket No. 2008-0161-AIR-E on August 7, 2008 assessing $3,500 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting Sidney Wheeler, Enforcement Coordinator at (512) 239-4969, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ashmal, Inc. East 1st Grocery, Docket No. 2008-0194-PST-E on August 7, 2008 assessing $4,375 in administrative penalties with $875 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Munsell Construction, Inc., Docket No. 2008-0196-MLM-E on August 7, 2008 assessing $2,355 in administrative penalties with $471 deferred.

Information concerning any aspect of this order may be obtained by contacting Colin Barth, Enforcement Coordinator at (512) 239-0086, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding East TeXas MillworXs, Inc. dba Seal Moulding, Docket No. 2008-0237-MLM-E on August 7, 2008 assessing $1,182 in administrative penalties with $236 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harris County Municipal Utility District 250, Docket No. 2008-0253-MWD-E on August 7, 2008 assessing $11,160 in administrative penalties with $2,232 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BCWK, LP, Docket No. 2008-0267-MWD-E on August 7, 2008 assessing $3,240 in administrative penalties with $648 deferred.

Information concerning any aspect of this order may be obtained by contacting Lauren Smitherman, Enforcement Coordinator at (512) 239-5223, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chesapeake Energy Marketing, Inc., Docket No. 2008-0291-WR-E on August 7, 2008 assessing $641 in administrative penalties with $128 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Central Bosque Water Supply Corporation, Docket No. 2008-0322-PWS-E on August 7, 2008 assessing $240 in administrative penalties with $48 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator at (512) 239-1482 Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Petrochemicals LP, Docket No. 2008-0331-AIR-E on August 7, 2008 assessing $8,086 in administrative penalties with $1,617 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Goodyear Tire & Rubber Company, Docket No. 2008-0339-AIR-E on August 7, 2008 assessing $5,600 in administrative penalties with $1,120 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kiker's Machine Works, Inc., Docket No. 2008-0341-WQ-E on August 7, 2008 assessing $2,100 in administrative penalties with $420 deferred.

Information concerning any aspect of this order may be obtained by contacting James Nolan, Enforcement Coordinator at (512) 239-6634, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Salado Water Supply Corporation, Docket No. 2008-0344-PWS-E on August 7, 2008 assessing $1,107 in administrative penalties with $221 deferred.

Information concerning any aspect of this order may be obtained by contacting Christopher Keffer, Enforcement Coordinator at (512) 239-5610, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cayuga Water Supply Corporation, Docket No. 2008-0356-PWS-E on August 7, 2008 assessing $735 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Christopher Keffer, Enforcement Coordinator at (512) 239-5610, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Falcon Gunite Co., Inc., Docket No. 2008-0376-AIR-E on August 7, 2008 assessing $950 in administrative penalties with $190 deferred.

Information concerning any aspect of this order may be obtained by contacting Sidney Wheeler, Enforcement Coordinator at (512) 239-4969, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tennessee Gas Pipeline Company, Docket No. 2008-0401-AIR-E on August 7, 2008 assessing $2,050 in administrative penalties with $410 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Medina County Water Control and Improvement District No. 2, Docket No. 2008-0410-MWD-E on August 7, 2008 assessing $1,265 in administrative penalties with $253 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrew Hunt, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tige Boats, Inc., Docket No. 2008-0526-AIR-E on August 7, 2008 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Stryker Lake Water Supply Corporation, Docket No. 2008-0549-PWS-E on August 7, 2008 assessing $347 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Christopher Keffer, Enforcement Coordinator at (512) 239-5610, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Sulphur Springs, Docket No. 2008-0626-PWS-E on August 7, 2008 assessing $675 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Christopher Keffer, Enforcement Coordinator at (512) 239-5610, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Harlow Stores, Inc. dba Harlows 3, Docket No. 2008-0083-PST-E on August 7, 2008 assessing $1,750 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Star Fuels, Inc. dba Wallisville Texaco, Docket No. 2008-0088-PST-E on August 7, 2008 assessing $1,750 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding J. E. Fortson, Docket No. 2007-1967-WR-E on August 7, 2008 assessing $350 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200804362
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 13, 2008

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Notice of a Public Meeting and a Proposed General Permit Authorizing the Discharge of Wastewater and Storm Water from Quarries in the John Graves Scenic Riverway

The Texas Commission on Environmental Quality (TCEQ) proposes to issue a general permit (Texas Pollutant Discharge Elimination System Permit No. TXG500000) authorizing the discharges of process wastewater, mine dewatering, storm water associated with industrial activity, construction storm water, and certain non-storm water discharges from quarries located greater than one mile from a water body that is within a water quality protection area in the John Graves Scenic Riverway. General permits are authorized by §26.040 of the Texas Water Code.

PROPOSED GENERAL PERMIT

The Executive Director has prepared a draft permit that authorizes the discharges of process wastewater, mine dewatering, storm water associated with industrial activity, construction storm water, and certain non-storm water discharges from quarries located greater than one mile from a water body that is within a water quality protection area in the John Graves Scenic Riverway. This general permit requires quarries located greater than one mile from a water body that is within a water quality protection area in the John Graves Scenic Riverway to submit a Notice of Intent (NOI), Pollution Prevention Plan, Restoration Plan, and proof of financial assurance for Restoration to obtain authorization for discharge. No significant degradation of high quality waters is expected and existing uses will be maintained and protected.

A copy of the proposed general permit and fact sheet are available for viewing and copying at the TCEQ's Office of the Chief Clerk, located at the TCEQ's Austin office at 12100 Park 35 Circle, Building F. These documents are also available at the TCEQ's Dallas (Region 4) office and on the TCEQ's website at: http://www.tceq.state.tx.us/permitting/water_quality/wastewater/general/WQ_general_permits/draftJGSRQuarryGP.html.

PUBLIC COMMENT/PUBLIC MEETING

You may submit public comments about this general permit in writing or orally at the public meeting held by the TCEQ. The purpose of a public meeting is to provide an opportunity to submit comments and to ask questions about the general permit. A public meeting is not a contested case hearing. The public comment will end at the conclusion of the public meeting. The TCEQ will hold a public meeting on this general permit on Tuesday, September 23, 2008 at 7:00 p.m. at Harberger Hill Community Building, Room E, 701 Narrow Street, Weatherford, Texas 76086.

Written public comments must be received by the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 by the end of the public comment period on September 23, 2008.

APPROVAL PROCESS

After the comment period, the Executive Director will consider all the public comments and prepare a written response. The response will be filed with the TCEQ Office of the Chief Clerk at least 10 days before the scheduled Commission meeting at which the commission will consider approval of the general permit. The commission will consider all public comment in making its decision and will either adopt the Executive Director's response or prepare its own response. The Commission will issue its written response on the general permit at the same time the Commission issues or denies the general permit. A copy of any issued general permit and response to comments will be made available to the public for inspection at the agency's Austin and regional offices. A notice of the Commission's action on the proposed general permit and a copy of its response to comments will be mailed to each person who made a comment. Also, a notice of the Commission's action on the proposed general permit and the text of its response to comments will be published in the *Texas Register.*

MAILING LISTS

In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific general permit; (2) the permanent mailing list for a specific applicant name and permit number; and/or (3) the permanent mailing list for a specific county. Clearly specify the mailing lists to which you wish to be added and send your request to the TCEQ's Office of the Chief Clerk at the address above. Unless you otherwise specify, you will be included only on the mailing list for this specific general permit.

INFORMATION

If you need more information about this permit or the permitting process, please call the TCEQ's Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at: www.tceq.state.tx.us.

Further information may also be obtained by calling the TCEQ's Water Quality Division, Storm Water and Pretreatment Team, at (512) 239-4671.

Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200804289
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 11, 2008

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Notice of Deletion of the Shelby Wood Specialty, Inc. Proposed State Superfund Site from the State Superfund Registry

The executive director (ED) of the Texas Commission on Environmental Quality (TCEQ) is issuing this notice of deletion of the Shelby Wood Specialty, Inc. proposed state Superfund site (the Site) from its proposed-for-listing status on the state registry, the list of state Superfund sites. The state registry lists the contaminated sites that may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment. The Site is being deleted from the state registry because it has been accepted into the TCEQ Voluntary Cleanup Program.

The Site was originally proposed for listing on the state registry in the April 6, 2007 issue of the *Texas Register* (32 TexReg 2038). The Site was proposed to the state registry with a commercial/industrial land use designation in accordance with Texas Risk Reduction Program (TRRP) regulations (30 TAC Chapter 350). The Site consists of approximately 27.4 acres and is located at 3295 United States Highway 84 East, in Tenaha, Shelby County, Texas. The Site also includes any areas where hazardous substances have come to be located as a result, either directly or indirectly, of releases of hazardous substances from the Site.

The records indicate that the Site operated as a wood treating facility from approximately the mid-1970s to the mid-1980s. The facility treated wood with copper chromium arsenate (CCA). The facility used four to five acres of the 27.4-acre property. Rails at the facility led to a pressure vessel in which CCA was used to treat wood. The pressure vessel and chemical tanks have been removed from the Site and the rails have been covered with concrete. An investigation in 1989 indicated elevated levels of chromium, copper and arsenic. On August 23, 2005, the TCEQ conducted soil sampling from one- to eight-inch depths at the Site. The sampling results indicated releases of arsenic, cadmium, chromium, copper, magnesium, manganese, sodium, zinc and other chemicals at the Site at levels greater than three times those that occur naturally in the environment. Hazardous substances have also been detected in sediment samples taken from wetlands located 0.8 miles downstream from the Site.

The Site has been accepted into the TCEQ Voluntary Cleanup Program (VCP) and is therefore eligible for deletion from the state registry as provided by 30 TAC §335.344(c). The Site will be addressed in accordance with TRRP regulations.

In accordance with 30 TAC §335.344(b), the TCEQ held a public meeting to receive comments on the intended deletion of the Site on July 10, 2008, at the Tenaha City Hall, located at 122 North Center, Tenaha, Texas. The TCEQ has prepared a responsiveness summary that responds to comments received into the record at the public meeting. The complete public file, including the transcript of the meeting and the responsiveness summary, may be viewed during regular business hours at the TCEQ's Records Management Center, Building E, First Floor, 12100 Park 35 Circle, Austin, Texas 78753, telephone numbers (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee.

All inquiries regarding the deletion of the Site should be directed to Ms. Crystal Taylor, Community Relations, telephone numbers (800) 633-9363, extension 3844.

TRD-200804292
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 12, 2008

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Notice of Opportunity to Comment on Agreed 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 Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 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. Section 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 **September 22, 2008**. Section 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 September 22, 2008**. 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, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: Geosource, Inc. dba Geosource aka Wagner Materials; DOCKET NUMBER: 2008-0501-MLM-E; TCEQ ID NUMBER: RN100847813; LOCATION: the south side of Farm-to-Market Road 1863, approximately one mile east of United States 281 North, Bexar and Comal Counties, Texas; TYPE OF FACILITY: wood recycling facility; RULES VIOLATED: 30 TAC §330.15(c), by failing to dispose of municipal solid waste in an authorized manner; and 30 TAC §213.4(j)(2), by failing to receive approval of modifications to an Edwards Aquifer Water Pollution Abatement Plan prior to performing a regulated activity; PENALTY: $3,500; STAFF ATTORNEY: Dinniah M. Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Hondo Healthcare and Rehabilitation Center, Inc. (Previously Known As Harvest Communities of Houston, Inc.); DOCKET NUMBER: 2007-1078-MWD-E; TCEQ ID NUMBER: RN102186889; LOCATION: 10110 Airline Drive at the northeast corner of the intersection of Airline Drive and Aldine Mail Road in Harris County, Texas; TYPE OF FACILITY: wastewater treatment facility for a healthcare center; RULES VIOLATED: 30 TAC §305.125(1) and §309.13(e)(2) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number 10825001, Other Requirements Number Three, by failing to implement a nuisance prevention system to mitigate odor and noise; 30 TAC §305.125(1) and §319.1 and TPDES Permit Number 10825001, Monitoring and Reporting Requirements Number One, by failing to submit Discharge Monitoring Reports (DMRs) as required by the permit; 30 TAC §305.125(1) and (11)(B)

and §319.7(c) and TPDES Permit Number 10825001, Monitoring and Reporting Requirements Number 3.b., by failing to have all the required monitoring and reporting records available for review upon request; 30 TAC §305.125(1) and §319.1 and TPDES Permit Number 10825001, Monitoring and Reporting Requirements Number One, by failing to correctly calculate and report the monitoring data based on the required monitoring frequency for November 2005; 30 TAC §305.125(1) and (5) and TPDES Permit Number 10825001, Operational Requirements Number One, by failing to properly operate and maintain the Facility; 30 TAC §305.125(1) and §319.1 and TPDES Permit Number 10825001, Monitoring and Reporting Requirements Number One, by failing to submit DMRs as required by the permit; and 30 TAC §21.4 and TWC, §5.702, by failing to pay outstanding Consolidated Water Quality fees and associated late fees for TCEQ Account Number 23002404 for Fiscal Years 2005 - 2007; PENALTY: $15,408; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200804293
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 12, 2008

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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; and 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 **September 22, 2008**. 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, Building 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 September 22, 2008**. 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, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Casey Croy; DOCKET NUMBER: 2008-0563-MSW-E; TCEQ ID NUMBER: RN104789045; LOCATION: 2324 Farm-to-Market Road 2905, Hamilton, Hamilton County, Texas; TYPE OF FACILITY: unauthorized municipal solid waste site; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $3,960; STAFF ATTORNEY: Mary R. Risner, Litigation Division, MC 175, (512) 239-6224; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(2) COMPANY: Duke Pendergraft dba Pendergraft Stone; DOCKET NUMBER: 2008-0592-WQ-E; TCEQ ID NUMBER: RN104285317; LOCATION: 0.8 miles north on Bean Road from the intersection of Rockdale Road and Bean Road, Haskell, Haskell County, Texas; TYPE OF FACILITY: stone quarry; RULES VIOLATED: 30 TAC §281.25(a)(4), 40 Code of Federal Regulations §122.26(c), and TCEQ Default Order, Docket Number 2004-0938-WQ-E, Ordering Provision Numbers 1, 2.a.i and 2.a.ii, by failing to obtain authorization to discharge storm water associated with industrial activities to waters in the state and failing to pay the administrative penalty assessed in TCEQ Default Order, Docket Number 2004-0938-WQ-E, Ordering Provision Number 1; PENALTY: $14,850; STAFF ATTORNEY: Mary R. Risner, Litigation Division, MC 175, (512) 239-6224; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(3) COMPANY: Efrain Juarez; DOCKET NUMBER: 2008-0090-MSW-E; TCEQ ID NUMBER: RN102402146; LOCATION: 3818 Kolloch Drive, Dallas, Dallas County, Texas; TYPE OF FACILITY: unauthorized municipal solid waste storage site; RULES VIOLATED: 30 TAC §330.7(a), by failing to obtain a permit or other authorization from the TCEQ prior to storing municipal solid waste at the facility; PENALTY: $1,050; STAFF ATTORNEY: Mary R. Risner, Litigation Division, MC 175, (512) 239-6224; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: P Johnston Ventures, Inc.; DOCKET NUMBER: 2005-1141-MSW-E; TCEQ ID NUMBER: RN100869254; LOCATION: 860 Rayford Road, Montgomery County, Texas; TYPE OF FACILITY: unauthorized municipal solid waste site; RULES VIOLATED: 30 TAC §330.5(c)(2), caused, suffered, allowed, or permitted the dumping or disposal of municipal solid waste without the written authorization of the commission; PENALTY: $7,875; STAFF ATTORNEY: Alfred Oloko, Litigation Division, MC R-12, (713) 422-8918; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(5) COMPANY: Richard Brannan; DOCKET NUMBER: 2007-1552-PST-E; TCEQ ID NUMBER: RN102220761; LOCATION: 1001 Wallis Avenue, Santa Ana, Coleman County, Texas; TYPE OF FACILITY: inactive underground storage tank (UST); RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, one UST for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; and 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees and associated late fees for TCEQ Financial Account Number 0049072U for Fiscal Years 1996 through 2007; PENALTY: $2,600; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

TRD-200804294

Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 12, 2008

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 291

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed repeals and additions to 30 Texas Administrative Code (TAC) Chapter 291, Utility Regulations.

The proposed rulemaking would allow implement House Bill 149, 80th Legislature, 2007, Regular Session, relating to retail public water and sewer utilities. This proposed rulemaking would add the definition of a nonfunctioning system and allow a retail public utility that takes over a nonfunctioning utility to charge reasonable temporary rates and give the retail public utility a reasonable period of time to bring the nonfunctioning system into compliance with commission rules before the commission assesses penalties.

A public hearing on this proposal will be held in Austin on September 18, 2008, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments. Registration begins 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established to assure enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, commission staff members will be available for discussion 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact Michael Parrish, Office of Legal Services at (512) 239-2548. Requests should be made as far in advance as possible.

Comments may be submitted to Michael Parrish, 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.state.tx.us/rules/ecomments*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2008-014-291-PR. The comment period closes September 22, 2008. To view rules, please visit *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information or questions concerning this proposal, please contact Tammy Benter, Utilities and Districts Section, Water Supply Division, at (512) 239-6136.

TRD-200804157
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 8, 2008

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapter 101 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct public hearings to receive testimony regarding proposed revisions to 30 TAC Chapter 101, General Air Quality Rules, Subchapter H, Emissions Banking and Trading, Division 4, Discrete Emission Credit Banking and Trading, §101.376 and §101.379 and corresponding revisions to the state implementation plan 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 state implementation plans.

The proposed rulemaking would create an enforceable mechanism that allows the executive director to restrict the use of discrete emissions reduction credits (DERCs) in the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area to a level consistent with the attainment and maintenance of the eight-hour ozone National Ambient Air Quality Standard. The proposed amendments would establish an annual review to be conducted by the executive director to determine the number of DERCs available for potential use in the upcoming calendar year for the DFW eight-hour ozone nonattainment area. The proposed rulemaking would also change the deadlines to submit a DEC-2 Form from 45 to 120 days prior to the applicable use period for the calendar year to allow adequate time for the executive director to determine the amount of available DERCs. (Rule Project Number 2008-011-101-EN)

The proposed SIP revision would incorporate a DERC rule revision, set a limit on DERC use for the DFW area, and identify reductions to satisfy the EPA's three percent contingency requirement for the DFW 1997 Eight-Hour Ozone Standard Nonattainment Area. The Motor Vehicle Emissions Budget for nitrogen oxides and volatile organic compound emissions as set in the attainment demonstration SIP is not changed or affected by this revision to the DFW 1997 eight-hour ozone nonattainment area SIP revision. (Project Number 2008-016-SIP-NR)

Public hearings for this proposed rulemaking have been scheduled on September 9, 2008, at 6:30 p.m. in the J. Erik Jonsson Central Library Auditorium, 1515 Young Street, Dallas, and on September 10, 2008, at 10:00 a.m. in the Arlington City Hall Council Chambers, 101 W. Abram Street, Arlington. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A time limit may be established at each hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposals 30 minutes before each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Joyce Spencer, Air Quality Division, at (512) 239-5017. Requests should be made as far in advance as possible.

Comments may be submitted to Kristin Smith, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference the rule or SIP project number that the comment pertains to: Rule Project Number 2008-011-101-EN for proposed rule changes, and SIP Project Number 2008-016-SIP-NR for proposed SIP changes. Comments must be received by September 12, 2008. Copies of the proposed rules can be obtained from the commission's web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. Copies of the proposed SIP revision and all appendices can be obtained from the commission's web site at *http://www.tceq.state.tx.us/implementation/air/sip/sipplans.html*. For further information regarding the proposed rules; please contact Luke Baine, Air Quality Planning Section, (512) 239-5856; and regarding

the proposed SIP revision, please contact Mary Ann Cook, Air Quality Planning Section, at (512) 239-6739.

TRD-200804138
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 8, 2008

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Notice of Water Quality Applications

The following notices were issued during the period of July 31, 2008 through August 12, 2008.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

ADVANCED AROMATICS, L.P. which operates Advanced Aromatics L.P., has applied for renewal of TPDES Permit No. WQ0001914000, which authorizes the discharge of treated process wastewater, domestic wastewater, utility wastewater and storm water at a daily average flow not to exceed 60,000 gallons per day via Outfall 001 and storm water on an intermittent and flow variable basis via Outfall 002. The facility is located at 5501 West Braker Road, midway between Decker Drive and Bayway Drive, in the City of Baytown, Harris County, Texas.

ASHBROOK SIMON-HARTLEY OPERATIONS, LP which operates a manufacturing facility of wastewater and water treatment plant belt filter presses and sluice gates, has applied for a renewal of TPDES Permit No. WQ0001536000, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 4,000 gallons per day via Outfall 001, and hydrostatic test water at a daily maximum flow not to exceed 200,000 gallons per day via Outfall 002. The facility is located at 11600 East Hardy Street, adjacent to the east side of Hardy Street between Collins Road on the south and Halls Bayou on the north, in the City of Houston, Harris County, Texas.

CJUF II STRATUS BLOCK 21 LLC which proposes to operate Block 21, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004854000, to authorize the discharge of treated groundwater at a daily maximum flow not to exceed 432,000 gallons per day via Outfall 001. The facility is located at 201 Guadalupe Street in downtown Austin, bounded by 2nd and 3rd Streets (to the north and south) and by Lavaca and Guadalupe Streets (to the east and west), Travis County, Texas.

EQUISTAR CHEMICALS, LP which operates the Channelview Complex, a synthetic organic chemical manufacturing facility, has applied for a major amendment to TPDES Permit No. WQ0000391000 to authorize the discharge of boiler blowdown, hydrostatic test water, maintenance wastewater, landfarm run-off, groundwater from monitoring and recovery wells (both onsite and offsite), and cooling tower blowdown, boiler blowdown, and process area storm water from an adjacent co-generation facility via Outfall 001; remove the maximum limit for residual chlorine required for domestic sewage at Outfall 001; and authorize the transport of wastewater treatment sludge from Equistar Chemicals, LP Channelview North Plant to the Lyondell Chemical Company South Plant located on a contiguous property. The current permit authorizes the discharge of treated organic chemical manufacturing process wastewater, auto shop wastewater, laboratory wastewater, cooling tower blowdown, sanitary wastewater, loading area and process area washdown, tank farm wastewater, heat exchanger blasting slab waste, steam blowdown, demineralization regeneration blowdown, methanol neutralization sump wastewater, and process area storm water runoff at a daily average flow not to exceed 7,200,000 gallons per day via Outfall 001; de minimus quantities from spill cleanups, utility wastewaters, construction water, non-process area storm water runoff, storm water (from secondary containment structures), and post first flush process area storm water runoff on a continuous and flow variable basis via Outfall 002; de minimus quantities from spill cleanups, utility wastewaters, construction water, and storm water runoff on an intermittent and flow variable basis via Outfalls 003 and 005; and de minimus quantities from spill cleanups, utility wastewaters, construction water, post first flush process area storm water runoff, and non-process area storm water runoff and storm water (from secondary containment structures) on a intermittent and flow variable basis via Outfall 004. The facility is located at 8280 Sheldon Road, approximately four miles north of Interstate Highway 10 in the extraterritorial jurisdiction of the City of Houston, Harris County, Texas.

EQUISTAR CHEMICALS, LP which operates Equistar Chemicals Port Arthur Plant, an inactive plant that formerly manufactured polyethylene, has applied for a major amendment to TPDES Permit No. WQ0000765000 to authorize the removal of effluent limitations for Organic Chemicals Plastics and Synthetic Fibers (OCPSF) parameters, biochemical oxygen demand (5-day), and total chromium; and a reduction in the monitoring frequencies for total organic carbon, oil and grease, and pH at Outfall 001. The current permit authorizes the discharge of storm water and groundwater seepage on an intermittent and flow variable basis via Outfall 001.The facility is located on the north side of Taylor Bayou and approximately one mile south of the intersection of Farm to Market Road 823 with State Highway 73 west of the City of Port Arthur, Jefferson County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

EVONIK DEGUSSA CORPORATION which operates the Baytown Carbon Black Plant, a carbon black product handling facility, has applied for a renewal of TPDES Permit No. WQ0000737000, which authorizes the discharge of storm water commingled with treated domestic sewage, washdown water, and utility water on an intermittent and flow variable basis via Outfall 001. The facility is located at 9300 Needlepoint Road, south of Interstate Highway 10, bounded by Cedar Bayou Tidal on the east and by the Southern Pacific Railroad tracks on the west, approximately five miles northeast of the City of Baytown, Harris County, Texas.

EXPLORER PIPELINE COMPANY which operates Port Arthur Station, a petroleum products pipeline tank farm, has applied for a renewal of TPDES Permit No. WQ0002399000, which authorizes the discharge of storm water runoff on intermittent and flow variable basis via Outfall 001, and the discharge of storm water runoff, tank water drainage, and washdown water from the launcher/receiver slab on intermittent and flow variable basis via Outfall 002. The facility is located at 6300 Port Arthur Road, one mile north-northwest of the intersection of State Highway 73 and State Highway 823 in the City of Port Arthur, Jefferson County, Texas.

INEOS POLYETHYLENE NORTH AMERICA which operates the La Porte Plant, which is a polyolefin manufacturing facility, has applied for a renewal of TPDES Permit No. WQ0000544000, which authorizes the discharge of treated process wastewater, utility wastewater,

domestic wastewater, and storm water runoff via Outfall 001 at a daily average flow not to exceed 3,980,000 gallons per day; utility wastewater and storm water runoff on an intermittent and flow variable basis via Outfalls 002 and 004; and storm water runoff on an intermittent and flow variable basis via Outfall 005. The facility is located at 1230 Battleground Road (State Highway 134), south of Miller Cutoff Road, in the City of La Porte, Harris County, Texas.

KINDER MORGAN PETCOKE, L.P. which operates Petcoke Penn City Terminal, a bulk material storage facility that handles washed aggregate, petroleum coke, carbonaceous pitch, sand, and gravel, has applied for a renewal of TPDES Permit No. WQ0003244000, which authorizes the discharge of dust suppression water and storm water at a daily maximum flow not to exceed 3,800,000 gallons per day via Outfall 001. The facility is located at 3100 Penn City Road, approximately one mile south of the intersection of Penn City Road and Interstate Highway 10, Harris County, Texas.

KINDER MORGAN PETCOKE, L.P. which operates Port of Houston Terminal, a bulk handling facility, has applied for a renewal of TPDES Permit No. WQ0003373000, which authorizes the discharge of wash water and storm water on an intermittent and flow variable basis via Outfall 001. The facility is located at 3100 Penn City Road in the City of Houston, immediately east-northeast of the confluence of Greens Bayou and Buffalo, Harris County, Texas.

LUFKIN INDUSTRIES, INC. which operates Lufkin Industries Plant, a facility which manufactures oil well pumping units and truck trailers, has applied for a renewal of TPDES Permit No. WQ0001268000, which authorizes the discharge of process wastewater, utility wastewater, and domestic wastewater at a daily average flow not to exceed 74,500 gallons per day via Outfall 001. The facility is located approximately 7.0 miles southeast of the City of Lufkin on U.S. Highway 69, Angelina County, Texas.

MST PRODUCTION, LTD. which proposes to operate to operate the Huckabay Ridge Renewable Energy Facility, which will produce biogas using anaerobic digestion of cow manure and other organic agricultural/food processing by-products., has applied for a new permit, Proposed Permit No. WQ0004826000 to authorize the disposal of digester process wastewater at a volume not to exceed an annual average flow of 125,000 gallons per day via irrigation of 2,241.3 acres. This permit will not authorize a discharge of pollutants into water in the State. The facility is located on Farm-to-Market Road (FM) 219, 5.4 miles north of the intersection of FM 210 and State Highway 8. The disposal sites are located: north of FM Road 219, 0.8 mile northwest of the intersection of FM 219 and FM 2303; south of FM Road 219, 0.9 mile northeast of the intersection of FM 219 and FM 2303; north of FM 219, 0.5 mile northeast of the intersection of County Road (CR) 404 and CR 403; off of CR 405, between CR 403 and CR 419, south of the eastern arm of CR 419; north of the eastern arm of CR 419; off FM 219, 0.85 mile east of the intersection of FM 219 and CR 422; north of CR 403, one mile northeast of the intersection of CR 403 and CR 398; north of CR 398, 0.75 mile west of the intersection of CR 403 and CR 398; east of CR 403, directly south of CR 398; and east of CR 403 and west of CR 402, Erath County, Texas.

NEW CANEY MUNICIPAL UTILITY DISTRICT has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to TPDES Permit No. WQ0012274001 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 1,060,000 gallons per day to an annual average flow not to exceed 2,000,000 gallons per day. The facility is located approximately 0.4 mile east and 1.6 miles south of the intersection of Caney Creek and State Highway 59 in Montgomery County, Texas.

OAK GROVE MANAGEMENT COMPANY LLC which will operate the Oak Grove Steam Electric Station, a lignite-fired steam electric generating facility currently under construction, has applied for a major amendment to TPDES Permit No. WQ0001986000, to authorize the increase in the total volume discharged during any 24-hour period from not to exceed 1,470,000,000 gallons to a total volume discharged during any 24-hour period not to exceed 1,610,000,000 gallons via Outfall 001; delete Outfalls 004 and 005; move the discharge locations for Outfalls 006 and 007 to the Primary Discharge Canal prior to discharge via Outfall 001; renumber Outfall 006 to internal Outfall 101; renumber Outfall 007 to internal Outfall 401; add low volume waste and metal cleaning waste on an intermittent and flow variable basis via internal Outfall 101; add low volume waste, metal cleaning waste, bottom ash contact water, and flue gas desulfurization (FGD) system wastewater on an intermittent and flow variable basis via internal Outfall 401; add the discharge of coal pile runoff, low volume waste, and storm water on an intermittent and flow variable basis via new internal Outfall 201; add the discharge of low volume waste on an intermittent and flow variable basis via Outfall 002; move the discharge location for Outfall 003 to the Primary Discharge Canal prior to discharge via Outfall 001; renumber Outfall 003 to internal Outfall 301; remove the 4.0 mg/l maximum chlorine residual concentration and reduce the1.0 mg/l minimum chlorine concentration monitoring frequency from five times per week to once per week at internal Outfall 301; add the discharge of previously monitored effluents from internal Outfalls 101, 201, 301 and 401 via Outfall 001; revise monitoring location descriptions; and recalculate effluent limitations with adjustment and/or removal of effluent limitations as applicable. The current permit authorizes the discharge of once-through cooling water and auxiliary cooling water at a daily maximum flow not to exceed 1,470,000,000 gallons during any 24-hour period via Outfall 001; coal pile runoff and storm water runoff from the lignite/limestone storage area on an intermittent and flow variable basis via Outfall 002; treated domestic wastewater at a daily average flow not to exceed 25,000 gallons per day via Outfall 003; low volume waste and storm water runoff on an intermittent and flow variable basis via Outfall 004; low volume waste, metal cleaning waste, ash transport water (bottom ash contact water), and storm water runoff on an intermittent and flow variable basis via Outfall 005; flue gas desulfurization system wastewater, ash transport water (bottom ash contact water), and storm water runoff on an intermittent and flow variable basis via Outfall 006; and storm water runoff from the railroad area on an intermittent and flow variable basis via Outfall 007. The facility is located on the west shore of Twin Oak Reservoir, approximately 8.5 miles south of Texas Highway 7, off Farm-to-Market Road 979, and approximately 12 miles north of the City of Franklin, Robertson County, Texas.

CITY OF SAN JUAN has applied for a major amendment to TPDES Permit No. WQ0011512001 to authorize the addition of Outfall 002 for the discharge of treated domestic wastewater at a volume not to exceed 200,000 gallons per day. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,000,000 gallons per day. The facility is located approximately 1.9 miles south of U.S. Highway 83 Business Route at the south end of the San Antonio Road, at 201 West Hall Acres Road, in the City of San Juan in Hidalgo County, Texas.

The Texas Commission on Environmental Quality (TCEQ) has initiated a minor amendment of the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014836001 issued to SCHERTZ/SEGUIN LOCAL GOVERNMENT CORPORATION to include the definition of the composite sample type under the effluent limitations and monitoring requirements pages 2 and 2a of the permit. The existing permit authorizes the discharge of filter backwash effluent from a water treatment plant at a daily average flow not to exceed 1,500,000 gallons per day. The facility is located on County Road

127, approximately two miles north of Farm-to-Market Road 1117 in Gonzales County, Texas.

SIGNAL INTERNATIONAL TEXAS, L.P. which operates Signal International Texas Drydock facility, has applied for a renewal of TPDES Permit No. WQ0003753000, which authorizes the discharge of storm water runoff associated with industrial activity on an intermittent and flow variable basis via Outfalls 001, 002, 003, 004, 005, 006, and 007, vessel ballast water on an intermittent and flow variable basis via Outfall 008, and cooling water on an intermittent and flow variable basis via Outfall 009. The facility is located on Farm-to-Market Road (FM) 82 approximately one mile south of the intersection of FM 87 and FM 82 on Pleasure Island in the City of Port Arthur, Jefferson County, Texas. The effluent is discharged to the Sabine-Neches Canal Tidal, in Segment No. 0703 of the Neches-Trinity Coastal Basin.

SOLVAY CHEMICALS, INC. which operates Solvay Interox Deer Park Plant that produces hydrogen peroxide and sodium percarbonate, has applied for a renewal of TPDES Permit No. WQ0002544000, which authorizes the discharge of storm water runoff at a variable rate depending on rainfall from the hydrogen peroxide and sodium percarbonate process and storage areas via Outfall 001, and treated process wastewater, utility waters, and storm water runoff at a daily average flow not to exceed 434,000 gallons per day (MGD) via Outfall 002. The facility is located at 1130 Battleground Road (State Highway 134) in the City of Deer Park, Harris County, Texas

The Texas Commission on Environmental Quality (TCEQ) has initiated a minor amendment of the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014852001 issued to SOUTH CENTRAL WATER COMPANY to change the daily maximum limitation for Total Suspended Solids from 4 mg/l to 40 mg/l on Page 2b of the permit under the Final Effluent Limitations and Monitoring Requirements. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 950,000 gallons per day. The facility will be located approximately 7,200 feet northeast of Farm-to-Market Road 1486 and Shady Oaks Lane in Montgomery County, Texas.

SOUTHMOST REGIONAL WATER AUTHORITY AND BROWNSVILLE PUBLIC UTILITIES BOARD, which operates a reverse osmosis potable water treatment plant, has applied for a major amendment to TPDES Permit No. WQ0004541000 to authorize an increase of the daily maximum effluent limitation for total dissolved solids at Outfall 001; remove Other Requirement Provision No. 7 which requires monitoring of the ambient total dissolved solids concentrations and background stream-flow conditions of the receiving stream; and authorize the disposal of over pressure relief well water by evaporation in an on-site evaporation/retention pond. The current permit authorizes the discharge of reverse osmosis reject water at a daily average flow not to exceed 4,000,000 gallons per day via Outfall 001. The proposed permit authorizes the discharge of reverse osmosis reject water and raw well water at a daily average flow not to exceed 4,000, 000 gallons per day via Outfall 001. The facility is located at 1255 North Farm-to-Market Road 511, approximately 2.7 miles east of the intersection of U.S. Highway 83 and Farm-to-Market Road 511, in the City of Brownsville, Cameron County, Texas.

STAGECOACH PROPERTIES, INC. has applied for a renewal of TPDES Permit No. WQ0010884001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility is located 200 feet west of Farm-to-Market Road 2268, 300 feet south of Salado Creek, and 400 feet southeast of the crossing of Salado Creek by the Interstate Highway 35 east frontage road, in the community of Salado in Bell County, Texas.

The Texas Commission on Environmental Quality (TCEQ) has initiated a minor modification of the Texas Pollutant Discharge Elimination System (TPDES) permit issued to the CITY OF SULPHUR SPRINGS, to incorporate a substantial modification to the approved pretreatment program. The applicant has applied to the TCEQ for approval of a substantial modification to its approved pretreatment program under the TPDES program. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,215 gallons per day. The facility is located south of the St. Louis Southwestern Railroad approximately 7,000 feet north east of the intersection of Interstate highway 30 and Farm-to-Market Road 1870 in Hopkins County, Texas in Hopkins County, Texas.

TEXAS BARGE & BOAT, INC. which operates Texas Barge & Boat, Inc., has applied for a renewal of TPDES Permit No. WQ0004696000, which authorizes the discharge of ballast and bilge water from marine vessels on an intermittent and flow variable basis via Outfall 004, and ballast and bilge water from marine vessels, drydock water and pressure wash water on an intermittent and flow variable basis via Outfall 005. The facility is located approximately 2.5 miles south of the intersection of State Highway 288 and County Road 242A, Brazoria County, Texas.

U.S. STEEL TUBULAR PRODUCTS, INC. which operates U.S. Steel Tubular Products, Inc., has applied for a major amendment to TPDES Permit No. WQ0003540000 to authorize the removal of aluminum limits from the permit, to increase the flow rate at internal outfall 101 from a daily average flow not to exceed 6,000 gallons per day to a daily average flow not to exceed 18,000 gallons per day and from a daily maximum flow not to exceed 7,500 gallons per day to a daily maximum flow not to exceed 22,500 gallons per day; reroute the flow from internal outfall 101 to Outfall 002; and to remove Outfalls 003, 004, 005, and 006 and authorize the discharges from these outfalls under the Multi-Sector General Permit for storm water (TPDES No. TXR050000) and the Hydrostatic Test Water General Permit (TPDES No. TXG670000); the removal of total silver limits at Outfall 005; and the revision of total copper and total cyanide final effluent limits at Outfall 001, 003, 004, and 005. The current permit authorizes the discharge of cooling tower wastewater, hydrostatic test water, vehicle wash water, storm water, and previously monitored effluent on an intermittent and flow variable basis via Outfall 001; hydrostatic test water and storm water on an intermittent and flow variable basis via Outfall 002; hydrostatic test water and storm water on an intermittent and flow variable basis via Outfall 003; hydrostatic test water, wash water, and storm water on an intermittent and flow variable basis via Outfall 004; process wastewater, hydrostatic test water and storm water on an intermittent and flow variable basis via Outfall 005; and hydrostatic test water and storm water on an intermittent and flow variable basis via Outfall 006. The facility is located at 9393 Sheldon Road, at the intersection of Sheldon Road and U.S. Highway 90, approximately four miles north of the City of Channelview, Harris County, Texas.

YES COMPANIES, LLC has applied for a renewal of TPDES Permit No. WQ0012849001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000 gallons per day. The facility is located approximately 1 mile north of the intersection of Farm-to-Market Road 518 and Suburban Gardens Road and approximately 2.3 miles west-northwest of the City of Pearland in Brazoria County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200804361

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 13, 2008

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on August 5, 2008, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Pulak Barua dba Sunshine Food Mart; SOAH Docket No. 582-08-2780; TCEQ Docket No. 2007-1842-PST-E. The commission will consider the Administrative Law Judge(s Proposal for Decision and Order regarding the enforcement action against Pulak Barua dba Sunshine Food Mart on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-200804363
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 13, 2008

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General Land Office

Notice of Availability and Request for Comments on a Damage Assessment and Restoration Plan

AGENCIES: The Texas General Land Office (TGLO), Texas Parks and Wildlife Department (TPWD), and the Texas Commission on Environmental Quality (TCEQ) (collectively, the Trustees).

ACTION: Notice of availability of a proposed Damage Assessment and Restoration Plan for Natural Resource Damages related to the Port Arthur refinery ('Facility'), owned and operated by Motiva Enterprises LLC ('Motiva'), release of hazardous substances and of a 30-day period for public comment on the plan beginning the date of publication of this notice.

SUMMARY: Notice is hereby given of a Draft Damage Assessment and Restoration Plan (Draft DARP) that outlines the natural resource injuries resulting from releases of hazardous substances, comprised of polycyclic hydrocarbons and metals, from the Facility to Alligator Bayou and the Jefferson County Drainage Ditch 7 (DD-7) Lower Main Canal. The Draft DARP summarizes the injuries resulting from unauthorized discharge of hazardous substances into waters of the State of Texas and adjacent habitats as well as proposed restoration projects to compensate for those injuries. The proposed projects are wetlands restoration and the preservation of woodlands in perpetuity within the Neches or Sabine River systems.

The opportunity for public review and comment on the proposed Draft DARP announced in this notice is required under 43 Code of Federal Regulations (C.F.R.) §11.81(d) of the Natural Resource Damage Assessment regulations.

ADDRESSES: To receive a copy of this Draft DARP interested members of the public are invited to contact Keith Tischler at Texas General Land Office, Coastal Resources Division, Natural Resource Trustee Program, P.O. Box 12873, Austin, Texas 78711-2873, Phone: (512) 463-6287, e-mail: Keith.Tischler@glo.state.tx.us.

DATES: Comments must be submitted in writing within 30 days of the publication of this notice to Keith Tischler of the Texas General Land Office at the address listed in the previous paragraph. The Natural Resource Trustees will consider all written comments received during the comment period prior to finalizing the Draft DARP.

SUPPLEMENTARY INFORMATION: The Motiva Facility is located at 2555 Savannah Avenue, at the intersection of Savannah Avenue and 25th Street, east of State Highway 73, in Port Arthur, Jefferson County, Texas. On February 16, 1995, the Texas Natural Resource Conservation Commission, a predecessor of TCEQ, approved an Agreed Order (Docket No. 94-0730-MLM-E) with Motiva's predecessor, Star Enterprise, relating to the release of hazardous substances at the site, providing for receiving water assessments and remediation activities for identified water bodies adjacent to the Facility, to assess whether or not the designated aquatic life use of the receiving waters is being met, to identify contaminants and their effect on the aquatic biological community, and to design work plans to generate scientific data to develop appropriate clean-up levels in Alligator Bayou and the Drainage District No. 7 canals.

Motiva elected to perform the remedial alternatives evaluation in a sequential mode by designated segments. The designations were assigned as follows; City Outfall Canal-Segment 1, Alligator Bayou-Segment 2, and the DD-7 Main Canal-Segments 3, 4, and 5. Analytical data indicate the presence of elevated concentrations of polycyclic aromatic hydrocarbons (PAHs) and metals, including chromium, copper, lead, and zinc (COCs), in sediments of Segment 2 and to a lesser extent in Segment 3, with potential adverse effects to any benthic macroinvertebrates and semi-aquatic wildlife exposed to these chemicals of concern. Motiva sought approval of a remedial alternative for Segment 2 that will (1) reroute the City Outfall Canal flow so that storm water from the City of Port Arthur flows directly to the DD7 Main Canal instead of through Segment 2; and (2) remediate Segment 2 by stabilizing the contaminated sediment/soils and placement of these sediments either in-situ or into a consolidation cell. The remediated portion of Segment 2 would subsequently serve to create additional stormwater retention capacity. Stabilization of contaminated sediments/soils will be performed using methods involving the mixing of a stabilization reagent (e.g, fly ash, bed ash, cement-kiln dust, portland cement) and occasionally other materials to produce a cured, stabilized product capable of supporting a cap providing physical fixation of the COCs in a solid matrix. The TCEQ concurred with Motiva's remediation concept for Segment 2 and issued a remediation directive dated November 29, 2006, authorizing implementation of the remediation concept for Segment 2. In a letter dated April 17, 2007, Motiva requested authorization to conduct an Ecological Services Analysis in cooperation with the Trustees for relevant portions of the Lower Main Canal (Segments 3 and 4).

The TGLO, TCEQ, TPWD, and the US Fish and Wildlife Service (USFWS) (representing the United States Department of the Interior), are designated as the natural resource trustees pursuant to Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 et seq., the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1251, et seq.; the Clean Water Act ("CWA"), 33 U.S.C. §1321, with responsibility to conduct natural resource damage assessments on behalf of the public when a release of hazardous substances affect natural resources and services.

The Trustees conducted an assessment of natural resource damages pursuant to 43 C.F.R. §11.60 et seq. for injuries to Alligator Bayou and DD-7 Main Channel resulting from Facility releases of hazardous

substances, including PAHs, metals, and gross hydrocarbon contamination. The assessment was limited to the portion of Alligator Bayou beginning at Savannah Avenue and continuing downstream to the confluence with DD-7 Main Canal at State Highway (SH) 82 ('Segment 2') located within the Motiva Port Arthur Refinery facility; and the DD-7 Lower Main Canal beginning at the confluence of the DD-7 Main Canal with Alligator Bayou and continuing downstream to the DD-7 hurricane protection levee at Taylor Bayou ('Segment 3') located outside the facility where hazardous substances may have come to be located as a result, either directly or indirectly, of releases of hazardous substances from the Facility.

The Natural Resource Trustees have determined that resources subject to their trust authority under these Acts were exposed to hazardous substances as a result of the release. The Trustees determined that hazardous substances (including PAHs and metals) were available in the sediments and injury to approximately 44.2 acres of benthic habitat had occurred. Additionally, the remediation concept for Alligator Bayou will result in injury to 45.8 acres of riparian habitat.

The Trustees and Motiva agreed to settle natural resource liability for injuries that resulted from the release. A proposed Settlement Agreement was reached and posted for public comment on November 9, 2007. No comments were received and the Settlement Agreement was executed on February 15, 2008. The settlement provides funds for the Trustees to construct wetlands habitat and preserve woodlands in perpetuity in the vicinity of the release, as well as pay all Trustees assessment costs. The Trustees propose using these funds to construct approximately 32 acres of salt marsh and to preserve in perpetuity approximately 422 acres of woodlands in the vicinity of the release. A wetland construction or enhancement project has not yet been identified. Once a suitable project has been identified an addendum to the Draft DARP containing project details will be published. To the extent possible, the Trustees will co-locate the wetland restoration project with other wetland initiatives in the region thus achieving the maximum productive area of contiguous habitat possible.

The Trustees have identified a preferred restoration alternative for the compensation of riparian losses and are seeking public comment on the proposed action. The Trustees propose to provide for the preservation in perpetuity of a 408 acre parcel of land adjacent to the Lower Neches River to offset riparian losses. Habitat protection would be established through the purchase of the property and transferring title to the U.S. Department of the Interior's (National Park Service) Big Thicket National Preserve. While this tract is slightly smaller that the original restoration target, it is comprised of higher quality habitat than the injured riparian habitat. The proposed preservation tract will provide comparable or greater ecological services to those injured and offer additional benefits as it is tied into a larger corridor of preserved habitat associated with the Big Thicket. In the event that excess settlement funds remain following the preservation of this property, the Trustees will apply the remaining funds to a comparable restoration project in the area.

The Draft DARP describes the information and methods used to define the natural resource injuries, scale restoration actions, and identify the preferred restoration actions needed to restore, replace or acquire the resources or services equivalent to those lost.

For further information contact: Keith Tischler at (512) 463-6287, fax: (512) 475-0680, e-mail: Keith.Tischler@glo.state.tx.us.

TRD-200804291
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: August 12, 2008

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Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission (HHSC) intends to submit to the Centers for Medicare and Medicaid Services an amendment to the Community Living Assistance and Support Services (CLASS) waiver program. CLASS is a Medicaid home and community-based services waiver program established under the authority of Title XIX, §1915(c) of the Social Security Act. The proposed effective date for the amendment is April 1, 2008.

The CLASS program provides essential home and community-based services and supports to individuals living in their own or their families' homes who have severe chronic disabilities closely related to mental retardation.

Services include case management, adaptive aids and medical supplies, habilitation, minor home modifications, nursing services, occupational therapy, physical therapy, speech therapy, specialized therapies, behavioral support services, respite, and transition assistance.

This amendment sets the waiver cost limit for an individual in the CLASS program at 200 percent of the cost of serving similar individuals in an intermediate care facility for individuals with mental retardation.

HHSC is requesting that the waiver amendment be approved for the period beginning April 1, 2008, through August 31, 2009. This amendment maintains cost neutrality for waiver years 2008 through 2009.

To obtain copies of the proposed waiver amendment, interested parties may contact Betsy Johnson by mail at Texas Health and Human Services Commission, P.O. Box 85200, mail code H-620, Austin, Texas 78708-5200, phone (512) 491-1199, fax (512) 491-1953, or by e-mail at betsy.johnson@hhsc.state.tx.us.

TRD-200804121
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 6, 2008

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout Tx	Tank and Vessel Builders LP	L06168	Baird	00	05/15/08
Throughout Tx	Alliance Geotechnical Group of Austin Inc	L06147	Elgin	00	05/06/08
Throughout Tx	Waggoner and Associates, Inc. DBA Waggoner-Texas and Associates, Inc.	L06159	Flint	00	05/12/08

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Alvin	Solutia, Inc.	L00219	Alvin	82	05/07/08
Alvin	Solutia, Inc.	L00219	Alvin	81	04/30/08
Amarillo	Baptist St Anthonys Health System	L01259	Amarillo	87	04/25/08
Andrews	Waste Control Specialists LLC	L06153	Andrews	01	05/06/08
Arlington	USMD Hospital at Arlington	L05727	Arlington	07	05/05/08
Austin	St. David's Healthcare Partnership LP LLP DBA St. David's Medical Center	L00740	Austin	101	05/12/08
Austin	Columbia St. David's Healthcare System LP DBA South Austin Hospital	L03273	Austin	76	05/02/08
Austin	Texas Cardiovascular Consultants P.A.	L05246	Austin	29	05/05/08
Austin	Columbia St. David's Healthcare System LP DBA South Austin Hospital	L03273	Austin	77	05/06/08
Austin	ARA Imaging	L05862	Austin	31	05/07/08
Austin	Austin Diagnostic Clinic	L05646	Austin	10	05/18/08
Beasley	Hudson Products Corporation	L02370	Beasley	49	05/12/08
Bedford	Metroplex Surgicare Partners LTD. DBA Metroplex Surgicare	L05764	Bedford	04	05/01/08
Borger	GPCH LLC DBA Golden Plains Community Hospital	L04369	Borger	13	05/12/08
Borger	WRB Refining LLC DBA ConocoPhillips Company	L02480	Borger	53	05/06/08
Brenham	Trinity Community Medical Center of Brenham	L03419	Brenham	25	05/06/08
Cedar Creek	Agilent Technologies	L05214	Cedar Creek	07	05/06/08
College Station	Cancer Physicians Associated P.A.	L05790	College Station	08	05/07/08
Corpus Christi	Spohn Hospital	L02495	Corpus Christi	95	05/05/08
Dallas	Texas Heart Care P.A.	L06067	Dallas	04	05/07/08
Dallas	E+ PET Imaging V LP	L05726	Dallas	08	05/08/08
Dallas	Texas Heart Care P.A.	L06067	Dallas	03	04/22/08
Dallas	Baylor University Medical Center	L01290	Dallas	89	05/01/08
Denton	Trace Life Sciences, Inc.	L05435	Denton	17	04/29/08
Fort Worth	Cook Childrens Medical Center	L04518	Fort Worth	17	05/05/08
Frisco	Tenet Hospital LTD DBA Centennial Medical Center	L05768	Frisco	09	05/07/08
Houston	Spectracell Laboratories, Inc.	L04617	Houston	12	05/13/08
Houston	Cardiac Nuclear Imaging, Inc.	L05962	Houston	04	05/06/08
Houston	One Step Diagnostic, Inc.	L05990	Houston	02	05/07/08
Houston	Nuclear Imaging Services LP	L05791	Houston	07	05/05/08
Houston	J. Raul Soto M.D. PA	L06032	Houston	01	05/08/08
Houston	Chopra Imaging Center, Inc. DBA Advanced Diagnostics	L05566	Houston	06	05/09/08
Houston	Eye Excellence	L05737	Houston	02	05/06/08

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Texas Childrens Hospital Diagnostic Imaging 2-2521	L04612	Houston	41	04/30/08
La Porte	Cardiorad, Inc.	L05755	La Porte	15	05/09/08
Lubbock	Methodist Diagnostic Imaging DBA Covenant Diagnostic Imaging	L03948	Lubbock	41	05/07/08
Lubbock	IBA Molecular North America, Inc. DBA IBA Molecular	L05482	Lubbock	15	05/07/08
Midland	Permian Cardiology Associates	L05716	Midland	05	05/05/08
Midlothian	Ash Grove Texas LP	L05424	Midlothian	04	05/12/08
Mount Pleasant	DX Imaging LTD DBA Open Imaging of Mount Pleasant	L05445	Mount Pleasant	13	05/02/08
New Braunfels	Cancer Care Network of South Texas PA	L05717	New Braunfels	11	04/22/08
Pasadena	Albemarle Corporation	L04072	Pasadena	17	05/02/08
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	163	05/12/08
San Antonio	Southwest Research Institute	L04958	San Antonio	15	05/12/08
San Antonio	San Antonio Endovascular and Heart Institute	L05766	San Antonio	02	05/08/08
San Antonio	U.T. Medicine San Antonio Nuclear Cardiology	L05410	San Antonio	10	05/05/08
San Antonio	William Craig M.D. PA	L05378	San Antonio	09	05/05/08
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	162	05/05/08
San Antonio	Medlab DBA Clinical Laboratory	L04824	San Antonio	12	05/01/08
Sugar Land	Houston Cardiovascular Consultants LLP DBA Houston Cardiovascular Imaging	L05350	Sugar Land	14	04/30/08
Sugar Land	Houston Cardiovascular Consultants LLP DBA Houston Cardiovascular Imaging	L05350	Sugar Land	15	05/07/08
Throughout Tx	J-W Wireline Company	L06132	Addison	02	05/09/08
Throughout Tx	TEAM Industrial Services, Inc.	L00087	Alvin	184	05/08/08
Throughout Tx	Texas Department of Transportation Construction Division	L00197	Austin	137	05/02/08
Throughout Tx	Gulf Coast Weld Spec	L05426	Beaumont	71	05/06/08
Throughout Tx	National Inspection Services LLC	L05930	Crowley	18	05/12/08
Throughout Tx	Terracon Consultants, Inc.	L05268	Dallas	25	05/09/08
Throughout Tx	IRISNDT, Inc.	L04769	Deer Park	54	05/09/08
Throughout Tx	AMEC Earth and Environmental, Inc.	L03622	El Paso	22	05/09/08
Throughout Tx	Probe Technology Services, Inc.	L05112	Fort Worth	20	05/08/08
Throughout Tx	Kiewit Texas Construction LP	L04569	Fort Worth	22	05/08/08
Throughout Tx	Gray Wireline Service, Inc.	L03541	Fort Worth	28	05/08/08
Throughout Tx	Bonded Inspections, Inc.	L00693	Garland	78	05/07/08
Throughout Tx	METCO	L03018	Houston	185	05/08/08
Throughout Tx	Key Electric Wireline Services	L06003	Houston	03	04/30/08
Throughout Tx	Weldsonix, Inc.	L05718	Houston	38	05/15/08
Throughout Tx	H and G Inspection Company, Inc. DBA Statewide Maintenance Company	L02181	Houston	225	05/07/08
Throughout Tx	Petrochem Inspection Services, Inc.	L04460	Houston	86	05/09/08
Throughout Tx	Integrated Production Services, Inc.	L06051	Iowa Park	05	05/02/08
Throughout Tx	Perf-O-Log, Inc.	L05478	Iowa Park	19	05/02/08
Throughout Tx	Texas Perforators, Inc.	L05086	Kingsville	11	05/08/08
Throughout Tx	Good Shepherd Medical Center Linden, Inc.	L02721	Linden	23	05/08/08
Throughout Tx	S and T International, Inc.	L03652	Mauriceville	38	05/07/08
Throughout Tx	American X-Ray and Inspection Services, Inc. DBA A X I S, Inc.	L05974	Midland	12	05/14/08
Throughout Tx	Applied Physics and Measurements, Inc	L06120	Missouri City	02	05/08/08
Throughout Tx	R.K. Hall Construction LTD	L04886	Paris	12	05/08/08
Throughout Tx	Fugro Consultants LP	L04322	Pasadena	93	05/08/08
Throughout Tx	Fugro Consultants LP	L04322	Pasadena	93	05/09/08

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout Tx	Ludlum Measurements, Inc.	L01963	Sweetwater	80	05/02/08
Throughout Tx	B.J. Services Company USA	L02684	Tomball	59	05/05/08
Tomball	Cardiovascular Institute PA	L05740	Tomball	04	05/12/08
Tomball	Clinic for Cardiovascular Care PA DBA Cardiovascular Clinic of Texas	L05670	Tomball	05	05/16/08
Tyler	Trinity Mother Frances Health System	L01670	Tyler	135	05/06/08
Victoria	Crossroads Health Center PLLC	L06130	Victoria	01	05/07/08
Winnie	Newpark Environmental Services LLC	L04999	Winnie	12	05/12/08

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Dallas	Mallinckrodt, Inc.	L03580	Dallas	59	05/02/08

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Dallas	Texas Radiation Physics Associates, Inc.	L04152	Dallas	11	05/08/08
Dallas	Cumbre, Inc.	L05474	Dallas	07	05/01/08
San Angelo	West Texas Medical Associates	L05849	San Angelo	03	05/11/08
Throughout Tx	Jester Brothers Construction	L05057	Whitewright	04	05/09/08

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200804297
Lisa Hernandez
General Counsel
Department of State Health Services

Filed: August 12, 2008

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Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
College Station	Energy Laboratories, Inc.	L06171	College Station	00	07/14/08
Ft Worth	Marilyn King Rankine M.D.	L06170	Ft Worth	00	07/28/08
Throughout Tx	Tucker Energy Services, Inc.	L06157	Denton	00	07/28/08

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Arlington	Arlington Memorial Hospital	L02217	Arlington	91	07/15/08
Athens	East Texas Medical Center	L02470	Athens	40	07/21/08
Austin	Austin Heart PA	L04623	Austin	61	07/15/08
Austin	The University of Texas at Austin Environmental Health and Safety	L00485	Austin	79	07/28/08
Bedford	Columbia North Hills Outpatient Imaging Ctr Subsidiary LP DBA Bedford Imaging Center	L03455	Bedford	46	07/25/08
Borger	WRB Refining LLC DBA Conoco Phillips Company	L02480	Borger	54	07/21/08
Cedar Creek	Agilent Technologies	L05214	Cedar Creek	08	07/17/08
Conroe	Drilling Specialties Company	L04825	Conroe	13	07/18/08
Corpus Christi	Del Mar College, Allied Health Dept., Nuclear Medicine Dept.	L06002	Corpus Christi	02	07/17/08
Corpus Christi	Citgo Refining and Chemicals Company LP	L00243	Corpus Christi	42	07/17/08
Cypress	N Cypress Medical Center Operating Co. LLC DBA North Cypress Medical Center	L06020	Cypress	10	07/25/08
Dallas	Dallas Cardiology Associates PA DBA Heartplace-Charlton Methodist	L05541	Dallas	08	07/21/08
Dallas	N. Texas Cardiovascular Associates PA	L05602	Dallas	08	07/21/08
Dallas	Donald L Levene M.D. FACC	L03817	Dallas	14	07/25/08
Ennis	PRHC Ennis LP DBA Ennis Regional Medical Center	L05427	Ennis	08	07/16/08
Ft Worth	Baylor All Saints Medical Center	L02212	Ft Worth	79	07/10/08
Ft Worth	Fort Worth Surgicare Partners Ltd. DBA Baylor Surgical Hospital @Fort Worth	L05668	Ft Worth	07	07/14/08
Ft Worth	Cooks Childrens Health Care System DBA Cook Childrens Medical Center Department of Pathology	L04587	Ft Worth	13	07/21/08
Ft Worth	Tarrant County Cardiology	L04659	Ft Worth	20	07/28/08
Ft Worth	Healthsouth of Texas, Inc. DBA Baylor All Saints Gamma Knife Center	L05473	Ft Worth	25	07/28/08
Gainesville	Gainesville Hospital District DBA North Texas Medical Center	L02585	Gainesville	30	07/10/08
Houston	Nuclear Sources and Services, Inc. DBA NSSI/Sources and Services, Inc.	L02991	Houston	37	07/10/08
Houston	Ben Taub General Hospital Nuclear Medicine	L01303	Houston	66	07/16/08
Houston	The University of Texas Health Science Center at Houston	L02774	Houston	56	07/16/08
Houston	The Zimmerman Medical Clinic	L00244	Houston	22	07/16/08
Houston	Willowbrook Cardiovascular Associates PA	L05090	Houston	07	07/17/08
Houston	Nuclear Imaging Services	L05775	Houston	43	07/11/08
Houston	River Oaks Imaging and Diagnostic LP	L05493	Houston	14	07/15/08
Houston	American Diagnostic Tech LLC	L05514	Houston	48	07/10/08

AMENDMENTS TO EXISTING LICENSES (CONTINUED)

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Columbia/HCA Healthcare Corporation DBA Spring Branch Medical Center	L02473	Houston	67	07/21/08
Houston	CHCA East Houston LP DBA East Houston Regional Medical Center	L03306	Houston	27	07/21/08
Houston	Cardiology Specialists of Houston	L05083	Houston	08	07/25/08
Houston	DBA River Oaks Imaging and Diagnostic	L04342	Houston	58	07/28/08
Houston	Memorial Hermann Hospital System DBA Memorial Hospital Southwest	L00439	Houston	136	07/16/08
Irving	Las Colinas Oncology MSO LP DBA Las Colinas Cancer Center	L06078	Irving	02	07/18/08
Jacksonville	East Tx Medical Center Jacksonville	L00169	Jacksonville	39	07/25/08
La Porte	Ineos USA LLC Battleground Manufacturing	L00088	La Porte	56	07/22/08
Longview	Eastman Chemicals Company, Tx Operations	L00301	Longview	110	07/10/08
Lubbock	Covenant Health System DBA Covenant Medical Center - Lakeside	L01547	Lubbock	90	07/21/08
Lubbock	Covenant Medical Center	L00483	Lubbock	139	07/21/08
Lubbock	Covenant Health System DBA Joe Arrington Cancer Research and Treatment Center	L06028	Lubbock	09	07/21/08
McAllen	McAllen Hospitals LP DBA McAllen Medical Center	L01713	McAllen	87	07/10/08
N Richland Hills	Columbia N Hills Hospital Subsidiary LP DBA North Hills Hospital	L02271	N Richland Hills	55	07/25/08
Round Rock	Scott and White Hospital at University Medical Campus	L06085	Round Rock	01	07/14/08
San Antonio	South Tx Radiology Imaging Centers	L03518	San Antonio	62	07/16/08
San Antonio	South Tx Radiology Imaging Centers	L00325	San Antonio	165	07/16/08
San Antonio	Bionumerik Pharmaceuticals, Inc.	L05226	San Antonio	13	07/21/08
San Antonio	The University of Tx Health Science Ctr.S.A.	L05217	San Antonio	11	07/28/08
San Antonio	Cardiology Clinic of San Antonio	L04489	San Antonio	36	07/25/08
Tatum	Luminant Mining Company LLC	L06081	Tatum	05	07/16/08
Texas City	Sterling Chemical, Inc.	L03952	Texas City	20	07/17/08
The Woodlands	Advanced Cardiovascular Care Center PA	L05413	The Woodlands	06	07/16/08
The Woodlands	Memorial Hospital The Woodlands	L03772	The Woodlands	60	07/28/08
Throughout Tx	Desert Industrial X-Ray LP	L04590	Abilene	84	07/25/08
Throughout Tx	Team Industrial Services, Inc.	L00087	Alvin	187	07/18/08
Throughout Tx	Lotus, LLC	L05147	Andrews	15	07/18/08
Throughout Tx	Rodriguez Engineering	L04700	Austin	14	07/17/08
Throughout Tx	Garner Environmental Services, Inc.	L05228	Deer Park	03	07/18/08
Throughout Tx	PSC Industrial Outsourcing LP	L06155	Deerpark	01	07/15/08
Throughout Tx	Pavetex Engineering and Testing, Inc.	L05533	Dripping Springs	08	07/25/08
Throughout Tx	Waggoner and Associates, Inc. DBA Waggoner-Texas and Associates, Inc.	L06159	Flint	01	07/29/08
Throughout Tx	Landtec Engineers LLC	L05341	Ft Worth	04	07/17/08
Throughout Tx	Weatherford International, Inc.	L04286	Ft Worth	77	07/29/08
Throughout Tx	Coastal Testing Laboratories, Inc.	L01945	Houston	28	07/17/08
Throughout Tx	Cav-Tech, Inc.	L05996	Houston	01	07/17/08
Throughout Tx	Radiographic Specialists Inc	L02742	Houston	60	07/21/08
Throughout Tx	The Murillo Company	L01373	Houston	19	07/22/08
Throughout Tx	Q Pro, Inc. DBA Q Pro Technical Services	L05980	Houston	04	07/30/08
Throughout Tx	Nuclear Imaging Services LP	L05791	Houston	08	07/28/08
Throughout Tx	Technical Industries, Inc.	L05705	Houston	03	07/30/08
Throughout Tx	Oceaneering International, Inc.	L04463	Ingleside	60	07/14/08
Throughout Tx	Oceaneering International, Inc.	L04463	Ingleside	61	07/17/08

AMENDMENTS TO EXISTING LICENSES (CONTINUED)

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout Tx	Oceaneering International Inc. Solus Schall Division.	L04463	Ingleside	62	07/21/08
Throughout Tx	Parkland Engineering and Testing, Inc.	L04089	Irving	07	07/17/08
Throughout Tx	Suntrac Services, Inc.	L03062	League City	26	07/22/08
Throughout Tx	NORM Decon Services LLC	L04917	Midland	20	07/18/08
Throughout Tx	Allen Inspection Service	L03003	Odessa	10	07/17/08
Throughout Tx	Fugro Consultants LP	L04322	Pasadena	94	07/14/08
Throughout Tx	Petrochem Inspection Services, Inc.	L04460	Pasadena	89	07/17/08
Throughout Tx	NDS Products, Inc.	L00991	Pasadena	46	07/17/08
Throughout Tx	Conam Inspection and Engineering, Inc.	L05010	Pasadena	145	07/17/08
Throughout Tx	Texas Gamma Ray LLC	L05561	Pasadena	85	07/22/08
Throughout Tx	Petrochem Inspection Services, Inc.	L04460	Pasadena	90	07/25/08
Throughout Tx	Carrillo & Associates Inc	L05804	San Antonio	08	07/11/08
Throughout Tx	Frost Geosciences, Inc.	L06015	San Antonio	01	07/22/08
Throughout Tx	General Electric Company DBA GE Healthcare	L05653	Spring Branch	07	07/17/08
Tyler	Tyler Cardiovascular Consultants PA CVC	L05242	Tyler	16	07/14/08
Tyler	Nutech, Inc.	L04274	Tyler	64	07/21/08
Tyler	Trinity Mother Frances Health System	L01670	Tyler	137	07/21/08
Tyler	East Texas Medical Center	L00977	Tyler	141	07/29/08
Vernon	Wilbarger General Hospital	L03047	Vernon	18	07/25/08
Waco	Kleinfelder	L01351	Waco	61	07/17/08
Webster	River Oaks Imaging and Diagnostic LP DBA River Oaks Imaging and Diagnostic	L05475	Webster	13	07/15/08
Wichita Falls	Bradley E Samuelson M.D.	L05682	Wichita Falls	04	07/25/08

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout Tx	ConocoPhillips Pipeline Company DBA Petroleum Transportation	L02083	Bartlesville OK	20	07/14/08

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Bertram	Bullock Bennett and Associates LLC	L06012	Bertram	02	07/21/08
Sugarland	Draiger Safety, Inc.	L05757	Sugarland	06	07/30/08
Throughout Tx	Royal Wireline, Inc.	L03110	Riviera	27	06/23/08

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - MC 2835, PO Box 149347, Austin, Texas 78714-9347. For information call (512) 834-6688.

TRD-200804298

Lisa Hernandez
General Counsel
Department of State Health Services
Filed: August 12, 2008

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Texas Department of Insurance

Third Party Administrator Applications

The following third party administrator application has been filed with the Texas Department of Insurance and is under consideration.

Application of ABILITY RESOURCES, INC. (using the assumed name MA ABILITY RESOURCES, INC.), a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of David Moskowitz, MC 305-2E, 333 Guadalupe, Austin, Texas 78701.

TRD-200804369
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: August 13, 2008

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Texas Department of Licensing and Regulation

Public Notice - Revised Enforcement Plan

The Texas Commission of Licensing and Regulation ("Commission") provides this public notice that at its meeting held July 27 and 28, 2008, the Commission adopted the Texas Department of Licensing and Regulation's ("Department") revised enforcement plan, which was established in compliance with Texas Occupations Code, §51.302(c).

The enforcement plan gives all license holders notice of the specific ranges of penalties and license sanctions that apply to specific alleged violations of the statutes and rules enforced by the Department. The enforcement plan also presents the criteria that are considered by the Department's Enforcement Division staff in determining the amount of a proposed administrative penalty or the magnitude of a proposed sanction.

During the 80th Legislative Session (2007), the Legislature created the "Texas Towing Act" by adding new Chapter 2308 to the Texas Occupations Code effective September 1, 2007. Under the Texas Towing Act, the Department has the authority to regulate towing companies and tow truck operators. During this same legislative session, the Legislature also transferred the authority to regulate Texas Occupations Code, Chapter 2303, Vehicle Storage Facilities, from the Texas Department of Transportation to the Department effective September 1, 2007.

The Department's revised enforcement plan includes penalty matrices for Towing Companies, Tow Operators, Vehicle Storage Facilities, and Vehicle Storage Facility Employees consistent with the administrative rules that were adopted effective April 15, 2008.

A copy of the revised enforcement plan is posted on the Department's website and may be downloaded at www.license.state.tx.us. You may also contact the Department's Enforcement Division by telephone at (512) 463-2906 or by e-mail at enforcement@license.state.tx.us to obtain a copy of the revised plan.

TRD-200804365
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: August 13, 2008

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Texas Lottery Commission

Instant Game Number 1107 "Poker Face"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1107 is "POKER FACE". The play style is "beat score with win all".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1107 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1107.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 6 CARD SYMBOL, 7 CARD SYMBOL, 8 CARD SYMBOL, 9 CARD SYMBOL, 10 CARD SYMBOL, J CARD SYMBOL, Q CARD SYMBOL, K CARD SYMBOL, BLUFF CARD SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, $100 and $1,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1107 - 1.2D

PLAY SYMBOL	CAPTION
6 CARD SYMBOL	SIX
7 CARD SYMBOL	SVN
8 CARD SYMBOL	EGT
9 CARD SYMBOL	NIN
10 CARD SYMBOL	TEN
J CARD SYMBOL	JCK
Q CARD SYMBOL	QUN
K CARD SYMBOL	KNG
A CARD SYMBOL	ACE
BLUFF CARD SYMBOL	WIN ALL
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$40.00	FORTY
$100	ONE HUND
$1,000	ONE THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $40.00 or $100.

H. High-Tier Prize - A prize of $1,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1107), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1107-0000001-001.

K. Pack - A pack of "POKER FACE" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "POKER FACE" Instant Game No. 1107 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "POKER FACE" Instant Game is determined once the latex on the ticket is scratched off to expose 11 (eleven) Play Symbols. If any PLAYERS' CARDS play symbols beats the DEALER'S CARD play symbol, the player wins the PRIZE shown for that card. If the player reveals a "BLUFF" card symbol, the player wins ALL 5 PRIZES instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 11 (eleven) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 11 (eleven) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 11 (eleven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 11 (eleven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning PLAYER 1 - 5 play symbols on a ticket.

C. No ties between a PLAYER 1 - 5 play symbol and the DEALER'S CARD play symbol.

D. No duplicate non-winning prize symbols on a ticket.

E. The "BLUFF" (win all) play symbol will only appear on winning tickets as dictated by the prize structure.

F. The "BLUFF" (win all) play symbol will only appear once on a ticket.

G. When the "BLUFF" (win all) play symbol appears, there will be no occurrence of any PLAYER 1-5 play symbols beating the DEALER'S CARD play symbol.

H. The top prize symbol will appear once on every ticket unless otherwise restricted.

I. Winning prize symbol(s) will never be the same as non-winning prize symbol(s).

2.3 Procedure for Claiming Prizes.

A. To claim a "POKER FACE" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $40.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "POKER FACE" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "POKER FACE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp pro-

gram or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "POKER FACE" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "POKER FACE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 tickets in the Instant Game No. 1107. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1107 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	604,800	16.67
$2	1,008,000	10.00
$4	252,000	40.00
$5	67,200	150.00
$10	67,200	150.00
$20	29,400	342.86
$40	16,380	615.38
$100	840	12,000.00
$1,000	84	120,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.93. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1107

without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1107, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200804359
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 13, 2008

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Instant Game Number 1117 "Holiday Package"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1117 is "HOLIDAY PACKAGE". The play style is "coordinate with prize legend".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1117 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 1117.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: A1, A2, A3, A4, A5, A6, B1, B2, B3, B4, B5, B6, C1, C2, C3, C4, C5, C6, D1, D2, D3, D4, D5, D6, E1, E2, E3, E4, E5, E6, F1, F2, F3, F4, F5 and F6.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1117 - 1.2D

PLAY SYMBOL	CAPTION
A1	
A2	
A3	
A4	
A5	
A6	
B1	
B2	
B3	
B4	
B5	
B6	
C1	
C2	
C3	
C4	
C5	
C6	
D1	
D2	
D3	
D4	
D5	
D6	
E1	
E2	
E3	
E4	
E5	
E6	
F1	
F2	
F3	
F4	
F5	
F6	

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $3.00, $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $40.00, $50.00, $60.00, $75.00, $100, $150 or $300.

H. High-Tier Prize - A prize of $3,000 or $35,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven

(7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1117), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1117-0000001-001.

K. Pack - A pack of "HOLIDAY PACKAGE" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "HOLIDAY PACKAGE" Instant Game No. 1117 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "HOLIDAY PACKAGE" Instant Game is determined once the latex on the ticket is scratched off to expose 48 (forty-eight) Play Symbols. The player will scratch the "HOLIDAY GRID COORDINATES" play symbols. The player will then scratch only the boxes on the PACKAGE GRID whose letters and numbers match the "HOLIDAY GRID COORDINATES". If a player reveals 3 matching play symbols, the player wins the prize according to the prize legend. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 48 (forty-eight) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 48 (forty-eight) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 48 (forty-eight) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 48 (forty-eight) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. A ticket may win up to four (4) times per the prize structure.

C. No duplicate HOLIDAY GRID COORDINATE play symbols on a ticket.

D. No grid will be used consecutively.

E. No more than 3 matching grid symbols will match winning PACKAGE GRID symbols.

F. No HOLIDAY GRID COORDINATE play symbols will appear that will reveal 3 or more sleigh symbols on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "HOLIDAY PACKAGE" Instant Game prize of $3.00, $5.00, $10.00, $15.00, $20.00, $30.00, $40.00, $50.00, $60.00, $75.00,

$100, $150 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $30.00, $40.00, $50.00, $60.00, $75.00, $100, $150 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "HOLIDAY PACKAGE" Instant Game prize of $3,000 or $35,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "HOLIDAY PACKAGE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "HOLIDAY PACKAGE" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "HOLIDAY PACKAGE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1117. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1117 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	576,000	10.42
$5	624,000	9.62
$10	192,000	31.25
$15	96,000	62.50
$20	48,000	125.00
$30	15,000	400.00
$40	10,000	600.00
$50	7,500	800.00
$60	6,250	960.00
$75	3,750	1,600.00
$100	2,450	2,448.98
$150	1,000	6,000.00
$300	500	12,000.00
$3,000	25	240,000.00
$35,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.79. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1117 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1117, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200804122
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 7, 2008

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Instant Game Number 1120 "Merry Money"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1120 is "MERRY MONEY". The play style is "other".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1120 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1120.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and STAR SYMBOL. The possible red play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and BOW SYMBOL. The possible green play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and TREE SYMBOL. The possible blue play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and SNOW SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1120 - 1.2D

PLAY SYMBOL	CAPTION
1 (black)	ONE
2 (black)	TWO
3 (black)	THR
4 (black)	FOR
5 (black)	FIV
6 (black)	SIX
7 (black)	SVN
8 (black)	EGT
9 (black)	NIN
10 (black)	TEN
11 (black)	ELV
12 (black)	TLV
13 (black)	TRN
14 (black)	FTN
15 (black)	FFN
16 (black)	SXN
17 (black)	SVT
18 (black)	ETN
19 (black)	NTN
20 (black)	TWY
STAR SYMBOL (black)	STAR
1 (red)	ONE
2 (red)	TWO
3 (red)	THR
4 (red)	FOR
5 (red)	FIV
6 (red)	SIX
7 (red)	SVN
8 (red)	EGT
9 (red)	NIN
10 (red)	TEN
11 (red)	ELV
12 (red)	TLV
13 (red)	TRN
14 (red)	FTN
15 (red)	FFN
16 (red)	SXN
17 (red)	SVT
18 (red)	ETN
19 (red)	NTN
20 (red)	TWY
BOW SYMBOL (red)	BOW
1 (green)	ONE
2 (green)	TWO
3 (green)	THR
4 (green)	FOR

5 (green)	FIV
6 (green)	SIX
7 (green)	SVN
8 (green)	EGT
9 (green)	NIN
10 (green)	TEN
11 (green)	ELV
12 (green)	TLV
13 (green)	TRN
14 (green)	FTN
15 (green)	FFN
16 (green)	SXN
17 (green)	SVT
18 (green)	ETN
19 (green)	NTN
20 (green)	TWY
TREE SYMBOL (green)	TREE
1 (blue)	ONE
2 (blue)	TWO
3 (blue)	THR
4 (blue)	FOR
5 (blue)	FIV
6 (blue)	SIX
7 (blue)	SVN
8 (blue)	EGT
9 (blue)	NIN
10 (blue)	TEN
11 (blue)	ELV
12 (blue)	TLV
13 (blue)	TRN
14 (blue)	FTN
15 (blue)	FFN
16 (blue)	SXN
17 (blue)	SVT
18 (blue)	ETN
19 (blue)	NTN
20 (blue)	TWY
SNOW SYMBOL (blue)	SNOW

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $25.00, $30.00, $40.00, $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1120), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1120-0000001-001.

K. Pack - A pack of "MERRY MONEY" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MERRY MONEY" Instant Game No. 1120 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MERRY MONEY" Instant Game is determined once the latex on the ticket is scratched off to expose 18 (eighteen) Play Symbols. The player scratches the PLAY AREA to reveal 18 SYMBOLS. If the player reveals 3 or more matching SYMBOLS, the player wins the corresponding PRIZE in the PRIZE LEGEND. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 18 (eighteen) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 18 (eighteen) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 18 (eighteen) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 18 (eighteen) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. A ticket may win up to 4 times as dictated by the prize structure.

C. A ticket wins by revealing three or more like ornament symbols in the PLAY AREA.

D. The prize won will be determined by the legend and dictated by the prize structure.

E. On non-winning tickets, each individual ornament symbol will appear at least once.

F. No two like number symbols will appear on any ticket regardless of color.

G. The number symbols may appear in any of the 4 colors (green, blue, red and black).

H. No six or more TREE, SNOW, BOW or STAR play symbols on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "MERRY MONEY" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $25.00, $30.00, $40.00, $50.00, $100 or $500,

a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $25.00, $30.00, $40.00, $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "MERRY MONEY" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MERRY MONEY" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MERRY MONEY" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "MERRY MONEY" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 7,080,000 tickets in the Instant Game No. 1120. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1120 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	566,400	12.50
$10	660,800	10.71
$15	283,200	25.00
$20	94,400	75.00
$25	70,800	100.00
$30	70,800	100.00
$40	23,600	300.00
$50	30,739	230.33
$100	10,030	705.88
$500	590	12,000.00
$1,000	177	40,000.00
$5,000	59	120,000.00
$50,000	7	1,011,428.57

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.91. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1120 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1120, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200804251
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 11, 2008

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Instant Game Number 1121 "Silver Bells"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1121 is "SILVER BELLS". The play style is "key number match with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1121 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1121.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, SNOWFLAKE SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000 and $20,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1121 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
SNOWFLAKE SYMBOL	DBL
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$1,000	ONE THOU
$20,000	20 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000 or $20,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1121), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1121-0000001-001.

K. Pack - A pack of "SILVER BELLS" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SILVER BELLS" Instant Game No. 1121 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SILVER BELLS" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to either SILVER NUMBER play symbol, the player wins the PRIZE shown for that number. If a player reveals a "snowflake" play symbol, the player wins DOUBLE the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 (twenty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 (twenty-two) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 22 (twenty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "SNOWFLAKE" (doubler) play symbol will only appear on intended winning tickets and only as dictated by the prize structure.

C. No more than two (2) matching non-winning prize symbols will appear on a ticket.

D. No duplicate SILVER NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

H. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "SILVER BELLS" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SILVER BELLS" Instant Game prize of $1,000 or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "SILVER BELLS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SILVER BELLS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "SILVER BELLS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,040,000 tickets in the Instant Game No. 1121. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1121 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	707,520	11.36
$4	771,840	10.42
$5	321,600	25.00
$10	176,880	45.45
$20	48,240	166.67
$50	14,874	540.54
$100	6,700	1,200.00
$1,000	34	236,470.59
$20,000	8	1,005,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.93. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1121 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1121, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200804123
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 7, 2008

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Instant Game Number 1122 "Jingle Jumbo Bucks"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1122 is "JINGLE JUMBO BUCKS". The play style is "key number match with auto win (10X)".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1122 shall be $10.00 per ticket.

1.2 Definitions in Instant Game No. 1122.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, JUMBO SYMBOL, JINGLE BELL SYMBOL, $10.00, $20.00, $50.00, $100, $500, $1,000, $2,500 and $100,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1122 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
JUMBO SYMBOL	WINX10
JINGLE BELL SYMBOL	WIN$100
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND

$500	FIV HUND
$1,000	ONE THOU
$2,500	25 HUND
$100,000	HUN THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, $200 or $500.

H. High-Tier Prize - A prize of $1,000, $2,500 or $100,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1122), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 050 within each pack. The format will be: 1122-0000001-001.

K Pack - A pack of "JINGLE JUMBO BUCKS" Instant Game tickets contains 050 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket back 001 and 050 will both be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "JINGLE JUMBO BUCKS" Instant Game No. 1122 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "JINGLE JUMBO BUCKS" Instant Game is determined once the latex on the ticket is scratched off to expose 55 (fifty-five) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any SERIAL NUMBER play symbol, the player wins PRIZE shown for that number. If a player reveals a "JUMBO" play symbol, the player wins 10 TIMES the PRIZE shown for that symbol. If a player reveals a "jingle bell" play symbol, the player wins $100 instantly! No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 55 (fifty-five) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 55 (fifty-five) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 55 (fifty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 55 (fifty-five) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "JUMBO" (10 times multiplier) play symbol will only appear on intended winning tickets and only as dictated by the prize structure.

C. No five or more matching non-winning prize symbols on a ticket.

D. No duplicate SERIAL NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 10 and $10).

H. The "JINGLE BELL" (win $100) play symbol will appear only once on a ticket.

I. The "JINGLE BELL" (win $100) play symbol will only appear with the $100 prize symbol.

J. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "JINGLE JUMBO BUCKS" Instant Game prize of $10.00, $20.00, $50.00, $100, $200, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00, $100, $200 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "JINGLE JUMBO BUCKS" Instant Game prize of $1,000, $2,500 or $100,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "JINGLE JUMBO BUCKS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "JINGLE JUMBO BUCKS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "JINGLE JUMBO BUCKS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 4,080,000 tickets in the Instant Game No. 1122. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1122 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$10	326,400	12.50
$20	612,000	6.67
$50	81,600	50.00
$100	58,378	69.89
$200	8,840	461.54
$500	1,326	3,076.92
$1,000	136	30,000.00
$2,500	68	60,000.00
$100,000	4	1,020,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.75. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1122 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1122, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200804124
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 7, 2008

♦ ♦ ♦

Instant Game Number 1123 "3-D Tic-Tac-Toe"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1123 is "3-D TIC-TAC-TOE". The play style is "row/column".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1123 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 1123.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: MONEY BAG SYMBOL, POT OF GOLD SYMBOL, RABBIT FOOT SYMBOL, HORSE SHOE SYMBOL, STAR SYMBOL, DIAMOND SYM-

BOL, CLOVER SYMBOL, RAINBOW SYMBOL and WISHBONE SYMBOL.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1123 - 1.2D

PLAY SYMBOL	CAPTION
MONEY BAG SYMBOL	MNYBG
POT OF GOLD SYMBOL	PTGLD
RABBIT FOOT SYMBOL	RBTFT
HORSE SHOE SYMBOL	SHOE
STAR SYMBOL	STAR
DIAMOND SYMBOL	DIMND
CLOVER SYMBOL	CLOVER
RAINBOW SYMBOL	RNBOW
WISHBONE SYMBOL	WSHBN

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $3.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $100 or $300.

H. High-Tier Prize - A prize of $3,000 or $30,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1123), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1123-0000001-001.

K. Pack - A pack of "3-D TIC-TAC-TOE" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "3-D TIC-TAC-TOE" Instant Game No. 1123 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "3-D TIC-TAC-TOE" Instant Game is determined once the latex on the ticket is scratched off to expose 27 (twenty-seven) play symbols. A player must scratch all of the "X's" and "O's" in each of the 3 GAMES. If the player reveals 3 matching play symbols in a complete row or column within a GAME, the player wins the PRIZE shown for that line. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 27 (twenty-seven) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 27 (twenty-seven) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 27 (twenty-seven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 27 (twenty-seven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. Each game will have one symbol that appears at least four times across that game's spots.

C. Each game on a ticket will use a different symbol for the symbol that must appear at least four times.

D. There will be no more than one occurrence of three of the same symbol in any row or column within a game with the exception where the game has 2 or 3 wins.

E. There will not be three or more of any symbol other than the symbol referenced in parameter 2.2.C.

F. There will be no duplicate symbols adjacent from game to game.

G. There will be no occurrence of three matching symbols in a diagonal in any game.

2.3 Procedure for Claiming Prizes.

A. To claim a "3-D TIC-TAC-TOE" Instant Game prize of $3.00, $5.00, $10.00, $20.00, $30.00, $100 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $30.00, $100 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "3-D TIC-TAC-TOE" Instant Game prize of $3,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "3-D TIC-TAC-TOE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "3-D TIC-TAC-TOE" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "3-D TIC-TAC-TOE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1123. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1123 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	672,000	8.93
$5	864,000	6.94
$10	120,000	50.00
$20	72,000	83.33
$30	35,000	171.43
$100	8,000	750.00
$300	2,400	2,500.00
$3,000	50	120,000.00
$30,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.38. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1123 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1123, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200804125
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 7, 2008

♦ ♦ ♦

Instant Game Number 1124 "Sizzlin' Red 7's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1124 is "SIZZLIN' RED 7'S". The play style is "key number match with auto win and multiplier".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1124 shall be $7.00 per ticket.

1.2 Definitions in Instant Game No. 1124.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, BLACK 7 SYMBOL, $7.00, $10.00, $15.00, $20.00, $40.00, $50.00, $100, $500, $2,000 and $70,000. The possible red play symbols are: 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and RED 7 SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1124 - 1.2D

PLAY SYMBOL	CAPTION
1 (black)	ONE
2 (black)	TWO
3 (black)	THR
4 (black)	FOR
5 (black)	FIV
6 (black)	SIX
8 (black)	EGT
9 (black)	NIN
10 (black)	TEN
11 (black)	ELV
12 (black)	TLV
13 (black)	TRN
14 (black)	FTN
15 (black)	FFN
16 (black)	SXN
17 (black)	SVT
18 (black)	ETN
19 (black)	NTN
20 (black)	TWY
21 (black)	TWON
22 (black)	TWTO
23 (black)	TWTH
24 (black)	TWFR
25 (black)	TWFV
26 (black)	TWSX
27 (black)	TWSV
28 (black)	TWET
29 (black)	TWNI
30 (black)	TRTY
31 (black)	TRON
32 (black)	TRTO
33 (black)	TRTH
34 (black)	TRFR
35 (black)	TRFV
36 (black)	TRSX
37 (black)	TRSV
38 (black)	TRET
39 (black)	TRNI
40 (black)	FRTY
7 SYMBOL (black)	AUTO
1 (red)	ONE
2 (red)	TWO
3 (red)	THR
4 (red)	FOR
5 (red)	FIV
6 (red)	SIX

8 (red)	EGT
9 (red)	NIN
10 (red)	TEN
11 (red)	ELV
12 (red)	TLV
13 (red)	TRN
14 (red)	FTN
15 (red)	FFN
16 (red)	SXN
17 (red)	SVT
18 (red)	ETN
19 (red)	NTN
20 (red)	TWY
21 (red)	TWON
22 (red)	TWTO
23 (red)	TWTH
24 (red)	TWFR
25 (red)	TWFV
26 (red)	TWSX
27 (red)	TWSV
28 (red)	TWET
29 (red)	TWNI
30 (red)	TRTY
31 (red)	TRON
32 (red)	TRTO
33 (red)	TRTH
34 (red)	TRFR
35 (red)	TRFV
36 (red)	TRSX
37 (red)	TRSV
38 (red)	TRET
39 (red)	TRNI
40 (red)	FRTY
7 SYMBOL (red)	WINX10
$7.00 (black)	SEVEN$
$10.00 (black)	TEN$
$15.00 (black)	FIFTN
$20.00 (black)	TWENTY
$40.00 (black)	FORTY
$50.00 (black)	FIFTY
$100 (black)	ONE HUND
$500 (black)	FIV HUND
$2,000 (black)	TWO THOU
$70,000 (black)	70 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $7.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $2,000 or $70,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1124), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1124-0000001-001.

K. Pack - A pack of "SIZZLIN' RED 7'S" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SIZZLIN' RED 7'S" Instant Game No. 1124 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SIZZLIN' RED 7'S" Instant Game is determined once the latex on the ticket is scratched off to expose 45 (forty-five) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the HOT NUMBERS play symbols, the player wins the prize shown for that number. If the player reveals a BLACK "7" play symbol, the player wins the prize shown instantly. If the player reveals a RED "7" play symbol, the player wins 10 TIMES the prize shown! No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 45 (forty-five) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 45 (forty-five) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 45 (forty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 45 (forty-five) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The "RED 7" (10 times multiplier) play symbol will only appear once on intended winning tickets and only as dictated by the prize structure.

C. There will be a minimum of 4 and a maximum of 12 red YOUR NUMBERS play symbols on every ticket.

D. No five or more matching non-winning prize symbols will appear on a ticket.

E. No duplicate HOT NUMBERS play symbols on a ticket

F. No duplicate non-winning YOUR NUMBERS play symbols on a ticket regardless of color.

G. Non-winning prize symbols will never be the same as the winning prize symbol(s).

H. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 20 and $20).

I. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "SIZZLIN' RED 7'S" Instant Game prize of $7.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SIZZLIN' RED 7'S" Instant Game prize of $2,000 or $70,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "SIZZLIN' RED 7'S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SIZZLIN' RED 7'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "SIZZLIN' RED 7'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players

whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1124. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1124 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$7	480,000	12.50
$10	560,000	10.71
$15	240,000	25.00
$20	280,000	21.43
$50	80,000	75.00
$100	42,650	140.68
$500	3,050	1,967.21
$2,000	95	63,157.89
$70,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.56. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1124 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1124, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200804252
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 11, 2008

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Instant Game Number 1128 "Holiday Treasures"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1128 is "HOLIDAY TREASURES". The play style is "key number match with 10X".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1128 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1128.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 10X SYMBOL, $5.00, $10.00, $15.00, $20.00, $50.00, $100, $200, $2,000 and $50,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1128 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
10X SYMBOL	WINX10
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND

$200	TWO HUND
$2,000	TWO THOU
$50,000	50 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $25.00, $50.00, $100 or $200.

H. High-Tier Prize - A prize of $2,000 or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1128), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1128-0000001-001.

K. Pack - A pack of "HOLIDAY TREASURES" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "HOLIDAY TREASURES" Instant Game No. 1128 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "HOLIDAY TREASURES" Instant Game is determined once the latex on the ticket is scratched off to expose 44 (forty-four) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the PRIZE shown for that number. If the player reveals a "10X" play symbol, the player wins 10 TIMES the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 44 (forty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 44 (forty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 44 (forty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 44 (forty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award

of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "10X" (10 times multiplier) play symbol will only appear on intended winning tickets and only as dictated by the prize structure.

C. No four or more matching non-winning prize symbols on a ticket.

D. No duplicate WINNING NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

H. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "HOLIDAY TREASURES" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $25.00, $50.00, $100 or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $25.00, $50.00, $100 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "HOLIDAY TREASURES" Instant Game prize of $2,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "HOLIDAY TREASURES" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "HOLIDAY TREASURES" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "HOLIDAY TREASURES" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1128. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1128 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	403,200	12.50
$10	604,800	8.33
$15	67,200	75.00
$20	84,000	60.00
$25	67,200	75.00
$50	67,200	75.00
$100	3,780	1,333.33
$200	1,050	4,800.00
$2,000	252	20,000.00
$50,000	5	1,008,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.88. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1128 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1128, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200804253
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 11, 2008

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Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 5, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Southwestern Bell Telephone Company d/b/a AT&T Texas for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 35961 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the following municipalities and/or unincorporated area(s) in the Lubbock area: Buffalo Springs, Floydada, Hale Center, Lockney, Lubbock, New Deal, Plainview, Ransom Canyon, Reese Center, Seminole, Seth Ward, Slaton and Wolfforth. It also includes additional unincorporated portions of the following counties in the Lubbock area: Borden, Crosby, Floyd, Gaines, Hale, Kent, Lubbock, Lynn, and Motley.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text tele-

phone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35961.

TRD-200804249
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2008

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On August 4, 2008, Globalcom, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60218. Applicant intends to relinquish its certificate.

The Application: Application of Globalcom, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 35955.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 27, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35955.

TRD-200804247
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2008

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On August 6, 2008, BullsEye Telecom, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60517. Applicant intends to reflect a change in its service area.

The Application: Application of BullsEye Telecom, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 35965.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 27, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35965.

TRD-200804305
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2008

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 4, 2008, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Airdis, LLC d/b/a Airdis Telecom for a Service Provider Certificate of Operating Authority, Docket Number 35954 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, Optical Services, T1 - Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, and long distances services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by all incumbent local exchange companies.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 27, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35954.

TRD-200804246
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2008

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on August 7, 2008, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' (AT&T Texas) request for assignment of two thousand blocks of numbers in the McKinney rate center.

Docket Title and Number: Petition of Southwestern Bell Telephone Company d/b/a AT&T Texas for Waiver of Denial of Numbering Resources, Docket Number 35971.

The Application: AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 27, 2008. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35971.

TRD-200804304
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2008

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Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On August 4, 2008, Computer Network Technology Corporation filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60665. Applicant intends to relinquish its certificate.

The Application: Application of Computer Network Technology Corporation to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 35958.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 27, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35958.

TRD-200804248
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2008

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Notice of Petition for Emergency Rulemaking

On August 7, 2008, Senator Juan Hinojosa filed a Petition for Emergency Rulemaking, pursuant to P.U.C. Procedural Rule §22.283, to temporarily suspend the disconnection of retail electric provider or electric utility services of Texas ratepayers for non-payment due to extreme and persistent heat.

The proposed rule amendments would temporarily suspend the disconnection of electric utility services to a residential customer who is at a higher risk of heat-related illness. Senator Hinojosa asserted that an expedited effective date for this rule is necessary because of the imminent peril to the public health. Senator Hinojosa proposes electric providers shall offer deferred payment plans to any low income customer who express an inability to pay an electric bill that becomes due beginning the effective date of the adoption of this emergency rule through September 30, 2008.

Pursuant to P.U.C. Procedural Rule §22.281(a)(2), comments on the petition (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, no later than September 12, 2008, 21 days after the publication of this notice in the *Texas Register*. The Commission may, however, consider and possibly act on this petition at its next open meeting.

To obtain further information interested persons may contact Mick Long, Attorney, Legal Services, by phone at (512) 936-7294 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free 1-800-735-2989. All correspondence should refer to Project Number 35973.

TRD-200804367
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2008

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Notice of Petition for Emergency Rulemaking

On August 11, 2008, The Honorable Sylvester Turner, The Honorable Eddie Lucio III, the Office of Public Utility Counsel, Texas Ratepayers' Organization to Save Energy, and the Texas Legal Services Center (collectively, Petitioners) filed a Petition for Emergency Rulemaking, pursuant to P.U.C. Procedural Rule §22.283, to temporarily suspend the disconnection of electric services for residential customers due to extreme and persistent heat conditions and record high electricity prices.

The proposed rule amendments would 1) temporarily suspend the disconnection of electric utility services to residential customers during the heat emergency, 2) require utilities and owners of master-metered or submetered residential facilities to offer deferred payment plans to assist residential customers in managing their unusually high electric bills caused by the extreme heat, and 3) require utilities to provide notice of the rule to social service agencies within their service territories that provide low income energy assistance.

The Petitioner's propose the rule take effect immediately and continue through September 30, 2008. The Petitioner's assert that an emergency adoption is necessary because disconnection of electric service during the extreme and persistent heat currently being experienced in Texas poses an imminent peril to the health of residential customers.

Pursuant to P.U.C. Procedural Rule §22.281(a)(2), comments on the petition (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, no later than September 12, 2008, 21 days after the publication of this notice in the *Texas Register*. The Commission may, however, consider and possibly act on this petition at its next open meeting.

To obtain further information interested persons may contact Mick Long, Attorney, Legal Services, by phone at (512) 936-7294 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free 1-800-735-2989. All correspondence should refer to Project Number 35984.

TRD-200804368
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2008

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Public Notice of Request for Comments and Workshop

Pursuant to Public Utility Regulatory Act (PURA) §52.006, the Public Utility Commission of Texas (commission) will be submitting a report on the Scope of Competition in Telecommunications Markets in Texas which is due to the Legislature by January 15, 2009. This project has been assigned Project Number 35575. In preparation of the report, the commission staff will be undertaking a review of PURA, Subtitle A, Chapter 17, relating to Customer Protection, and Subtitle C, relating to Telecommunications Utilities, to determine their continued relevance in the current telecommunications market. To this end, commission staff requests comments on the following questions:

1. If comments are filed on behalf of an entity subject to the PUC's regulatory jurisdiction, please indicate your company's regulatory status (i.e., your company is regulated under PURA Chapter 52, 58, 59 or 65).

2. Please identify any sections in Subtitle A, Chapter 17 or Subtitle C that you believe should be modified and include the following information:

a. an explanation of why the section should be modified;

b. your recommendation regarding language modifying the section;

c. a discussion of any negative ramifications that would occur if the section is not modified.

3. Please identify any sections in Subtitle A, Chapter 17 or Subtitle C that you believe should be eliminated and include the following information:

a. an explanation of why the section should be eliminated;

b. discussion of any negative ramifications that would occur if the section is not eliminated.

4. Please identify any other sections in PURA relating to telecommunications issues that you believe should be modified or eliminated. Please provide an explanation for your answer.

Commission staff will consider the comments filed in response to these questions during the review of the relevant sections of PURA. Comments may be filed by submitting 16 copies to the commission's filing clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 within 31 calendar days of the publication of this notice. Reply comments may be filed within 41 calendar days of the notice of this publication. All responses should reference Project Number 35575.

A workshop will be held on Thursday, September 25, 2008, at 9:30 a.m. in the Commissioner's Hearing Room located on the seventh floor of the William B. Travis State Office Building, 1701 Congress Avenue, Austin, Texas 78701.

Questions concerning this notice should be referred to Meena Thomas, Competitive Markets Division, at (512) 936-7344. Hearing and speech-impaired individuals with text telephones may contact the commission at (512) 936-7136.

TRD-200804255
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2008

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Texas A&M University System Board of Regents

Announcement of Finalist for the Position of President of Texas A&M Univeristy - Kingsville

Pursuant to §552.123, Texas Government Code, the following candidate is the finalist for the position of President of Texas A&M University - Kingsville. Upon the expiration of twenty-one (21) days, final action is to be taken by the Board of Regents of The Texas A&M University System:

Dr. Steven H. Tallant

TRD-200804137
Vickie Burt Spillers
Executive Secretary to the Board of Regents
Texas A&M University System Board of Regents
Filed: August 8, 2008

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Texas State University-San Marcos

Notice of Intent to Amend Asbestos Abatement Consulting Services Contract

Pursuant to the provisions of Texas Government Code, Chapter 2254, §2254.031(c) Texas State University-San Marcos intends to amend a contract for consulting services related to asbestos abatement. Preliminary asbestos abatement consulting services have been provided by Burcham Environmental Services, L.L.C.

As required by Chapter 2254 of the Texas Government Code, prior to amending its contract with Burcham Environmental Services, L.L.C., Texas State University-San Marcos is posting this Notice of Intent to Amend Asbestos Consulting Services Contract, and hereby extends this invitation to qualified and experienced consultants interested in providing the asbestos consulting services described in this notice.

Scope of Work:

The project requires the design and monitoring of asbestos abatement and demolition of ten two-story apartment buildings of approximately 320,000 square feet. The asbestos abatement consulting firm will provide project management, the filing of Asbestos Reporting Unit (ARU) to the Texas Department of State Health Services (TDSHS), on-site air monitoring, attending project review meetings and assembling close-out documentation (including a final report). The asbestos abatement consultant must be licensed in the State of Texas as an asbestos consultant to design asbestos abatement projects.

Specifications:

Any consultant submitting an offer in response to this invitation must provide the following: (1) the consultant's legal name, type of entity (individual, partnership, corporation, etc.), and address; (2) background information regarding the consultant, including the number of years in business and the number of employees; (3) information regarding the qualifications, education, and experience of the team members proposed to conduct the requested services; (4) the fee to be charged for providing the services and any applicable hourly rate for any team member providing services; (5) the earliest date by which the consultant could begin providing the services; (6) a list of five client references, including any complex institutions or systems of higher education for which the consultant has provided similar consulting services; (7) a statement of the consultant's approach to providing the services described in the Scope of Work section of this invitation, any unique benefits the consultant offers Texas State University-San Marcos, and any other information the consultant desires Texas State University-San Marcos to consider in connection with the consultant's offer; (8) information to assist Texas State University-San Marcos in assessing the consultant's demonstrated competence and experience providing consulting services similar to the services requested in this invitation; (9) information to assist Texas State University-San Marcos in assessing the consultant's experience performing the requested services for other complex institutions or systems of higher education; (10) information to assist Texas State University-San Marcos in assessing whether the consultant will have any conflicts of interest in performing the requested services; (11) information to assist Texas State University-San Marcos in assessing the overall cost to Texas State University-San Marcos; and (12) information to assist Texas State University-San Marcos in assessing the consultant's capability and financial resources to perform the requested services.

Selection Process:

The consulting services sought herein relate to services previously provided to Texas State University-San Marcos by Burcham Environmental Services, L.L.C. Texas State University-San Marcos intends to amend its contract with Burcham Environmental Services, L.L.C. unless a better offer, as determined by Texas State University-San Marcos in its sole discretion, is received in response to this invitation.

The successful offer must be submitted in response to this invitation no later than the submittal deadline and will be the offer that is the most advantageous to Texas State University-San Marcos in Texas State University-San Marcos' sole discretion. Offers will be evaluated by Texas State University-San Marcos. The evaluation of offers and the selection of the successful offer will be based on information provided to Texas State University-San Marcos by the consultant in response to the Specifications section of this invitation. Consideration may also be given to any additional information and comments if such information or comments increase the benefits to Texas State University-San Marcos. The successful consultant will be required to enter into a contract acceptable to Texas State University-San Marcos.

Finding by Texas State University-San Marcos: Texas State University-San Marcos finds that the consulting services are necessary due to Texas Administrative Code Title 25, Part 1, Chapter 295, §295.47. *An individual must be licensed as an asbestos consultant to design asbestos abatement projects.*

Submittal Deadline: To respond to this invitation, consultants must submit the information requested in the Specifications section in a clear and concise written format to: Steve Marlow, Construction Contract Administrator, Texas State University-San Marcos, 601 University Drive-US Mail delivery (151-2 E. Sessom Drive, Suite 104-physical address). Offers must be submitted in an envelope or other appropriate container, and the name and return address of the consultant must be clearly visible. All offers must be received at the above address no later than 2:00 p.m., CST, Monday, September 22, 2008. Submissions received after the submittal deadline will not be considered.

TRD-200804290
Robert C. Moerke
Director of Contract Compliance
Texas State University-San Marcos
Filed: August 11, 2008

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University of North Texas

Invitation for Consultants to Provide Offers of Consulting Services relating to Federal Facilities and Administrative Rate Proposal

Pursuant to the provisions of Texas Government Code, Chapter 2254, the University of North Texas (UNT) extends this invitation (Invitation) to qualified and experienced consultants interested in providing the consulting services described in this Invitation to the University of North Texas and its member institutions.

Scope of Work:

The selected consulting firm will be responsible for assisting the UNT and member institutions in developing and maximizing its federal facilities and administrative (F&A) rate proposal for submission to the Dallas Office of the U.S. Department of Health and Human Services, Division of Cost Allocation; and assisting the UNT and member institutions in the support of the development of a project plan designed to maximize UNT's F&A reimbursement rate. The consultation is necessary to support UNT's technical installation and reconfiguration of the Comprehensive Rate Information System (CRIS).

Specifications:

Any consultant submitting an offer in response to this Invitation must provide the following: (1) the consultant's legal name, including type of entity (individual, partnership, corporation, etc.) and address; (2) background information regarding the consultant, including the number of years in business and the number of employees; (3) information regarding the qualifications, education, and experience of the team members proposed to conduct the requested services; (4) the hourly rate to be charged for each team member providing services; (5) the earliest date by which the consultant could begin providing the services; (6) a list of five client references, including any complex institutions or systems of higher education for which the consultant has provided similar consulting services; (7) a statement of the consultant's approach to providing the services described in the Scope of Work section of this Invitation, any unique benefits the consultant offers the UNT, and any other information the consultant desires the UNT to consider in connection with the consultant's offer; (8) information to assist the UNT in assessing the consultant's demonstrated competence and experience providing consulting services similar to the services requested in this Invitation; (9) information to assist the UNT in assessing the consultant's experience performing the requested services for other complex institutions or systems of higher education; (10) information to assist the UNT in assessing whether the consultant will have any conflicts of interest in performing the requested services; (11) information to assist the UNT in assessing the overall cost to the UNT for the requested services to be performed; and (12) information to assist the UNT in assessing the consultant's capability and financial resources to perform the requested services.

Selection Process:

The consulting services sought herein relate to services previously provided to the UNT by Maximus, Inc.. Unless a better offer (as determined by the UNT) is received in response to this Invitation, the UNT intends to award the contract for the consulting services to Maximus, Inc.

Selection of the Successful Offer (defined below) submitted in response to this Invitation by the Submittal Deadline (defined below) will be made using the competitive process described below. After the opening of the offers and upon completion of the initial review and evaluation of the offers submitted, selected consultants may be invited to participate in oral presentations. The selection of the Successful Offer may be made by UNT on the basis of the offers initially submitted, without discussion, clarification or modification. In the alternative, selection of the Successful Offer may be made by UNT on the basis of negotiation with any of the consultants. At UNT's sole option and discretion, it may discuss and negotiate all elements of the offers submitted by selected consultants within a specified competitive range. For purposes of negotiation, a competitive range of acceptable or potentially acceptable offers may be established comprising the highest rated offers. UNT will provide each consultant within the competitive range with an equal opportunity for discussion and revision of its offer. UNT will not disclose any information derived from the offers submitted by competing consultants in conducting such discussions. Further action on offers not included within the competitive range will be deferred pending the selection of the Successful Offer, however, UNT reserves the right to include additional offers in the competitive range if deemed to be in its best interest. After the submission of offers but before final selection of the Successful Offer is made, UNT may permit a consultant to revise its offer in order to obtain the consultant's best final offer. UNT is not bound to accept the lowest priced offer if that offer is not in its best interest, as determined by UNT. UNT reserves the right to: (a) enter into agreements or other contractual arrangements for all or any portion of the Scope of Work set forth in this Invitation with one or more consultants; (b) reject any and all offers and re-solicit offers; or (c) reject any and all offers and temporarily or permanently abandon this procurement, if deemed to be in the best interest of UNT.

Criteria for Selection:

The Successful Offer must be submitted in response to this Invitation by the Submittal Deadline will be the offer that is the most advanta-

geous to UNT in UNT's sole discretion. Offers will be evaluated by University of North Texas System and member institution personnel. The evaluation of offers and the selection of the Successful Offer will be based on the information provided to UNT by the consultant in response to the Specifications section of this Invitation. Consideration may also be given to any additional information and comments if such information or comments increase the benefits to UNT. The successful consultant will be required to enter into a contract acceptable to UNT.

Consultant's Acceptance of Offer:

Submission of an offer by a consultant indicates: (1) the consultant's acceptance of the Offer Selection Process, the Criteria for Selection, and all other requirements and specifications set forth in this Invitation; and (2) the consultant's recognition that some subjective judgments must be made by UNT during this Invitation process.

Finding by President:

The President of the University of North Texas finds that the consulting services are necessary because the University of North Texas does not have the specialized experience or the staff resources available to support the development of a project plan designed to maximize UNT's F&A reimbursement rate. The University of North Texas believes that such expert consulting services will be cost effective and is essential to maximize UNT's F&A rate and provide support for the specialized software to measure the growth of externally funded research, capitalize on the return of F&A, and provide forecasting capabilities and other management tools to UNT.

Submittal Deadline:

To respond to this Invitation, consultants must submit the information requested in the Specification section of this Invitation and any other relevant information in a clear and concise written format to: Carrie Stoeckert, Assistant Director of Purchasing and Payment Services (PPS), University of North Texas, 2310 North Interstate 35-E, P.O. Box 310499, Denton, Texas 76201. Offers must be submitted in an envelope or other appropriate container and the name and return address of the consultant must be clearly visible. All offers must be received at the above address no later than 4:00 p.m., CST, Monday, September 22, 2008 (Submittal Deadline). Submissions received after the Submittal Deadline will not be considered.

Questions:

Questions concerning this Invitation should be directed to: Carrie Stoeckert, Assistant Director of PPS, University of North Texas, 2310 North Interstate 35-E, P.O. Box 310499, Denton, Texas 76201; (940) 565-3203. UNT may in its sole discretion respond in writing to questions concerning this Invitation. Only UNT's responses made by formal written addenda to this Invitation shall be binding. Oral or other written interpretations or clarifications shall be without legal effect.

TRD-200804243
Carrie Stoeckert
Assistant Director of PPS
Universtiy of North Texas
Filed: August 8, 2008

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 30 (2005) is cited as follows: 30 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 "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

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 (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affecte***d. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).