TEXAS REGISTER

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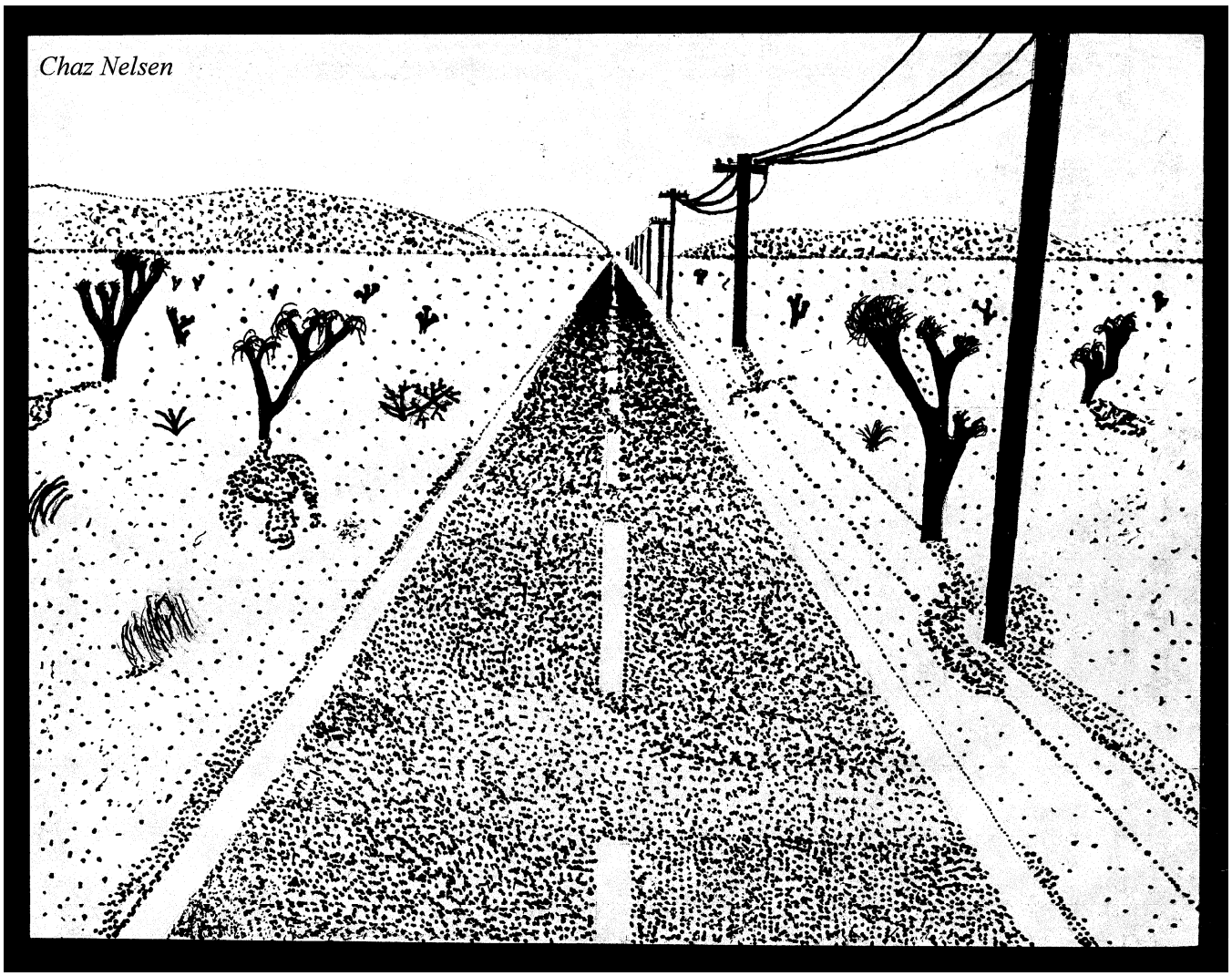

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but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

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

Appointments

Appointments for February 19, 2009

Appointed to be the Presiding Judge of the First Administrative Judicial Region for a term to expire four years from the date of qualification, John David Ovard of Dallas. Judge Ovard is being reappointed.

Appointed to be a member of the Office of Rural Community Affairs for a term to expire February 1, 2015, Dora G. Alcala of Del Rio (reappointment).

Appointed to be a member of the Office of Rural Community Affairs for a term to expire February 1, 2015, Woodrow Anderson of Colorado City (reappointment).

Appointed to be a member of the Office of Rural Community Affairs for a term to expire February 1, 2015, Charles W. Graham of Elgin (reappointment).

Appointed to be a member of the Texas Transportation Commission for a term to expire February 1, 2015, Edward C. Houghton, IV of El Paso (reappointment).

Appointed to be a member of the Texas Transportation Commission for a term to expire February 1, 2015, Fred A. Underwood of Lubbock (reappointment).

Appointments for February 24, 2009

Appointed to be a member of the State Securities Board for a term to expire January 20, 2015, Derrick M. Mitchell of Houston. Mr. Mitchell is being reappointed.

Appointed to be a member of the Task Force on Indigent Defense for a term to expire February 1, 2011, Anthony C. Odiorne of Amarillo (reappointment).

Appointed to be a member of the Task Force on Indigent Defense for a term to expire February 1, 2011, Olen U. Underwood of Willis (reappointment).

Appointed to be a member of the Texas State Board of Acupuncture Examiners for a term to expire January 31, 2015, Suehing Yee Chiang of Sugar Land (replacing Sheng Chen of Austin whose term expired).

Appointed to be a member of the Texas State Board of Acupuncture Examiners for a term to expire January 31, 2015, Linda Wynn Drain of Lucas (replacing Pedro Garcia of Frisco whose term expired).

Appointed to be a member of the Texas State Board of Acupuncture Examiners for a term to expire January 31, 2015, Donald Ray Counts of Austin (Dr. Counts is being reappointed).

Appointed to be a member of the Texas Commission of Licensing and Regulation for a term to expire February 1, 2015, Mike Arismendez, Jr. of Shallowater (reappointment).

Appointed to be a member of the Texas Commission of Licensing and Regulation for a term to expire February 1, 2015, LuAnn Morgan of Midland (reappointment).

Appointed to be a member of the Texas Commission of Licensing and Regulation for a term to expire February 1, 2015, Fred N. Moses of Plano (reappointment).

Appointed to be a member of the Texas Municipal Retirement System for a term to expire February 1, 2015, April Nixon of Arlington (reappointment).

Appointed to be a member of the Texas Municipal Retirement System for a term to expire February 1, 2015, H. Frank Simpson of Missouri City (reappointment).

Appointed to be a member of the State Board of Examiners of Marriage and Family Therapists for a term to expire February 1, 2015, Joe Ann Clack of Missouri (reappointment)

Appointed to be a member of the State Board of Examiners of Marriage and Family Therapists for a term to expire February 1, 2015, Michael R. Puhl of McKinney (reappointment).

Appointed to be a member of the State Board of Examiners of Marriage and Family Therapists for a term to expire February 1, 2015, Beverly Womack of Jacksonville (reappointment).

Rick Perry, Governor

TRD-200900857

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THE ATTORNEY GENERAL

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

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

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

Office of the Attorney General

Request for Opinions

RQ-0782-GA

Requestor:

The Honorable Joe Black

Harrison County Criminal District Attorney

Post Office Box 776

Marshall, Texas 75671

Re: Whether a judge of a statutory county court that tries only misdemeanor cases is entitled to participate in the management of a community supervision and corrections department (RQ-0782-GA)

Briefs requested by March 19, 2009

RQ-0783-GA

Requestor:

The Honorable Rex Emerson

Kerr County Attorney

Kerr County Courthouse

700 Main Street, Suite BA-103

Kerrville, Texas 78028

Re: Whether the Kerr County jail is required to maintain a dedicated room for the purpose of recording the interrogation of drivers alleged to be intoxicated (RQ-0783-GA)

Briefs requested by March 23, 2009

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

TRD-200900830
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: February 24, 2009

♦ ♦ ♦

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 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 22. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES

1 TAC §22.7

The Texas Ethics Commission (commission) proposes an amendment to §22.7, relating to documentation that a candidate, officeholder, or political committee must obtain from an out-of-state political committee before accepting a political contribution from the out-of-state political committee.

The amendment to §22.7 would track statutory changes made to the §253.032 of the Election Code and would update the rule to be consistent with that statute.

David A. Reisman, Executive Director, has determined that for each year of the first five years that the rule is in effect there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Reisman has also determined that the rule will have no local employment impact.

Mr. Reisman has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be clarity in what is required by the law.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule does not apply to individuals.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the rule.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the commission concerning the proposed rule may do so at any commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a commission meeting when the commission considers final adoption of the proposed rule. Information concerning the date, time, and location of commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

The amendment to §22.7 is proposed under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

The amendment to §22.7 affects §253.032 of the Election Code.

§22.7. Contribution from Out-of-State Committee.

(a) For each reporting period during which a candidate, officeholder, or political committee accepts a contribution or contributions from an out-of-state political committee totaling more than $500, the candidate, officeholder, or political committee must comply with subsections (b) and (c) of this section.

(b) The candidate, officeholder, or political committee covered by subsection (a) of this section must first obtain from the out-of-state committee one of the following documents before accepting the contribution that causes the total received from the out-of-state committee to exceed $500 during the reporting period:

(1) a written statement, certified by an officer of the out-of-state [~~,~~] political committee, listing the full name and address of each person who contributed more than $100 to the out-of-state political committee during the 12 months immediately preceding the date of the contribution; or

(2) a copy of the out-of-state political committee's statement of organization filed as required by law with the Federal Election Commission and certified by an officer of the out-of-state committee [~~the Federal Election Commission~~].

(c) The document obtained pursuant to subsection (b) of this section shall be included as part of the report that covers the reporting period in which the candidate, officeholder, or political committee accepted the contribution that caused the total accepted from the out-of-state committee to exceed $500.

(d) A candidate, officeholder, or political committee that:

(1) receives contributions covered by subsection (a) of this section from the same out-of-state committee in successive reporting periods; and

(2) complies with subsection (b)(2) of this section before accepting the first contribution triggering subsection (a) of this section, may comply with subsection (c) of this section in successive reporting periods by submitting a copy of the certified document obtained before accepting the first contribution triggering subsection (a) of this section, rather than by obtaining and submitting an original certified document for each reporting period, provided the document has not been amended since the last submission.

(e) A candidate, officeholder, or political committee that accepts a contribution or contributions totaling $500 or less from an out-of-state political committee shall include as part of the report covering the reporting period in which the contribution or contributions are accepted either:

(1) a copy of the out-of-state committee's statement of organization filed as required by law with the Federal Election Commission and certified by an officer of the out-of-state committee [~~the Federal Election Commission~~]; or

(2) the following information:

(A) the full name of the committee, and, if the name is an acronym, the words the acronym represents;

(B) the address of the committee;

(C) the telephone number of the committee;

(D) the name of the person appointing the campaign treasurer; and

(E) the following information for the individual appointed campaign treasurer and assistant campaign treasurer:

(i) the individual's full name;

(ii) the individual's residence or business street address; and

(iii) the individual's telephone number.

(f) This section does not apply to a contribution from an out-of-state political committee if the committee filed a campaign treasurer appointment with the commission before making the contribution.

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 February 23, 2009.

TRD-200900777
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-5800

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CHAPTER 34. REGULATION OF LOBBYISTS
SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §§34.22 - 34.27

The Texas Ethics Commission (commission) proposes new §§34.22 - 34.27, relating to the valuation of a ticket to an entertainment event, including a sporting event.

Chapter 305 of the Government Code contains a number of restrictions on expenditures by registered lobbyists. (Chapter 305 of the Government Code also contains a number of restrictions on the acceptance of lobby expenditures by state officers, state employees, immediate family and guests of state officers and employees, candidates for state offices, and officers-elect.) One of the restrictions is for entertainment. A registered lobbyist is subject to an aggregate $500 maximum annual expenditure limit for entertainment for an individual state officer or employee, or immediate family or guests invited by a state officer or employee.

A question that often arises is what standard should be used to determine the value of entertainment in the form of a ticket to an entertainment event, including a sporting event. At its February 2009 meeting, the commission voted to propose the following six rules consisting of four options to clarify the question: Option 1 consists of §34.22 and §34.23, Option 2 consists of §34.24 and §34.25, Option 3 consists of §34.26, and Option 4 consists of §34.27.

David A. Reisman, Executive Director, has determined that for each year of the first five years that the new rules are in effect there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the new rules as proposed. Mr. Reisman has also determined that the new rules will have no local employment impact.

Mr. Reisman has also determined that for each year of the first five years the new rules are in effect, the anticipated public benefit will be clarity in what is required by the law.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the new rules do not apply to single businesses.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the new rules.

The Texas Ethics Commission invites comments on the proposed new rules from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the commission concerning the proposed rules may do so at any commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a commission meeting when the commission considers final adoption of the proposed rules. Information concerning the date, time, and location of commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

The new §§34.22 - 34.27 are proposed under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

The new §§34.22 - 34.27 affect Chapter 305 of the Government Code.

§34.22. Valuation of Ticket (Option 1).
For purposes of Chapter 305 of the Government Code and this chapter, and except as provided by §34.23 of this title (relating to Valuation of Ticket to a Suite (Option 1)):

(1) the value of a ticket to an entertainment event, including a sporting event, is the higher of:

(A) the face value of the ticket; or

(B) the amount paid for the ticket by the donor or a person on the donor's behalf and with the donor's consent or ratification.

(2) If the ticket has no face value, the ticket has the same value as the highest priced ticket to the same event with a face value.

§34.23. Valuation of Ticket to a Suite (Option 1).
For purposes of Chapter 305 of the Government Code and this chapter, the value of a ticket to an entertainment event, including a sporting event, obtained pursuant to a lease or other agreement for the right to use a suite and for the right to obtain tickets to the suite is as follows:

(1) If the ticket has a face value, the value of the ticket is calculated according to the following formula:
Figure: 1 TAC §34.23(1)

(2) If the ticket has no face value, the ticket has the same value as the highest priced ticket to the same suite with a face value.

(3) If none of the tickets to a suite have a face value, the value of a ticket is calculated according to the formula in paragraph (1) of this section with "$0" used as the face value of the ticket.

§34.24. Valuation of Ticket with a Face Value (Option 2).

For purposes of Chapter 305 of the Government Code and this chapter, and except as provided by §34.25 of this title (relating to Valuation of Ticket to a Suite (Option 2)), the value of a ticket to an entertainment event, including a sporting event, is the higher of:

(1) the face value of the ticket; and

(2) the amount paid for the ticket by the donor or a person on the donor's behalf and with the donor's consent or ratification.

§34.25. Valuation of Ticket to a Suite (Option 2).

(a) For purposes of Chapter 305 of the Government Code and this chapter, the value of a ticket to an entertainment event, including a sporting event, obtained pursuant to a lease or other agreement for the right to use a suite and for the right to obtain tickets to the suite is the fair market value at the time the ticket is accepted.

(b) Any reasonable method for determining the fair market value must factor in the value of a comparable ticket in an arm's length transaction.

(c) If a ticket to a suite is not available for resale at the time the ticket is accepted, the value of the ticket is calculated according to the following formula:
Figure: 1 TAC §34.25(c)

(1) If the ticket has no face value, the ticket has the same value as the highest priced ticket to the same suite with a face value.

(2) If none of the tickets to a suite have a face value, the value of the ticket is calculated according to the formula in subsection (c) of this section with "$0" used as the face value of the ticket.

§34.26. Valuation of a Ticket to an Entertainment Event, Including a Sporting Event (Option 3).

(a) For purposes of Chapter 305 of the Government Code and this chapter, the value of a ticket to an entertainment event, including a sporting event, is the fair market value at the time the ticket is accepted.

(b) Any reasonable method for determining the fair market value must factor in the value of a comparable ticket in an arm's length transaction.

(c) If a ticket to a suite is not available for resale at the time the ticket is accepted, the value of the ticket is calculated according to the following formula:
Figure: 1 TAC §34.26(c)

(1) If the ticket has no face value, the ticket has the same value as the highest priced ticket to the same suite with a face value.

(2) If none of the tickets to a suite have a face value, the value of a ticket is calculated according to the formula in subsection (c) of this section with "0" used as the face value of the ticket.

§34.27. Valuation of a Ticket to an Entertainment Event, Including a Sporting Event (Option 4).

(a) For purposes of Chapter 305 of the Government Code and this chapter, the value of a ticket to an entertainment event, including a sporting event, is the higher of:

(1) the face value of the ticket; or

(2) the amount paid for the ticket by the donor or a person on the donor's behalf and with the donor's consent or ratification; or

(3) the fair market value at the time the ticket is accepted.

(b) Any reasonable method for determining the fair market value must factor in the value of a comparable ticket in an arm's length transaction.

(c) If a ticket to a suite is not available for resale at the time the ticket is accepted, the value of the ticket is calculated according to the following formula:
Figure: 1 TAC §34.27(c)

(1) If the ticket has no face value, the ticket has the same value as the highest priced ticket to the same suite with a face value.

(2) If none of the tickets to a suite have a face value, the value of a ticket is calculated according to the formula in subsection (c) of this section with "0" used as the face value of the ticket.

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 February 18, 2009.

TRD-200900712
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-5800

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PART 8. TEXAS JUDICIAL COUNCIL

CHAPTER 173. INDIGENT DEFENSE GRANTS

The Task Force on Indigent Defense (Task Force) is a permanent Standing Committee of the Texas Judicial Council. The Task Force proposes the repeal of §§173.1 - 173.8, 173.101 - 173.104, 173.201, 173.202, 173.301 - 173.312, 173.401, and 173.402, concerning indigent defense grants. The Task Force simultaneously proposes new §§173.101 - 173.109, 173.201 - 173.205, 173.301 - 173.310, 173.401, and 173.402, concerning indigent defense grants. The new rules are proposed to establish the guidelines for the administration of the Task Force's grant program, which is designed to promote compliance by counties with the requirements of state law relating to indigent defense.

Jim Bethke, Director of the Task Force, has determined that for each year of the first five-year period the repeal is in effect the public benefit will be an improvement in the indigent defense services provided by counties because of the grants awarded under the proposed new rules.

Glenna Rhea Bowman, Chief Financial Officer of the Office of Court Administration, has determined that for each year of the first five years the proposed repeal is in effect, enforcing or administering the repeal will have no fiscal impact on state or local governments.

Ms. Bowman has also determined that there will be no material economic costs to persons who are required to comply with the repeal, nor does the proposed repeal have any anticipated adverse effect on small or micro-businesses.

Comments on the repeal of the sections may be submitted in writing to Wesley Shackelford, Special Counsel, Task Force on Indigent Defense, P.O. Box 12066, Austin, Texas 78711-2066, or by fax to (512) 475-3450 no later than 30 days from the date that this proposed repeal is published in the *Texas Register.*

SUBCHAPTER A. GENERAL GRANT PROGRAM PROVISIONS

1 TAC §§173.1 - 173.8

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

The repeal is proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

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

§173.1. Applicability.

§173.2. Definitions.

§173.3. Grant Submission Process.

§173.4. Selection Process.

§173.5. Grant Funding Decisions.

§173.6. Grant Acceptance.

§173.7. Adoptions by Reference.

§173.8. Use of the Internet.

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 February 18, 2009.

TRD-200900703
James Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 936-6994

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SUBCHAPTER B. ELIGIBILITY AND GRANT FUNDING REQUIREMENTS

1 TAC §§173.101 - 173.104

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

The repeal is proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

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

§173.101. Eligibility.

§173.102. Grant Funding.

§173.103. Expenditure Categories.

§173.104. Program Income.

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 February 18, 2009.

TRD-200900704
James Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 936-6994

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SUBCHAPTER C. CONDITIONS OF GRANT FUNDING

1 TAC §173.201, §173.202

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

The repeal is proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

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

§173.201. Grant Conditions.

§173.202. Resolutions.

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 February 18, 2009.

TRD-200900705
James Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 936-6994

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SUBCHAPTER D. ADMINISTERING GRANTS

1 TAC §§173.301 - 173.312

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

The repeal is proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

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

§173.301. Grant Officials.

§173.302. Obligating Funds.

§173.303. Retention of Records.

§173.304. Expenditure Reports.

§173.305. Inventory Reports.

§173.306. Provision of Funds.

§173.307. Discretionary Grant Adjustments.

§173.308. Remedies for Noncompliance.

§173.309. Grant Termination.

§173.310. Violations of Laws.

§173.311. Grant Progress Reports.

§173.312. Grant Management.

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 February 18, 2009.

TRD-200900706
James Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 936-6994

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SUBCHAPTER E. PROGRAM MONITORING AND AUDITS

1 TAC §173.401, §173.402

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

The repeal is proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

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

§173.401. Monitoring.

§173.402. Audits Not Performed by The Task Force on Indigent Defense.

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 February 18, 2009.

TRD-200900707
James Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 936-6994

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CHAPTER 173. INDIGENT DEFENSE GRANTS

The Task Force on Indigent Defense (Task Force) is a permanent Standing Committee of the Texas Judicial Council. The Task Force proposes new §§173.101 - 173.109, 173.201 - 173.205, 173.301 - 173.310, 173.401, and 173.402, concerning indigent defense grants. The Task Force simultaneously proposes the repeal of §§173.1 - 173.8, 173.101 - 173.104, 173.201, 173.202, 173.301 - 173.312, 173.401, and 173.402, concerning indigent defense grants. The new rules are proposed to establish the guidelines for the administration of the Task Force's grant program, which is designed to promote compliance by counties with the requirements of state law relating to indigent defense.

Jim Bethke, Director of the Task Force, has determined that for each year of the first five-year period the rules are in effect the public benefit will be an improvement in the indigent defense services provided by counties because of the grants awarded under the proposed new rules.

Glenna Rhea Bowman, Chief Financial Officer of the Office of Court Administration, has determined that for each year of the first five years the proposed new sections are in effect, enforcing or administering the sections will have no fiscal impact on state or local governments.

Ms. Bowman has also determined that there will be no material economic costs to persons who are required to comply with the new sections, nor do the proposed new sections have any anticipated adverse effect on small or micro-businesses.

Comments on the proposed new rules may be submitted in writing to Wesley Shackelford, Special Counsel, Task Force on Indigent Defense, P.O. Box 12066, Austin, Texas 78711-2066, or by fax to (512) 475-3450 no later than 30 days from the date that these proposed rules are published in the *Texas Register.*

SUBCHAPTER A. GENERAL FUNDING PROGRAM PROVISIONS

1 TAC §§173.101 - 173.109

The new rules are proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

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

§173.101. Applicability.

(a) The Texas Legislature authorized the Task Force on Indigent Defense (Task Force) to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties to provide indigent defense services. It further authorized the Task Force to monitor grants and enforce compliance by counties with grant terms. Subchapters A - D of this chapter apply to all indigent defense grants and other funds awarded to counties by the Task Force. Subchapter A of this chapter covers the general provisions for funding. Subchapter B of this chapter addresses funding types, eligibility, and general provisions of grant funding. Subchapter C of this chapter sets out the rules related to administering grants. Subchapter D of this chapter specifies rules regarding fiscal and program monitoring and audits.

(b) Only counties in Texas are eligible to receive grants or other funds from the Task Force.

(c) The Task Force may distribute funds in accordance with its policies and based on official submissions and reports provided by the counties. These funds must be used to improve indigent defense systems in the county and are subject to all applicable conditions contained in this chapter.

§173.102. Definitions.

The following words and terms, when used in this chapter, will have the following meanings, unless otherwise indicated:

(1) "Applicant" is a county that has submitted a grant application, grant renewal documentation, or other request for funding from the Task Force.

(2) "Application" is any formal request for funding submitted by a county to the Task Force.

(3) "Crime" means

(A) a misdemeanor punishable by confinement; or

(B) a felony.

(4) "Defendant" means a person accused of a crime or a juvenile offense.

(5) "Direct Disbursement" means funds available for reimbursement of indigent defense expenses to counties that do not apply for the formula grant.

(6) "Discretionary Grant" means funding approved for a specific program designed to improve the quality of indigent defense services.

(7) "Equalization Disbursement" means funding allocated to counties through a formula based on the percentage of reimbursement counties receive for increased indigent defense expenses or other criteria approved by the Task Force.

(8) "Extraordinary Disbursement" means funding to reimburse a county for actual extraordinary expenses for providing indigent defense services in a case or series of cases.

(9) "Fair Defense Account" is an account in the general revenue fund that may be appropriated only to the Task Force on Indigent Defense for the purpose of implementing the Texas Fair Defense Act.

(10) "Formula Grant" means funding allocated to counties through a formula based upon population figures or other criteria approved by the Task Force.

(11) "Grant" is a funding award made by the Task Force to a Texas county in the form of a formula grant or discretionary grant.

(12) "Grantee" means a county that is the recipient of a grant or other funds from the Task Force.

(13) "Juvenile offense" means conduct committed by a person while younger than 17 years of age that constitutes:

(A) a misdemeanor punishable by confinement; or

(B) a felony.

(14) "Other funds" means funding awarded by the Task Force to a county other than a grant and includes but is not limited to:

(A) Direct Disbursements;

(B) Extraordinary Disbursements;

(C) Equalization Disbursements;

(D) Targeted Specific funding; and

(E) Technical Support.

(15) "Special condition" means a requirement placed on a county by the Task Force that must be satisfied as condition of funding.

(16) "Targeted Specific Funds" means funding awarded to counties by the Task Force for a specific program designed to promote and assist counties' compliance with the requirements of state law relating to indigent defense.

(17) "Technical Support" means funding awarded to counties to improve the quality of indigent defense services, raise the knowledge base about indigent defense, and establish processes that can be generalized to similar situations in other counties.

(18) "Task Force on Indigent Defense" (Task Force) is the governmental entity established and governed by §71.051 of the Texas Government Code.

(19) "UGMS" means the Uniform Grant Management Standards promulgated by the Governor's Office of Budget and Planning at §§5.141 - 5.151 and §5.167 of this title.

§173.103. Process for Submitting Applications for Grants and Other Funds.

(a) The Task Force shall provide notice of availability of grants and other funds on the Internet, and will publish on its website the related methods and policies.

(b) Grant applications. The Task Force will provide written notice to each county judge of any Requests for Applications (RFA) for indigent defense grants. Applicants applying pursuant to an RFA must submit their applications according to the requirements provided in the RFA. The RFA will provide the following:

(1) information regarding deadlines for the submission of applications;

(2) the maximum and minimum amounts of funding available for a grant, if applicable;

(3) the starting and ending dates for grants;

(4) information regarding how applicants may access applications;

(5) information regarding where applicants must submit applications;

(6) submission and program requirements; and

(7) the priorities for funding as established by the Task Force.

(c) Applications for other funds. The Task Force also may consider applications for other funds that have not been submitted pursuant to an RFA. Applicants must submit such applications in accordance with the Task Force-provided guidelines for other funds, and will be selected in accordance with §173.104 of this chapter (relating to Grant Resolutions).

§173.104. Grant Resolutions.

(a) Each grant application must include a resolution from the county commissioners' court that contains the following:

(1) authorization for the submission of the application to the Task Force;

(2) provision giving the authorized official the power to apply for, accept, decline, modify, or cancel the grant; and

(3) written assurance that, in the event of loss or misuse of Fair Defense Account funds, the governing body will return all funds as required by the Task Force.

(b) The Task Force may require a resolution from counties receiving other funds.

§173.105. Selection Process.

(a) The Task Force or its designees will review all applications and shall award from the Fair Defense Account formula grants, discretionary grants, or other funds.

(b) Upon reviewing an application, staff may require an applicant to submit, within a specified time, additional information to complete the review or to clarify or justify the application. Neither a request for additional information nor the issuance of a preliminary review report means that the Task Force will fund an application.

(c) The Task Force will inform applicants in writing or by electronic means of decisions to grant or deny applications for funding.

(d) If the Task Force determines that an applicant has failed to submit the necessary information or has failed to comply with any Task Force rule or other relevant statute, rule, or requirement, the Task Force may hold a grantee's funds until the grantee has satisfied the requirements of a special condition imposed by the Task Force. The Task Force may reject the application and deny the grant for failure to satisfy the requirements.

(e) Except as provided by law, all funding decisions made by the Task Force or its designees are final and are not subject to appeal.

§173.106. Grant Funding Decisions.

(a) The Task Force or its designees will make decisions on applications for funding through the use of objective tools and comparative analysis. The Task Force or its designees will first determine whether the grantee is eligible for funds in accordance with §173.101 of this chapter (relating to Applicability) and §173.201 of this chapter (relating to Eligibility).

(b) All funding decisions rest completely within the discretionary authority of the Task Force or its designees. The receipt of an application for funding does not obligate the Task Force to award funding, and the Task Force may partially fund budget items in grant applications.

(c) Granting an application does not require the Task Force to give a subsequent application priority consideration.

(d) Task Force decisions regarding funding are subject to the availability of funds.

§173.107. Grant Acceptance.

Each applicant must accept or reject a grant award within 30 days of the date upon which the Task Force issues a Statement of Grant Award. The Director of the Task Force may alter this deadline upon request from the applicant. The authorized official designated under §173.301 of this chapter (relating to Grant Officials) must formally accept the grant in writing before the grantee may receive any grant funds.

§173.108. Adoptions by Reference.

(a) Grantees must comply with all applicable state statutes, rules, regulations, and guidelines.

(b) The Task Force adopts by reference the rules, documents, and forms listed below that relate to the administration of grants.

(1) Uniform Grant Management Standards (UGMS) adopted pursuant to the Uniform Grant and Contract Management Act of 1981, Chapter 783, Texas Government Code. See §§5.141 - 5.151 and §5.167 of this title.

(2) The Task Force forms, including the statement of grant award, grant adjustment notice, grantee's progress report, financial expenditure report, and property inventory report.

§173.109. Use of the Internet.

The Task Force may require submission of applications for grants or other funds, progress reports, financial reports, and other information via the Internet. Completion and submission of a progress report or financial report via the Internet meets the relevant requirements contained within this chapter for submitting reports in writing. If an application for a grant or other funds is submitted via the Internet, the Task Force will not consider it complete until the grantee provides an Internet Submission Form that is signed by the applicant's authorized official and that meets all relevant deadlines for applications. This form certifies that the information submitted via the Internet is true and correct and that, if funding is awarded, the grantee will abide by all relevant rules, policies, and procedures. The Director of the Task Force

may grant a county a waiver of Internet submission requirements for good cause shown.

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 February 18, 2009.

TRD-200900708
James Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 936-6994

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SUBCHAPTER B. ELIGIBILITY AND FUNDING REQUIREMENTS

1 TAC §§173.201 - 173.205

The new rules are proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

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

§173.201. Eligibility.

(a) The Task Force may provide funds, including grants from the Fair Defense Account, to counties that have complied with standards developed by the Task Force and that have demonstrated commitment to compliance with the requirements of state law relating to indigent defense.

(b) A county may not reduce the amount of funds expended for indigent defense services in the county because of funds provided by the Task Force. Because discretionary grants and targeted specific funds are awarded to enable a county to establish a new system or program for providing indigent defense services, such grants may or may not enter into a calculation of whether the county has or will reduce its funding because of Task Force funding. Other types of funding, including formula grants, direct disbursements, equalization disbursements, extraordinary disbursements, or technical support, shall be considered in determining compliance with this requirement.

§173.202. Use of Funds.

Grants provided under this chapter may be used by counties for:

(1) Attorney fees for indigent defendants accused of crimes or juvenile offenses;

(2) Expenses for licensed investigators, experts, forensic specialists, or mental health experts related to the criminal defense of indigent defendants;

(3) Other direct litigation costs related to the criminal defense of indigent defendants; and

(4) Other approved expenses allowed by the RFA or necessary for the operation of a funded program.

§173.203. Expenditure Categories.

(a) Allowable expenditure categories and any necessary definitions will be provided to the applicant as part of the application process.

(b) Expenditures may be allocated to the grant in accordance with the Uniform Grant Management Standards.

§173.204. Program Income.

(a) Rules governing the use of program income are included in the provisions of the Uniform Grant Management Standards adopted by reference in §173.108 of this chapter (relating to Adoptions by Reference).

(b) Grantees must use program income to supplement program costs or reduce program costs. Program income may only be used for allowable program costs.

§173.205. Equipment.

(a) Decisions by the Task Force or its designees regarding requests to purchase equipment using Task Force funds will be made based on the availability of funds, whether the grantee has demonstrated that the requested equipment is necessary and essential to the successful operation of the funded program, and whether the equipment is reasonable in cost.

(b) For counties that receive a multi-year grant, the Task Force will only fund equipment and other one-time costs during the first year unless permission is granted in writing. Otherwise, equipment and other one-time costs will not factor in to the overall project costs after the first year of the grant.

(c) The Task Force requires each grantee to maintain an inventory report of all equipment purchased with Task Force funds. This report must comport with the final financial expenditure report. At least once each year during the award period, each grantee must complete a physical inventory of all property purchased with Task Force funds and the grantee must reconcile the results with the purchased property records. For single-year awards, the inventory and reconciliation must be made at the end of the award period and submitted with the final report.

(d) Equipment purchased with Task Force funds must be labeled and handled in accordance with the grantee's property management policies and procedures.

(e) Unless otherwise provided, equipment purchased is the property of the grantee after the end of the award period or termination of the operation of the funded program, whichever occurs last.

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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James Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
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For further information, please call: (512) 936-6994

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SUBCHAPTER C. ADMINISTERING GRANTS

1 TAC §§173.301 - 173.310

The new rules are proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

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

§173.301. Grant Officials.

(a) Each grant must have the following designated to serve as grant officials:

(1) Program director. This person must be the officer or employee responsible for program operation and who will serve as the point-of-contact regarding the program's day-to-day operations.

(2) Financial officer. This person must be the county auditor or county treasurer if the county does not have a county auditor.

(3) Authorized official. This person must be authorized to apply for, accept, decline, modify, or cancel the grant for the applicant county. A county judge or a designee authorized by the governing body in its resolution may serve as the authorized official.

(b) The Task Force may require a county to designate a program director for other funded programs.

(c) The program director and the authorized official may be the same person. The financial officer may not serve as the program director or the authorized official.

§173.302. Obligating Funds.

The grantee may not obligate grant funds before the beginning or after the end of the grant period.

§173.303. Retention of Records.

(a) Grantees must maintain all financial records, supporting documents, statistical records, and all other records pertinent to the award for at least three years following the closure of the most recent audit report or submission of the final expenditure report. Records retention is required for the purposes of state examination and audit. Grantees may retain records in an electronic format. All records are subject to audit or monitoring during the entire retention period.

(b) Grantees must retain records for equipment, non-expendable personal property, and real property for a period of three years from the date of the item's disposition, replacement, or transfer.

(c) If any litigation, claim, or audit is started before the expiration of the three-year records retention period, the grantee must retain the records under review until the resolution of all litigation, claims, or audit findings.

§173.304. Expenditure Reports.

(a) Recipients of grants and other funds may be required to submit expenditure reports to the Task Force in addition to the annual expenditure report required for all counties under Texas Government Code §71.0351(e).

(b) The Task Force will provide the appropriate forms and instructions for the reports along with deadlines for their submission. The financial officer shall be responsible for submitting the expenditure reports. The Task Force may place a financial hold on a grantee's future funds if the grantee fails to submit timely expenditure reports or submits incomplete financial reports.

(c) Grantees must ensure that actual expenditures are adequately documented. Documentation may include, but is not limited to, ledgers, purchase orders, travel records, time sheets or other payroll documentation, invoices, contracts, mileage records, telephone bills and other documentation that verifies the expenditure amount and appropriateness to the funded program.

§173.305. Provision of Funds.

(a) After a grant has been accepted and if there are no outstanding special conditions or other deficiencies, the Task Force may forward funds to the grantee. Funds will be disbursed to the grantee no more often than quarterly unless specific permission is granted in writing from the Director.

(b) Disbursement of funds is always subject to the availability of funds.

(c) Discretionary grant funds will be paid only after the expenditure report has been submitted. Funds must be expended, not obligated, before being included in the funding expenditure report.

§173.306. Discretionary Grant Adjustments.

(a) The authorized official must sign all requests for grant adjustments.

(b) Budget Adjustments. Grant adjustments consisting of reallocations of funds among or within budget categories in excess of $10,000 or ten percent of the original grant award, whichever is less, are considered budget adjustments, and are allowable only with prior approval of the Director of the Task Force.

(c) Non-Budget Grant Adjustments. The following rules apply to non-budget grant adjustments:

(1) Requests to revise the scope, target, or focus of the project, or alter project activities require advance written approval from the Task Force or its designees, as determined by the Director of the Task Force.

(2) The grantee will notify the Task Force or its designees in writing of any change in the designated program director, financial officer, or authorized official within ten days following the change.

§173.307. Remedies for Noncompliance.

If a grantee fails to comply with any term or condition of a grant or other funds, the Task Force may take one or more of the following actions:

(1) disallow all or part of the cost of the activity or action that is not in compliance and seek a return of the cost;

(2) impose administrative sanctions, other than fines, on the grantee;

(3) temporarily withhold all payments pending correction of the deficiency by the grantee;

(4) withhold future grants or other funds from the program or grantee; or

(5) terminate the grant or other funds in whole or in part.

§173.308. Term of Grant or Other Funds.

(a) The term of a grant or other funds shall be specified in the award statement or other funding document.

(b) If a grantee wishes to terminate a grant or other funds in whole or in part before the end of the award period, the grantee must

notify the Task Force in writing. The Task Force or its designee will make arrangements with the grantee for the early termination of the award.

(c) The Task Force may terminate any grant or other funds, in whole or in part, when:

(1) a grantee fails to comply with any term or condition of the grant or other funds or the grantee has failed to comply with any applicable rule;

(2) the grantee and the Director of the Task Force agree to do so;

(3) indigent defense funds are no longer available; or

(4) conditions exist that make it unlikely that grant or program objectives will be accomplished.

(d) A grantee may submit a written request for an extension of the funding period in extraordinary circumstances. The Task Force must receive requests for funding extensions at least 30 days prior to the end of the funding period.

§173.309. Violations of Laws.

If the grantee has a reasonable belief that a criminal violation may have occurred in connection with Fair Defense Account funds, including the misappropriation of funds, fraud, theft, embezzlement, forgery, or any other serious irregularities indicating noncompliance with the requirements of a grant or other funds, the grantee must immediately notify the Task Force in writing of the suspected violation or irregularity. The grantee may also notify the local prosecutor's office of any possible criminal violations. Grantees whose programs or personnel become involved in any litigation arising from the grant or award of other funds, whether civil or criminal, must immediately notify the Task Force and forward a copy of any demand notices, lawsuits, or indictments to the Task Force.

§173.310. Progress Reports for Discretionary Grants and Other Funds.

Each grantee must submit reports regarding performance and progress towards goals and objectives in accordance with the instructions provided by the Task Force or its designee. To remain eligible for funding, the grantee must be able to show the scope of services provided and the impact and quality of those services.

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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James Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
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For further information, please call: (512) 936-6994

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SUBCHAPTER D. FISCAL MONITORING AND AUDITS

1 TAC §173.401, §173.402

The new rules are proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

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

§173.401. Fiscal Monitoring.

(a) The Task Force or its designees will monitor the activities of grantees as necessary to ensure that Task Force grant funds are used for authorized purposes in compliance with laws, regulations, and the provisions of grant agreements.

(b) The monitoring program may consist of formal audits, monitoring reviews, and technical assistance. The Task Force or its designees may implement monitoring through on-site review at the grantee location or through a desk review based on grantee reports. In addition, the Task Force or its designees may require grantees to submit relevant information to the Task Force to support any monitoring review. The Task Force may contract with an outside provider to conduct the monitoring.

(c) Grantees must make available to the Task Force or its designees all requested records relevant to a monitoring review. The Task Force or its designees may make unannounced monitoring visits at any time. Failure to provide adequate documentation upon request may result in disallowed costs or other remedies for noncompliance as detailed under §173.307 of this chapter (relating to Remedies for Noncompliance).

(d) After a monitoring review, the grantee will be notified in writing of any noncompliance identified by the Task Force or its designees in the form of a draft report.

(e) The grantee will respond to the draft report and the deficiencies, if any, and submit a plan of corrective action, if necessary, within a time frame specified by the Task Force or its designees.

(f) The corrective action plan will include the:

(1) titles of the persons responsible for implementing the corrective action plan;

(2) corrective action to be taken; and

(3) anticipated completion date.

(g) If the grantee believes corrective action is not required for a noted deficiency, the response will include an explanation, specific reasons, and supporting documentation.

(h) The Task Force or its designees will approve the corrective action plan and may require modifications prior to approval. The grantee's replies and the approved corrective action plan, if any, will become part of the final report.

(i) The grantee will correct deficiencies identified in the final report within the time frame specified in the corrective action plan.

§173.402. Audits Not Performed by the Task Force on Indigent Defense.

(a) Grantees must submit to the Task Force copies of the results of any single audit conducted in accordance with the State Single Audit Circular issued under the Uniform Grant Management Standards. Grantees must ensure that single audit results, including the grantee's response and corrective action plan, if applicable, are submitted to the

Task Force within 30 days after grantee receipt of the audit results or nine months after the end of the audit period, whichever is earlier.

(b) All other audits performed by auditors independent of the Task Force must be maintained at the grantee's administrative offices pursuant to §173.303 of this chapter (relating to Retention of Records) and be made available upon request by the Task Force or its representatives. Grantees must notify the Task Force of any audit results that may adversely impact the Task Force grant funds.

(c) Nothing in this section should be construed so as to require a special or program-specific audit of a grantee's Indigent Defense grant 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.

Filed with the Office of the Secretary of State on February 18, 2009.

TRD-200900711
James Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 936-6994

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 7. PESTICIDES

SUBCHAPTER H. STRUCTURAL PEST CONTROL SERVICE

DIVISION 1. GENERAL PROVISIONS

4 TAC §7.114

The Texas Department of Agriculture (the department) proposes an amendment to Chapter 7, Subchapter H, Division 1, §7.114, concerning regulation of structural pest control. The amendment is proposed to add a definition for "integrated pest management" and to make grammatical corrections to existing language.

Jimmy Bush, Assistant Commissioner for Pesticides, has determined that, for the first five-year period the proposed amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section, as amended.

Mr. Bush also has determined that for each year of the first five years the proposed amendments is in effect, the public benefit anticipated as a result of enforcing the sections will be the addition of a necessary definition to provide guidance on what elements an integrated pest management strategy should address. There will be no effect on microbusinesses, small businesses or persons required to comply with the amended section, as proposed, therefore, no regulatory flexibility analysis is required.

Written comments on the proposal may be submitted to Jimmy Bush, Assistant Commissioner for Pesticide Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposed amendments in the *Texas Register*.

The amendment of §7.114 is proposed under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; and, §1951.212, which authorizes the department to establish standards for an integrated pest management program for the use of pesticides, herbicides, and other chemical agents to control pests, rodents, insects, and weeds at the school buildings and other facilities of school districts and by rule shall establish categories of pesticides that a school district is allowed to apply.

Occupations Code, Chapter 1951, is affected by the proposal.

§7.114. Definition of Terms.

In addition to the definitions set out in the Structural Pest Control Act, the following words, names, and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (15) (No change.)

(16) Integrated Pest Management (IPM)--A pest management strategy that relies on accurate identification and scientific knowledge of target pests, reliable monitoring methods to assess pest presence, preventative measures to limit pest problems and thresholds to determine when corrective control measures are needed. Under IPM, whenever economical and practical, multiple control tactics should be used to achieve best control of pests. These tactics will possibly include, but are not limited to, the judicious use of pesticides.

(17) [~~(16)~~] License--A document issued by the department to a person authorizing the practicing and/or supervising of the professional service or services indicated thereon.

(18) [~~(17)~~] Licensee--The holder of a valid license.

(19) [~~(18)~~] Obnoxious and unwanted animals or plants--Animals or weeds as defined in §1951.003 of the Occupations Code that limit the use or enjoyment or cause harm or damage of any type to people, pets, structures, landscapes, or the environment. Animals excluded from this definition are members of the Order Primates, hoofed mammals, members of the Family Ursidae [~~Ursidea~~], members of the Genus *Felis* [~~Felis~~], members of the Genus *Canis* [~~Canis~~], domestic livestock, ratites, gallinaceous birds, and alligators.

(20) [~~(19)~~] Personal Contact--Physical presence at a work location.

(21) [~~(20)~~] Revoke--To cancel a license issued under authority of the Structural Pest Control Act. When a business license is revoked, the holder of said license must acquire a new license by completing a new application, and paying the required fee. In the case of the certified applicator, the holder of such certified applicator's license must acquire a new license by completing a new application, paying a required fee, and being re-examined in each category desired by said person.

(22) [~~(21)~~] Service--The Structural Pest Control Service.

(23) [~~(22)~~] Suspend--To cease operations for a period of time as specified by the department.

(24) [~~(23)~~] Unit--One hour of time.

(25) [~~(24)~~] Vice-Chairman--An individual Advisory Committee member elected by the committee who presides at the committee meeting in the absence of the Chairman.

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 February 23, 2009.

TRD-200900804
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-4075

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DIVISION 2. LICENSES

4 TAC §7.135

The Texas Department of Agriculture (the department) proposes an amendment to Chapter 7, Subchapter H, Division 2, §7.135(k), concerning regulation of structural pest control. The amendment is made to correct an error that occurred in the adoption of §7.135(k), included in the the department's adoption of amendments to Subchapter H, Division 2, in the December 4, 2008, issue of the *Texas Register* (33 TexReg 9974). The amendment restores paragraphs (k)(1) - (4), relating to information that a sponsor must include in a certificate of completion of a continuing education course taken for purposes of meeting license requirements for structural pest control applicators. These paragraphs were inadvertently omitted in the department's adoption submission.

Jimmy Bush, Assistant Commissioner for Pesticides, has determined that, for the first five-year period the proposed amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section, as amended.

Mr. Bush also has determined that, for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amended section will be to specify the information that must appear on a certificate of completion provided to certified applicators by a course provider upon the successful completion of a department approved continuing education course. There will be no effect on microbusinesses or small businesses, or individuals who are required to comply with the amendment, therefore, no regulatory flexibility analysis is required.

Written comments on the proposal may be submitted to Jimmy Bush, Assistant Commissioner for Pesticide Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposed amendments in the *Texas Register*.

The amendment is proposed under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicator's conducting structural pest control activities; and §1951.315, which provides the department to establish by rule continuing education requirements for licensees.

Occupations Code, Chapter 1951, is affected by the proposal.

§7.135. Criteria and Evaluation of Continuing Education.

(a) - (j) (No change.)

(k) The sponsor must issue a certificate of completion within twenty-one (21) days of course to each applicator completing the course. This document must include at least the following information:

(1) certified applicator name and certified applicator assigned number;

(2) name of sponsor or sponsoring agency, company or organization;

(3) number and category of continuing education units awarded; and

(4) date and location of training or verification test.

(l) - (u) (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 February 23, 2009.

TRD-200900805
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-4075

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DIVISION 3. COMPLIANCE AND ENFORCEMENT

The Texas Department of Agriculture (the department) proposes the repeal of Chapter 7, Subchapter H, Division 3, §7.150, new §7.150 and amendments to §7.153 and §7.155, all concerning regulation of structural pest control. Section 7.150 is repealed in its entirety and a new §7.150 is proposed to specify requirements for school districts to follow in implementing an Integrated Pest Management (IPM) Program as provided by House Bill 2458, 80th Regular Legislative Session, 2007 (HB 2458). This section includes new continuing education requirements and training requirements for newly appointed integrated pest management coordinators employed by school districts. This section also provides for the responsibility of school districts to adopt an IPM program, sets forth the elements that an IPM program shall contain, provides for the appointment and notification to the department of IPM Coordinators, describes the responsibilities of the IPM Coordinator and certified applicators and licensed technicians, and establishes categories of pesticides that are allowed to be used in school buildings and other facilities of school districts. This section also provides for the approval for use requirements of each category and specifies the application restrictions associated with each category. Section 7.153, pertaining to a reduced impact pest control service, is amended to replace reference to the Board with the department and to correct cites to other sections of the rule that was changed with the transfer of the rules from the abolished Structural Pest Control Board to

the department by HB 2458. The section is also amended to specify that a pest control business that qualifies to use the reduced impact pest control service may use the consumer information sheet designed specifically for that service and that the consumer information sheet may be obtained from the department and through the department's website. Section 7.155 is amended to make requirements for school districts in that section consistent with those proposed in new §7.150. The department first published a proposal including the repeal of and new §7.150, and amendments to §7.153 and §7.155 for comment on July 4, 2008 (33 TexReg 5152), for a 30-day comment period. By the close of the comment period, substantive comments on new §7.150 and amendments to §7.153 and §7.155 had been received from many individuals and school districts. Recognizing that additional work was needed to address concerns of commenters the department withdrew the proposal and is now proposing a revised §7.150, §7.153 and §7.155 for comment. The comments received during the comment period of the original publication have been reviewed and considered in this new proposal.

Jimmy Bush, Assistant Commissioner for Pesticides, has determined that, for the first five-year period the proposed amendments, new section and repeal are in effect, there will be no fiscal implications for state government as a result of enforcing or administering the amended, repealed and new sections, as proposed. There will be a cost to local government as a result of new training requirements proposed in §7.150 for Integrated Pest Management (IPM) Coordinators employed by local school districts. The cost will vary depending on how many IPM Coordinators each district chooses to designate. While the proposed rule only requires that each school district appoint one IPM Coordinator, it does allow for school districts to appoint more than one IPM Coordinator to implement an IPM program. The estimated cost per year for the 1,035 school districts participating in the program will be: for newly appointed IPM Coordinators, an average cost of $261 for initial training and an average cost of $87 per year for the following four years; and an average continuing education cost of $87 per year for all existing IPM Coordinators. An IPM Coordinator that has been previously designated and has received the initial training must obtain the continuing education hours required for the three-year period.

Mr. Bush also has determined that, for each year of the first five years the proposed amendments and new section are in effect, the public benefit anticipated as a result of enforcing the amended sections will be updated regulations that provide clarity and additional guidance for the establishment of integrated pest management programs in school districts, the availability of reduced impact pest control services offered by pest control companies and incidental use of pesticides in schools. In regard to proposed new §7.150, relating to schools, the public benefit will be better trained Integrated Pest Management Coordinators working in school districts, more clearly defined categories of pesticides and application restrictions for each, and an immediate benefit to school districts and students from more clearly defined IPM Guidelines. There will be no effect on small or large businesses. There is an anticipated economic cost to persons who are required to comply with the amended sections as proposed. The cost of training and continuing education for newly appointed Integrated Pest Management Coordinators imposed by new §7.150 will be paid by local independent school districts who employ these individuals, and do not affect microbusinesses or small businesses. Therefore, no regulatory flexibility analysis is required.

Written comments on the proposal may be submitted to Jimmy Bush, Assistant Commissioner for Pesticide Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposed amendments in the *Texas Register*.

4 TAC §7.150

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

The repeal is proposed under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; §1951.212, which authorizes the department to establish standards for an integrated pest management program for the use of pesticides, herbicides, and other chemical agents to control pests, rodents, insects, and weeds at the school buildings and other facilities of school districts and by rule shall establish categories of pesticides that a school district is allowed to apply; and Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

The code affected by the proposal is Occupations Code, Chapter 1951.

§7.150. Schools.

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 February 23, 2009.

TRD-200900812
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-4075

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4 TAC §§7.150, 7.153, 7.155

The new section and amendments are proposed under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; §1951.212, which authorizes the department to establish standards for an integrated pest management program for the use of pesticides, herbicides, and other chemical agents to control pests, rodents, insects, and weeds at the school buildings and other facilities of school districts and by rule shall establish categories of pesticides that a school district is allowed to apply; and Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

The code affected by the proposal is Occupations Code, Chapter 1951.

§7.150. Integrated Pest Management Program for School Districts.

(a) Responsibility of School Districts to Adopt an IPM Program. Each school district shall establish, implement, and maintain an Integrated Pest Management (IPM) program. An IPM program is a regular set of procedures for preventing and managing pest problems using an integrated pest management strategy, as defined in §7.114. The school district is responsible for the IPM Coordinator(s) compliance with these regulations.

(1) The IPM program shall contain these essential elements:

(A) a school board approved IPM policy, stating the school district's commitment to follow integrated pest management guidelines in all pest control activities that take place on school district property. The IPM policy statement shall include:

(i) a definition of IPM consistent with this section;

(ii) a reference to Texas laws and rules governing pesticide use and IPM in public schools;

(iii) information about who can apply pesticides on school district property; and

(iv) information about designating, registering, and required training for the school district's IPM coordinator. The Superintendent and IPM Coordinator will maintain a copy of the policy.

(B) a monitoring program to determine when pests are present and when pest problems are severe enough to justify corrective action;

(C) the preferential use of lower risk pesticides and the use of non-chemical management strategies to control pests, rodents, insects and weeds;

(D) a system for keeping records of facility inspection reports, pest-related work orders, pest control service reports, pesticide applications, and pesticide complaints;

(E) a plan for educating and informing school district employees about their roles in the IPM program; and

(F) written guidelines that identify thresholds for when pest control actions are justified.

(2) Each school district superintendent shall appoint an IPM Coordinator(s) to implement the school district's IPM program. Not later than 90 days after the superintendent designates or replaces an IPM Coordinator(s), the school district must report to the department the newly appointed coordinator's name, address, telephone number, e-mail address and the effective date of the appointment. A school district that appoints more than one IPM Coordinator shall designate a Responsible IPM Coordinator who will have overall responsibility for the IPM program and provides oversight of subordinate IPM Coordinators regarding IPM program decisions.

(3) Each school district that engages in pest control activities must employ or contract with a licensed applicator, who may, if an employee, also serve as the IPM Coordinator(s).

(4) Each school district shall prior to or by the first week of school attendance, ensure that a procedure is in place to provide prior notification of pesticide applications in accordance with this chapter. Individuals who request in writing to be notified of pesticide applications may be notified by telephonic, written or electronic methods.

(b) Responsibilities of the IPM Coordinator(s). The IPM Coordinator(s) shall be responsible for implementation of the school district IPM Program and district compliance with these rules. In addition, the IPM Coordinator(s) shall:

(1) successfully complete a department-approved IPM Coordinator training course within six months of appointment;

(2) obtain at least six hours of department-approved IPM continuing education units at least every three years, beginning the effective date of this rule or the date of designation, whichever is later. No approved course may be repeated for credit within the same three year period;

(3) oversee and be responsible for:

(A) coordination of pest management personnel, ensuring that all school employees who perform pest control, including those employees authorized to perform incidental use applications, have the necessary training, are equipped with the appropriate personal protective equipment, and have the necessary licenses for their pest management responsibilities;

(B) ensuring that all IPM program records, including incidental use training records (as provided for under §7.155), facility inspection reports, pest-related work orders, pest control service reports, pesticide applications, and pesticide complaints are maintained for a period of two years and are made available to a department inspector upon request;

(C) conducting periodic facility inspections on campus buildings and grounds;

(D) working with district administrators to ensure that all pest control proposal specifications for outside contractors are compatible with IPM principles, and that contractors work under the guidelines of the school district's IPM policy;

(E) ensuring that all pesticides used on school district property are in compliance with the school district's IPM program and that current pesticide labels and Material Safety Data Sheets (MSDS) are available for interested individuals upon request;

(F) overseeing and implementing that portion of the plan that ensures that school district administrators and relevant school district personnel are provided opportunities to be informed and educated about their roles in the IPM program, reporting, and notification procedures;

(G) pesticide applications, including the approval of emergency applications at buildings and on school district grounds, are conducted in accordance with these rules;

(H) maintaining a current copy of the school district's IPM policy and making available to a department inspector upon request.

(c) Responsibilities of Certified Applicators and Licensed Technicians. The commercial or noncommercial certified applicator or licensed technician shall:

(1) apply only EPA labeled pesticides, appropriate for the target pest, except as provided in these rules;

(2) provide the structural pest management needs of the school district by following the school district's IPM program and these regulations;

(3) obtain written approval from the IPM Coordinator(s) for the use of pesticides in accordance with these rules;

(4) handle and forward to the IPM Coordinator(s) records of IPM activities, any complaints relating to pest problems, and pesticide use;

(5) ensure that pesticide use records are forwarded to the IPM Coordinator within 48 hours of application.

(6) consult with the IPM Coordinator(s) concerning the use of control measures in buildings and grounds; and

(7) ensure that all pest control activities are consistent with the school district's IPM program and IPM policy.

(d) Pesticide Use In School Districts. All pesticides used by school districts must be registered with the United States Environmental Protection Agency (EPA) and the Texas Department of Agriculture, with the exception of those pesticides that have been exempted from registration by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), Section 25(b). All pesticides used by school districts must also bear a label as required by FIFRA and Chapter 76 of the Texas Agriculture Code. Pesticide use must also meet the following requirements.

(1) Pest control signs shall be posted at least 48 hours prior to a pesticide application inside school district buildings.

(2) For outdoor applications made on school district grounds, a pest control sign shall be displayed at the time of application and will remain posted until the specified reentry interval has been met in accordance with these rules.

(3) Pesticides used on school district property shall be mixed outside of student occupied areas of building and grounds.

(4) The use of non-pesticide control measures, non-pesticide monitoring tools and mechanical devices, such as glue boards and traps as permitted in accordance with these rules, are exempt from posting requirements.

(5) Pesticide applications shall not be made to outdoor school grounds if such an application will expose students to physical drift of pesticide spray particles. Reasonable preventative measures shall be taken to avoid the potential of drift to occur.

(6) School districts are allowed to apply the following pesticides to control pests, rodents, insects and weeds at school buildings, grounds or other facilities in accordance with the approval for use and restrictions listed for each category:

(A) Green Category Pesticides.

(i) Definition: A pesticide will be designated as a Green Category pesticide if it meets the following criteria:

(I) all active ingredients belonging to EPA toxicity categories III and IV;

(II) it contains a CAUTION signal word on the product label, unless no signal word is required to appear on the product label as determined by EPA, and

(III) it consists of the active ingredient boric acid; disodium octoborate tetrahydrate or related boron compounds; silica gel; diatomaceous earth; or belongs to the class of pesticides that are insect growth regulators; microbe-based insecticides; botanical insecticides containing no more than 5% synergist (and does not include synthetic pyrethroids); biological (living) control agents; pesticidal soaps; natural or synthetic horticultural oils; or insect and rodent baits in tamper-resistant containers, or for crack-and-crevice use only;

(ii) Approval for Use: Green Category pesticides do not require prior written approval. These pesticides may be applied at the licensee's discretion under the guidelines of the school district IPM program.

(iii) Restrictions:

(I) Green Category pesticides may be applied indoors if students are not present and are not expected to be present in the room or treated area at the time of application. Reentry into the treated area is permitted as soon as the application is complete, the pesticide spray has dried, or the reentry interval specified on the pesticide label has expired, whichever interval is longer.

(II) Green Category pesticides may be applied outdoors if students are not present within ten (10) feet of the application site at the time of treatment. Students are allowed reentry into the treated area as soon as the application is complete, the pesticide spray has dried or the reentry interval specified on the pesticide label has expired, whichever interval is longer.

(B) Yellow Category Pesticides.

(i) Definition: A pesticide will be designated as a Yellow Category pesticide if it meets the following criteria:

(I) all active ingredients belonging to EPA toxicity categories III and IV,

(II) it contains a CAUTION signal word on the product label, unless no signal word is required to appear on the product label as determined by EPA; and

(III) it does not meet the criteria to be designated as a Green Category pesticide under subparagraph (A)(i) of this paragraph.

(ii) Approval for Use: Yellow Category pesticides require written approval from the certified applicator prior to their use. Yellow Category pesticide approvals shall have a duration of no longer than six (6) months or six (6) applications per site, whichever occurs first.

(iii) Restrictions:

(I) Yellow Category pesticides may be applied indoors if students are not present or not expected to be present in the room or treated area within the next four (4) hours following the application, or until the reentry interval specified on the pesticide label has expired, whichever interval is longer.

(II) Yellow Category pesticides may be applied outdoors if students are not present or not expected to be present within ten (10) feet of application site and the area is secured and reentry is in accordance with these rules for no less than four (4) hours, or until the reentry interval specified on the pesticide label has expired, whichever interval is longer.

(III) The treated area must be clearly posted at all entry points or secured using a locking device, a fence or other practical barrier such as commercially available barrier caution tape or periodically monitored to keep students out of the treated area until the allowed reentry time.

(C) Red Category Pesticides.

(i) Definition: A pesticide will be designated as a Red Category Pesticide if it meets the following criteria:

(I) all active ingredients belonging to EPA toxicity category I or II;

(II) it contains a WARNING or DANGER signal word on the product label; and

(III) it contains an active ingredient that has been designated as a restricted use pesticide, a state-limited-use pesticide or a regulated herbicide; and it does not meet the criteria to be designated as a Green Category pesticide under subparagraph (A)(i) of this paragraph, or a Yellow Category pesticide under subparagraph (B)(i) of this paragraph.

(ii) Approval for Use: Prior to the application, licensees must provide written justification to the IPM Coordinator for the use of the red category pesticide and must obtain signed approval for the application from the IPM Coordinator. Red Category pesticide approvals shall have a duration of no longer than three (3) months or three (3) applications per site, whichever occurs first.

(iii) Restrictions.

(I) Red Category pesticides may be applied indoors if students are not present and are not expected to be present in the room or treated area within eight (8) hours following the application, or until the reentry interval specified on the pesticide label has expired, whichever interval is longer.

(II) Red Category pesticides may be applied outdoors if students are not present within twenty five (25) feet of the application site, the area is secured in accordance with these rules, and reentry by students is prohibited for no less than eight (8) hours, or until the reentry interval specified on the pesticide label has expired, whichever interval is longer.

(III) The treated area must be clearly posted at all entry points or secured using a locking device, a fence or other practical barrier such as commercially available barrier caution tape or periodically monitored to keep students out of the treated area until the allowed reentry time.

§7.153. Reduced Impact Pest Control Service.

(a) A business may qualify to use the Reduced Impact Pest Control Service [~~Services~~] designation by having all certified applicators who will be supervising the service attend a continuing education course approved by the department for Reduced Impact Service. All licensed employees will have verifiable training from a certified applicator who has attended the course and is approved to provide such training.

(b) (No change.)

(c) A business using the Reduced Impact Pest Control Service designation must meet the following requirements. [~~:~~]

(1) The department [~~Board~~] approved Consumer Information Sheet must be used and it must be provided at the time of inspection.

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

(d) Notwithstanding §7.152 [~~§595.13~~] of this title (relating to Advertising), the following words may be used in an [~~a~~] advertisement for services by a business authorized to provide Reduced Impact Service: [~~:~~] Reduced Impact Service; Reduced Impact Methods; Reduced Impact Techniques; Reduced Risk Methods; Reduced Hazards; Reduced Exposure; Reduced Impact Specialist; Environmentally Sensitive Services; Environmentally Sensitive Programs; Environmentally Friendly; Environmentally Sound; Environmentally Aware; Environmentally Responsible or any other words descriptive of the service which are not specifically listed as prohibited in §7.152 of this title [~~§595.13~~] and which can be substituted by the business's adherence to the goals of Reduced Impact Service.

(e) (No change.)

(f) Licensees holding the Reduced Impact authorization and licensed in the lawn and ornamental or weed categories may use the Consumer Information Sheet for Reduced Impact Service (RIS) in lieu of the Consumer Information Sheet required in §7.147 of this title (relating to Consumer Information Sheet). Copies of the Consumer Information Sheet are available from the department in English and Spanish and are available on the Structural Pest Control Service website at: http://www.tda.state.tx.us/spcs/, or by contacting the Texas Department of Agriculture at P.O. Box 12847, Austin, TX 78711- 2847, Telephone 866-918-4481. The department's Consumer Information Sheet for Reduced Impact Service may be copied and used in accordance with this section [~~following text in place of that required in §595.7~~].
[~~Figure: 4 TAC §7.153(f)~~]

§7.155. Incidental Use For Schools.

(a) The Incidental Use [~~Situation~~] For Schools Fact Sheet must contain the following text: "This fact sheet must be distributed to all employees of school districts who apply general use Green Category pesticides [~~List products~~] (or Yellow Category pesticides [~~List products~~] specific to ant, bee and wasp applications) and are not licensed by the Texas Department of Agriculture. The fact sheet, instruction and training must be provided upon initial employment by the school district's IPM Coordinator, and thereafter must be available as needed. These general use Green Category [~~List~~] pesticides include insecticides only and involve applications made both inside and outside of structures. Incidental Use is not intended for long term or extensive pest control measures, rather emergency situations where safety of students or workers is at risk and there is insufficient time to contact a licensed applicator. Where long term pest control is required, a trained, licensed person is to make the applications. Examples of Incidental Use situations are treating fire ants in a transformer box or treatments for bees or wasps as a non-routine application to protect children or personnel. Incidental Use is defined as site-specific and incidental to the employee's primary duties. If it is part of the employee's primary duty to make applications of pesticides, that employee is required[~~,~~] by law to obtain a Texas Department of Agriculture license, depending on the location and type of application. In all cases of incidental use [~~Incidental Use~~], the employee should use the least hazardous, effective method of controlling pests. All applications to schools or school grounds must be in compliance with school district IPM policies. If chemicals are utilized, they must be applied in strict accordance with manufacturer labels of [~~"General Use" products on the Green or Yellow List~~] products being used. Applications made inconsistent with the department law [~~Law~~] and regulations [~~Regulations~~], or applications made inconsistent with the label requirements of the product may result in an enforcement action being taken against the individual and/or the certified applicator or technician responsible. [~~"~~]Incidental pesticide use in schools is [~~Use Situation" applications of pesticides are~~] regulated by the Texas Department of Agriculture. If you have any questions or comments, contact the Texas Department of Agriculture, phone number 1-866-918-4481 or P.O. Box 12847, Austin, Texas 78711-2847."

(b) - (c) (No change.)

(d) Pest control use records must be kept by IPM Coordinator(s) for all incidental pesticide use [~~Incidental Use~~] applications including reason for application and justification for emergency for two (2) years.

(e) Incidental pesticide use [~~Use~~] in school districts is limited to insecticides [~~and rodenticides~~] that are Green and Yellow Category pesticides [~~list products~~].

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 February 23, 2009.

TRD-200900806

Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-4075

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TITLE 10. COMMUNITY DEVELOPMENT

PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 313. STATE-SPONSORED INSPECTION AND DISPUTE RESOLUTION PROCESS (SIRP)

10 TAC §313.20

The Texas Residential Construction Commission ("commission") proposes amendments to Texas Administrative Code, Title 10, Part 7, §313.20, related to the appeal of the State-Sponsored Inspection and Dispute Resolution Process (SIRP).

The amendments are needed to correct an error in the language published in the December 26, 2008, issue of the *Texas Register.*

During an open meeting of the commission on December 10, 2008, the commission issued an order to adopt amendments to §313.20, which were previously published in the October 24, 2008, issue of the *Texas Register* (33 TexReg 8709). The adoption was with changes to the proposed text. The text of the commission's order of adoption was published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10430). Although the preamble published contained the rule language consistent with the commission's order, the text of the rule submitted for publication to the Secretary of State's office contained errors. Therefore, the rule that became effective on January 1, 2009, does not accurately reflect the commission's order. The amendments proposed herein reflect the correct language of the commission's order.

The rule amendments to 10 TAC §313.20 require that SIRP appeals be submitted on the commission's appeal form, identify the subject of the appeal, provide the ground or grounds for lodging the appeal, and state the performance standard or method or repair the homeowner, builder or remodeler asserts is correct when appealing on those grounds.

The proposed amendment to 10 TAC §313.20(b) tracks the language adopted by the commission in its order published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10430). "A builder or remodeler submitting an appeal to a third-party inspector's report that did not, before the inspection, offer to make repairs or have repairs made substantially equivalent to those required by the findings of the final report confirming the defect must submit a payment of $150 with the appeal form, as a deposit for the cost of the inspection."

"(1) A builder or remodeler's appeal received without payment or without evidence that an offer of repair as required under this subsection was made to the homeowner prior to the inspection will not be considered timely filed, unless the payment or evidence of offer is received before the fifteenth day after the date of the commission's letter notifying the parties of their right to appeal."

"(2) If the builder or remodeler's stated grounds for appeal are substantially affirmed in their entirety by the appeal panel, the $150 fee paid will be deducted from any amount due by the builder or remodeler for reimbursement of the inspection fee pursuant to §313.18 of this chapter, or if none of the allegedly defective items subject to inspection are finally determined by a final non-appealable report issued by the commission to be construction defects, the $150 fee will be refunded."

The proposed amendment to 10 TAC §313.20(d) tracks the language adopted by the commission is its order published in the December 26, 2008, issue of the *Texas Register.* In the preamble of the order the commission stated its intent to adopt 10 TAC §313.20(d), as follows: "A homeowner or builder or remodeler that asserts on appeal that the third-party inspector's recommendation for repair for an item found to be defective is unreasonable must state the method of repair that the homeowner, builder or remodeler asserts is reasonable. Failure to state the method of repair that the homeowner or builder or remodeler asserts is reasonable under this subsection will invalidate the appeal on that ground for the item appealed. If the basis of the builder or remodeler's appeal is that no defect exists and therefore no repair is required, the builder or remodeler must explain why the third-party inspector's finding of the existence of a defect is incorrect, why no defect exists, and thus no method of repair would be reasonable."

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 quicker more efficient SIRP 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) 463-9507. Comments may also be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "313.20" in the subject line. The deadline for submission of comments is fifteen days (15) 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 "313.20" in the subject line, may not be accepted.

The commission proposes the amendments under Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of

Title 16, Property Code. The commission proposes the rule amendments to implement Subtitle D, Title 16 of the Property Code, specifically chapter 429 which describes the appeal of the third-party inspector's report described in chapter 428.

The statutory provisions affected by the proposed rule amendments and rule review are set forth in Title 16, Property Code §408.001 and §429.001.

No other statutes, articles, or codes are affected by this rule adoption.

§313.20. Appeal Process.

(a) (No change.)

(b) A builder or remodeler submitting an appeal to a third-party inspector's report that did not, before the inspection, offer to make repairs or have repairs made substantially equivalent to those required by the findings of the final report confirming the defect [~~make a good faith offer of repair to a homeowner prior to the filing of the request for inspection,~~] must submit a payment of $150 with the appeal form, as a deposit for the cost of the inspection.

(1) A builder or remodeler's appeal received without payment or without evidence that an offer of repair as required under this subsection was made to the homeowner prior to the [~~filing of the~~] inspection [~~request~~] will not be considered timely filed, unless the payment or evidence of offer is received before the fifteenth day after the date of the commission's letter notifying the parties of their right to appeal.

(2) If the builder or remodeler's stated grounds for appeal are substantially affirmed in their entirety by the appeal panel, the $150 fee paid will be deducted from any amount due by the builder or remodeler for reimbursement of the inspection fee pursuant to §313.18 of this chapter, or if none of the allegedly defective items subject to inspection are finally determined by a final non-appealable report issued by the commission to be construction defects, the $150 fee will be refunded.

(c) (No change.)

(d) A homeowner or builder or remodeler that asserts on appeal that the third-party inspector's recommendation for repair for an item found to be defective is unreasonable must state the method of repair that the homeowner, builder or remodeler asserts is reasonable. Failure to state the method of repair that the homeowner or builder or remodeler asserts is reasonable under this subsection will invalidate the appeal on that ground for the item appealed. If the basis of the builder or remodeler's appeal is that no defect exists and therefore no repair is required, the builder or remodeler must explain[~~, in detail,~~] why the third-party inspector's finding [~~assessment~~] of the existence of a defect is incorrect, why no defect exists, and thus, [~~why there is~~] no [~~alternative~~] method of repair [~~that~~] would be reasonable.

(e) - (l) (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 February 23, 2009.

TRD-200900803

Susan K. Durso
General Counsel
Texas Residential Construction Commission
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-4075

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 11. ADMINISTRATIVE DEPARTMENT

13 TAC §11.13

The Texas Historical Commission (Commission) proposes new §11.13 (relating to Formal Bid Protest Procedures) to Title 13, Part 2, Chapter 11 of the Texas Administrative Code. The purpose of this section is to implement Texas Government Code §2155.076, which requires all state agencies to adopt bid protest procedures. The procedures to be adopted conform to the requirements of the statute and are consistent with the rules of the Comptroller of Public Accounts, which administers the State's purchasing program.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the rule is in effect there will not be fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Oaks has also determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of this new rule will be defined procedures and standards for any bid protests that are filed with the Commission. Additionally, Mr. Oaks has determined that there will be no effect on small or micro businesses. There will be no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711-2276. Comments will be accepted for 30 days after publication in the *Texas Register.*

The new rule is proposed 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 §552.275, which provides that governmental bodies may adopt rules on this subject.

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

§11.13. Formal Bid Protest Procedures.

(a) The purpose of this section is to provide an internal protest procedure to be used by any actual or prospective bidder, offeror, proposer, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract by the commission from a delegated procurement. The following procedures are available for persons or firms not awarded the contract pursuant to authority delegated to the Commission by the Comptroller of Public Accounts or by Texas Government Code, Chapters 2155 - 2158. These procedures are consistent with the rules of the Comptroller of Public Accounts insofar as such rules are applicable to an internal agency review.

(b) Any actual bidder or offeror who is aggrieved in connection with the award of a contract may formally protest the award of the contract by submitting a protest to the executive director in accordance with the procedures in this section.

(1) Any bid protest must be in writing and received in the care of the executive director within five working days after the bidder is notified that the award of a contract is forthcoming or otherwise knows, or should have known, of the occurrence of the action which is protested.

(2) Formal protests must conform to the requirements of and shall be resolved in accordance with the procedures set forth in this section.

(3) In the event of a timely protest, the commission shall consider the protest and reply in writing before proceeding with the solicitation or with the award of the contract unless the executive director makes a determination that the award of contract without delay is necessary to protect substantial interests of the state.

(4) If the executive director determines that a violation of the rules or statutes has occurred in a case where a contract has been awarded, the executive director shall inform the protesting party and other interested parties of that determination by letter. The letter shall set forth the reasons for the determination and may set forth any appropriate remedial action, which may include canceling or voiding the contract to the extent allowed by law.

(5) A bid or a bid protest that is not submitted in a timely manner is not eligible for consideration under this section.

(c) A formal protest shall be addressed to the executive director and must be sworn and contain the following:

(1) a specific identification of a statutory or regulatory provision(s) that the action complained of is alleged to have violated;

(2) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in paragraph (1) of this subsection;

(3) a precise statement of the relevant facts;

(4) an identification of the issue or issues to be resolved;

(5) argument and authorities in support of the protest; and

(6) a statement that copies of the protest have been mailed or delivered to all other identifiable interested parties. Upon request, the commission will furnish to the requestor a list of interested parties, as reflected in the records of the commission.

(d) The executive director may request additional information from the party submitting the protest, any other interested party, or commission staff.

(e) If the protest is not resolved by mutual agreement, the executive director will issue a written determination of the protest.

(1) If the executive director determines that no violation of rules or statutes has occurred, he shall so inform the protesting party by letter which sets forth the reasons for the determination.

(2) If the executive director determines that a violation of the rules or statutes has occurred, he shall so inform the protesting party by letter which sets forth the reasons for the determination and the appropriate remedial action.

(f) A decision by the executive director shall be the final administrative action.

(g) The commission will maintain all documentation about the purchasing process to be used in the event of a protest or appeal in accordance with the commission's record retention schedule.

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 February 20, 2009.

TRD-200900746
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Proposed date of adoption: April 15, 2009
For further information, please call: (512) 463-8817

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13 TAC §11.14

The Texas Historical Commission (Commission) proposes new §11.14, Title 13, Part 2, Chapter 11 of the Texas Administrative Code relating to Negotiated Rulemaking and Alternative Dispute Resolution. The rule establishes a policy for the use of negotiated rulemaking methods in adopting rules of the Commission when the Commission determines that it is appropriate. The Deputy Director of the Commission is appointed as the negotiated rulemaking coordinator. The rule establishes a policy for the use of alternative dispute resolution methods to resolve internal and external disputes. The Deputy Director of the Commission is appointed as the alternative dispute resolution coordinator.

The Commission is required to adopt this rule by the Legislature, Texas Government Code, §442.023, which requires the adoption of negotiated rulemaking procedures under Texas Government Code, Chapter 2008, for the adoption of Commission rules; and appropriate alternative dispute resolution procedures under Texas Government Code, Chapter 2009, to assist in the resolution of internal and external disputes under the Commission's jurisdiction.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Oaks has also determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of this rule will be improved dispute resolution processes by the agency and increased use of negotiated rulemaking techniques. This should reduce the number of contested cases and other disputes affecting the agency. Additionally, Mr. Oaks has determined that there will be no effect on small and micro businesses. There will be no anticipated economic cost to persons who are required to comply with these rule amendments as proposed.

Comments on the proposal may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711-2276. Comments will be accepted for 30 days after publication in the *Texas Register.*

The rule is proposed under the Texas Government Code §442.005(q), which provides the Commission with authority to promulgate rules that will reasonably effect the purposes of the chapter, and Texas Government Code §442.023, which

requires the Commission to adopt a policy regarding negotiated rulemaking and alternative dispute resolution.

§11.14. Negotiated Rulemaking and Alternative Dispute Resolution.

(a) Negotiated rulemaking.

(1) The commission's policy is to encourage the use of negotiated rulemaking for the adoption of commission rules in appropriate situations.

(2) The commission's deputy director or his designee shall be the commission's negotiated rulemaking coordinator (NRC). The NRC shall perform the following functions, as required:

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

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

(C) collect data to evaluate the effectiveness of negotiated rulemaking procedures implemented by the commission.

(3) The commission, its rules committee, or the executive director may direct the NRC to begin negotiated rulemaking procedures on a specified subject.

(b) Alternative Dispute Resolution (ADR).

(1) The commission's policy is to encourage the resolution and early settlement of internal and external disputes, including contested cases, through voluntary settlement processes, which may include any procedure or combination of procedures described by Chapter 154, Civil Practice and Remedies Code. Any 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.

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

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

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

(C) collect data to evaluate the effectiveness of ADR procedures implemented by the commission.

(3) The commission, a committee of the commission, a respondent in a disciplinary matter pending before the commission, the executive director, or a commission employee engaged in a dispute with the executive director or another employee, may request that the contested matter be submitted to ADR. The request must be in writing, be addressed to the DRC, and state the issues to be determined. The person requesting ADR and the DRC will determine which method of ADR is most appropriate. If the person requesting ADR is the respondent in a disciplinary proceeding, the executive director shall determine if the commission will participate in ADR or proceed with the commission's normal disciplinary processes.

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

(5) 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.

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

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 February 20, 2009.

TRD-200900724
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Proposed date of adoption: April 15, 2009
For further information, please call: (512) 463-8817

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CHAPTER 15. ADMINISTRATION OF FEDERAL PROGRAMS

13 TAC §15.3

The Texas Historical Commission (Commission) proposes to amend §15.3, Texas Administrative Code, Title 13, Part 2, Chapter 15, concerning State Board of Review/National Register. This amendment is being proposed to allow the State Historic Preservation Officer the authority to appoint a Texas advisor of the National Trust for Historic Preservation or, if the advisory member declines, to appoint a citizen member to the State Board of Review.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rules.

Mr. Oaks has also determined that for each year of the first five year period the rules are in effect the public benefit anticipated as a result of these rule amendments will be an increased efficiency and effectiveness in the implementation of the State Board of Review. There will also be no effect on small businesses or micro-businesses. There are no anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments on the proposal may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711-2276. Comments will be accepted for 30 days after publication in the *Texas Register.*

The amendments are proposed under the Texas Government Code §442.005(q) which provides the Texas Historical Commission with the authority to promulgate rules and conditions to reasonably affect the purposes of the chapter. No other statutes, articles or codes are affected by this amendment.

§15.3. State Board of Review/National Register.

(a) Name. The name of this organization shall be the State Board of Review (hereafter referred to as the "board", "review board", or "board of review") for the National Register of Historic Places, Texas.

(b) Purpose. The purpose of this organization is to review and make recommendations to the state historic preservation officer regard-

ing nominations from Texas to the National Register of Historic Places, and to perform other duties and responsibilities as prescribed in the Federal Register.

(c) Membership. The voting membership of the state board of review shall consist of 11 Texas residents. The board shall include one professional in the disciplines of history, prehistoric archeology, and historic archeology, and two professionals each in architectural history and architecture. All professional members shall meet the minimum standards of professional qualifications as set forth in the Federal Register (Part V: 36 Code of Federal Regulations Part 61, §61.4(e)) and verified by the state historic preservation officer (state liaison officer). Professionals from closely related fields are eligible to serve on the board of review in lieu of the above specified professionals subject to the approval of the National Park Service. [~~The senior appointed representative from Texas serving as advisor to the National Trust for Historic Preservation shall serve as an ex-officio, voting member of the board.~~] Four [~~Three~~] citizen members with a demonstrated interest, competence, and knowledge in historic preservation will be selected and shall serve as voting members. Whenever possible, one of these members shall be selected from the appointed representatives from Texas serving as advisors to the National Trust for Historic Preservation.

(d) Appointments. Appointments to the State Board of Review [~~state board of review~~] shall be upon recommendation of the State Historic Preservation Officer and confirmed by a majority vote of the Texas Historical Commission. The term of office for board of review members shall be two years, with five members to be appointed one year and six to be appointed on alternate years. Terms shall begin October 1. Appointments by the Texas Historical Commission to fill vacancies may occur at any time during the year. No member of the State Board of Review [~~state board of review~~] shall be appointed to more than three consecutive terms.

(e) Election and duties of officers. A chairperson, vice-chairperson, and secretary will be elected by the review board annually by a majority vote at the first meeting of each federal fiscal year. The chairperson shall perform such duties as are properly required of him or her by the board. He/she shall have general supervision of the affairs of the board, and shall have authority to interpret and carry out all policies established by its members. The vice-chairperson shall perform such duties as the board or chairperson directs, and shall preside in the absence of the chairperson. The secretary shall certify the minutes of all meetings of the board and shall perform other duties as may be prescribed by the chairperson or board. The secretary shall preside in the absence of both the chairperson and the vice-chairperson. The secretary shall complete an evaluation form for each nomination presented by staff at each board meeting. The form will become a part of the commission's permanent record of opinions and decisions by the board, and will be filed in the National Register programs office of the Texas Historical Commission.

(f) Meetings. Meetings of the State Board of Review [~~state board of review~~] shall be held as many times per year as prescribed in the Federal Register (Part V: 36 Code of Federal Regulations Part 61, §61.4(e)) pertaining to the National Register of Historic Places. Other meetings may be called by the chairperson as needed. The majority of the membership shall constitute a quorum and the chairperson shall vote only to break a tie. The chairperson may appoint members to committees for specific purposes and committee meetings may be required. Committee reports, if any, shall be given to the full board. If the elected secretary is absent from a board meeting, the chairperson shall appoint a member of the board to serve as the secretary.

(g) Rules. The board of review shall adopt these written procedures as required by the federal guidelines for the National Register as published in the Federal Register (Part V: 36 Code of Federal Regulations Part 61, §61.4(e)). The adoption of, and amendments to, these rules shall be subject to approval and adoption as rules by the Texas Historical Commission.

(h) Code of conduct.

(1) No member of the State Board of Review [~~state board of review~~] may vote upon the consideration of a property for nomination to the National Register of Historic Places if the member has a conflict of interest, real or potential, in that vote.

(2) A member of the board of review has a conflict of interest in such a vote if there is likely to be a financial benefit from the property being considered to any of the following:

(A) the member of the board of review; or

(B) any person of the member's immediate family, which includes spouse and any minor children; or

(C) a business partner of the member; or

(D) any organization for profit in which the member, or any person of subparagraphs (B) and (C) of this paragraph is serving or is about to serve as an officer, director, trustee, partner, or employee.

(3) A financial benefit includes, but is not limited to, grant money, contract, subcontract, royalty, commission, contingency, brokerage fee, gratuity, favor, or any other things of real or potential value.

(4) A member of the State Board of Review [~~state board of review~~] who has a conflict of interest may not participate as a private citizen in the deliberations concerning the property being considered for nomination to the National Register.

(5) Prior to any deliberations concerning the property in which a member of the state board of review has a conflict of interest, the member with a conflict shall announce, for the record, that such a conflict exists and physically recuse himself/herself from the decision-making process and not vote directly, in absentia, or by proxy in that matter. Review board minutes must indicate which member recused himself/herself and the reasons for the recusal.

(6) The nomination of any property passed by the board of review in which a member of the board has announced a conflict of interest will be forwarded to the United States Department of the Interior with a request for an intensive review of that nomination.

(i) Conduct of meetings. Parliamentary authority shall be according to Robert's Rules of Order, Newly Revised, except where specifically provided for otherwise in these rules.

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 February 20, 2009.

TRD-200900765
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-8817

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CHAPTER 21. HISTORY PROGRAMS

The Texas Historical Commission (Commission) proposes amendments to §21.7, relating to Application Requirements, and §21.9, relating to Application Evaluation Procedures, Title 13, Part 2, Chapter 21, History Programs. The purpose of the amendments is to implement changes for administering the Official Texas Historical Marker Program contained in Texas Government Code, §442.006(b) and (h), passed by the Legislature in House Bill 12, 80th Session, 2007. The amendments to §21.7 address the procedures and content of marker applications. The amendments to §21.9 address the criteria for ranking the marker applications and the scoring system the Commission will use. A limitation will be placed on the number of markers to be authorized each year through the use of these criteria.

F. Lawerence Oaks, Executive Director, has determined that, for the first five-year period the proposed sections are in effect, there are no fiscal implications for state or local government as a result of enforcing or administering the sections.

F. Lawerence Oaks also has determined that, for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections is that individuals, organizations, or county historical commissions desiring to preserve their local history through these programs will have increased clarity and understanding of the goals of the historic marker program and greater clarity in meeting the requirements to obtain markers. There is no adverse economic effect on small or micro businesses, or on businesses of any size, as a result of enforcing or administering the sections; because, although there is a cost associated with obtaining an Official Texas Historical Marker, the program is optional and businesses are not required to participate in them. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There is no anticipated effect on local employment in geographic areas affected by these sections.

Questions about the content of this proposal may be directed to Bratten Thomason at (512) 463-5854 in the Commission's History Programs Division. Written comments on the proposal may be submitted to: Bratten Thomason, History Programs Division, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711-2276, within 30 days of publication in the *Texas Register.*

Under §2007.003(b) of the Texas Government Code, the Commission has determined that Chapter 2007 of the Texas Government Code does not apply to these rules. Accordingly, the Commission is not required to complete a takings impact assessment regarding these rules.

SUBCHAPTER B. OFFICIAL TEXAS HISTORICAL MARKER PROGRAM

13 TAC §21.7

The revised sections are proposed under the Texas Government Code, §442.005(u), which authorizes the Commission to adopt rules to carry out its programs. The revised sections implement changes to Texas Government Code, §442.006. No other statutes are affected.

§21.7. Application Requirements.

(a) Any individual, group or county historical commission may apply to the commission for an Official Texas Historical Marker. The application shall include:

(1) a completed current Official Texas Historical Marker application form;

(2) supporting documentation as provided in program guidelines, criteria and procedures adopted by the commission.

(3) an application fee in the amount of $100.00.

(b) Historic Texas Cemetery markers. A marker may be awarded to a cemetery only if the commission has designated the cemetery as a Historic Texas Cemetery. See §21.12 of this chapter for information concerning Historic Texas Cemetery designation. The marker must be located either at or immediately adjacent to the designated cemetery.

(c) The following procedures shall be observed for the marker application process. Potential sponsors should check the commission web site at www.thc.state.tx.us for current information on the Official Texas Historical Marker Program.

(1) The sponsor must contact the county historical commission (CHC) to obtain a marker application form, to review basic program requirements and to discuss the county's review process and procedures, which differ from county to county. The commission does not mandate a specific review process at the county level, so the sponsor will need to work closely with the CHC to be sure all local concerns and procedures are addressed properly. The CHCs cannot send the application forward until they can certify that the history and the application have been adequately reviewed.

(2) CHC reviews the marker application for accuracy and significance, and either approves the application or works with the sponsor to develop additional information as necessary.

(3) CHC-approved applications are forwarded online as a Word document to the History Programs Division of the commission. Once the application is received by the commission, additional notifications and correspondence will be between the CHC contact and the commission staff contact only, unless otherwise noted.

(4) Commission staff makes a preliminary assessment to determine if the topic is eligible for review and if all required elements are included. The commission will notify the applicant through the CHC whether the application is accepted.

(5) Upon notification the application has been accepted for review, a $100 application fee is due within ten days.

(6) Eligible applications receive further review, and additional information may be requested via email. Failure to provide all requested materials as instructed within 45 days, unless a longer period is approved by the commission, will result in cancellation of the application.

(7) Commission staff and commissioners review applications and determine:

(A) eligibility for approval;

(B) size and type of marker for each topic; and

(C) priorities for work schedule on the approved applications.

(8) CHC and sponsor will be notified via email of approval and provided a payment form for the casting of the marker.

(9) The payment must be received in commission offices within 45 days or the application will be cancelled.

(10) Commission staff will write the marker inscription. One review copy will be provided via email to the CHC contact only for local distribution as needed. Inscription review is for accuracy of content only; the commission determines the content, wording, punctuation, phrasing, etc.

(A) Upon approval of the inscription, the CHC contact provides additional copies as necessary for committee, commission, or sponsor review and conveys a single response to the commission.

(B) Upon receipt of emailed approval by the CHC, the commission proceeds with the order.

(C) If changes recommended by the CHC are approved by the commission, staff will send a revised copy for content review. Because inscription reviews are for content only, only two reviews should be necessary to complete this step of the process. Additional requests for revisions are subject to approval by the commission, which will be the sole determiner of warranted requests for changes. Excessive requests for change, or delays in response, may, in the determination of the commission, result in cancellation of the order.

(D) Only the authorized CHC contact - chair or marker chair - can make the final approval of inscriptions at the county level. Final approval will be construed by the commission to mean concurrence by any interested parties, including the sponsor.

(11) After final approval, the order is sent to marker supplier for manufacturing. Subject to the terms of the commission vendor contract, only authorized commission staff may contact the manufacturer relative to any aspect of Official Texas Historical Markers, including those in process or previously approved.

(12) Commission staff reviews galley proofs of markers. With commission approval, manufacturing process proceeds. Manufacturer inspects, crates and ships completed markers and notifies commission, which in turn notifies CHC contact.

(13) With shipment notice, planning can begin on marker dedication ceremony, as needed, in conjunction with CHC, sponsors and other interested parties.

(14) Information on planning and conducting marker ceremonies is provided by the commission through its web site.

(15) Once the planning is complete, the CHC posts the information to the commission web site calendar.

(16) Commission staff enters marker information into the Texas Historic Sites Atlas at website atlas.thc.state.tx.us, an online inventory of marker information and inscriptions.

(d) Application content.

(1) Each marker application must address the criteria specified in §21.9 in sufficient detail to allow the commission to judge the merit of the application.

(2) Documentation. Each marker application must contain sufficient documentation to verify the assertions about the above criteria. If the claims in the application cannot be verified through documentation, the application will be rejected.

(e) Limitation of markers awarded.

(1) The commission will set a numerical limit on the number of markers that will be approved annually.

(2) No markers in excess of the limit may be approved except by vote of the commission to amend the limit.

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

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TRD-200900767
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-8817

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13 TAC §21.9

The revised sections are proposed under the Texas Government Code, §442.005(u), which authorizes the Commission to adopt rules to carry out its programs. The revised sections implement changes to Texas Government Code, §442.006. No other statutes are affected.

§21.9. Application Evaluation Procedures.

(a) The commission adopts the following criteria [~~may adopt internal procedures~~] governing evaluation for approval or rejection of applications for Official Texas Historical Markers, Recorded Texas Historic Landmarks (RTHLs),or Historic Texas Cemetery designations.

(1) Age: Structures eligible for the RTHL designation and marker must be at least 50 years old. Older structures may be awarded additional weight.

(2) Historical significance: Architectural significance alone is not enough to qualify a structure for the RTHL designation. It must have an equally significant historical association, and that association can come from an event that occurred at the site; through individuals who owned or lived on the property; or, in the case of bridges, industrial plants, schoolhouses, and other non-residential properties, through documented significance to the larger community.

(3) Architectural significance: Structures deemed architecturally significant are outstanding examples of architectural history through design, materials, structural type or construction methods. In all cases, eligible architectural properties must display integrity; that is, the structure should be in a good state of repair, maintain its appearance from its period of significance and be considered an exemplary model of preservation. Architectural significance is often best determined by the relevance of the property to broader contexts, including geography. Any changes over the years should be compatible with original design and reflect compliance with accepted preservation practices, e.g., the *Secretary of the Interior's Standards for Rehabilitation.*

(4) State of repair: Structures not considered by the commission to be in a good state of repair are ineligible for RTHL designation. The commission reserves the sole right to make that determination relative to eligibility for RTHL markers.

(5) Diversity of topic for addressing gaps in historical marker program. This criterion addresses the extent to which topic relates to an aspect or area of Texas history that has not been well represented by the marker program.

(6) Value of topic as an undertold or untold aspect of Texas history. This criterion addresses the extent to which topic addresses undertold facets of Texas history and increases the diversity of history and cultures interpreted through the marker program.

(7) Endangerment level of property, site or topic. This criterion addresses the extent to which the property (RTHLs), site or story is in danger of being lost if its history and significance are not addressed through the marker program.

(8) CHC support and existing documentation. This criterion addresses the extent to which the CHC has shown strong support and partnership in developing the topic and the quality of the research and documentation for the application.

(9) Diversity among this group of candidates. This criterion addresses the extent to which this topic represents an undertold story of Texas history among the applications received during that year's marker cycle.

(10) Relevance to other commission programs. This criterion addresses the extent to which the topic coordinates with other significant programs and initiatives of the agency.

(b) Applications and topics with *exceptional significance* directly address established statewide themes, promote undertold stories of Texas history and have exceptional ability to educate the public on aspects of Texas history not fully addressed by the marker program. Applications and topics with *high significance* address statewide themes, promote undertold stories of Texas history and have some ability to educate the public on aspects of Texas history not fully addressed by the marker program. Applications and topics that *meet requirements* have been found to fulfill the basic application requirements and guidelines, relate to statewide themes but do not necessarily directly address topics that have not been widely addressed by the marker program. Applications and topics deemed *not eligible* do not relate to statewide themes and/or do not meet the basic program application requirements and guidelines. All markers must relate to the statewide themes established by the Commission. These themes are available on the Commission's website at www.thc.state.tx.us. From time to time the commission may establish thematic priorities for the marker program. Additional points will be awarded to projects falling within these priorities.

(c) The scoring system for ranking applications is as follows:

(1) 15 pts. max. Relevance to the commission's current thematic priorities;

(2) 10 pts. max. Value of topic as an undertold or untold aspect of Texas history;

(3) 10 pts. max. Endangerment level of property, site or topic;

(4) 10 pts. max. Age;

(5) 10 pts. max. Historical or architectural/site significance;

(6) 10 pts. max. Historical or architectural/site integrity (state of repair);

(7) 10 pts. max. Diversity of topic for addressing gaps in historical marker program;

(8) 10 pts. max. CHC support and existing documentation; and

(9) 10 pts. max. Diversity among this group of candidates; and

(10) 5 pts. max. Relevance to other commission 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 February 20, 2009.

TRD-200900768

F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-8817

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 55. RULES FOR ADMINISTRATIVE SERVICES

The Texas Department of Licensing and Regulation ("Department") proposes new 16 Texas Administrative Code ("TAC"), Chapter 55, §§55.1, 55.10, 55.20, 55.30, 55.40, 55.50 - 55.61, and 55.70 - 55.82, regarding administrative services rules related to the Texas Commission of Licensing and Regulation ("Commission") and the Department.

JUSTIFICATION

The current rules at 16 TAC Chapter 60 implement the statutory requirements under Texas Occupations Code, Chapter 51, the enabling statute for the Commission and the Department. As the result of a rule review conducted in accordance with Texas Government Code §2001.039 (see 33 TexReg 8562, October 10, 2008), the Department is proposing that the current rules be repealed and replaced with two new rule chapters. The Department has determined that these changes are necessary to ensure that the rules: (1) include and accurately reflect all of the requirements of Texas Occupations Code, Chapter 51 and other statutes affecting state agencies; (2) reflect the Commission's and the Department's current policies, procedures and practices; and (3) do not contain provisions that are more appropriately located elsewhere, such as an employee handbook.

EXPLANATION OF NEW RULES

In conjunction with the repeal of the current rules at 16 TAC Chapter 60 and the proposal of new rules in Chapter 60, which are published in the Proposed Rules section of this issue of the *Texas Register,* the Department is proposing new rules at Chapter 55. Proposed new Chapter 55 addresses administrative services issues involving the Department including procurements, contracts, and contract disputes with vendors. The proposed new rules include many of the provisions found in the current Chapter 60 rules, which are being repealed.

Proposed new Chapter 55 has five subchapters addressing various administrative services issues. Subchapter A states the statutory authority for adopting rules and provides definitions used in the chapter. Subchapter B sets out the Department's processes for procuring goods and services. Subchapter C sets out the procedures for potential vendors to protest the procurement processes and/or awards. Subchapter D sets out the Department's rules for handling contract disputes with current vendors and resolving those disputes through negotiation. Subchapter E sets out the Department's rules for handling contract disputes with current vendors and resolving those disputes through mediation. Subchapters D and E reflect the model rules developed by the Texas Attorney General and the State Office of Administrative Hearings for use by state agencies.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed rules are in effect, there will be no direct cost to state or local government as a result of enforcing or administering the proposed rules.

PUBLIC BENEFITS

Mr. Kuntz also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be rules that provide more information to the public and that reflect the current policies, practices and procedures of the Commission and the Department. In addition, because of the structure and organization of the rules, it should be easier for vendors and the general public to find the specific information they are searching for in the rules.

PROBABLE ECONOMIC COSTS

Mr. Kuntz has determined that there are no anticipated economic costs to small or micro-businesses or to persons who are required to comply with the rules as proposed.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

Since the agency has determined that the rules will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

PUBLIC COMMENTS

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §55.1, §55.10

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed under Texas Government Code, Chapter 2156, which requires state agencies making purchases to adopt the Texas Comptroller of Public Accounts' rules related to bid opening and tabulation; Texas Government Code, Chapter 2161, which requires a state agency to adopt the Texas Comptroller of Public Accounts' rules as the agency's own rules for construction projects and purchases of goods and services; and Texas Government Code, Chapter 2260, which requires each state agency to develop rules to address contract disputes with vendors and to resolve those disputes through negotiation and/or mediation. Finally, the new rules are proposed in accordance with Texas Government Code, Chapters 552 and 2009; and Texas Civil Practice and Remedies Code, Chapters 107 and 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§55.1. Authority.

This chapter is promulgated under the authority of Texas Occupations Code, Chapter 51. This chapter applies except in the event of a conflict with other statutory provisions related to specific programs regulated by the Commission and the Department.

§55.10. Definitions.

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

(1) ALJ--Administrative law judge employed by the State Office of Administrative Hearings.

(2) Alternative Dispute Resolution (ADR) Administrator--The trained coordinator designated by the Commission:

(A) to coordinate and oversee the negotiated rulemaking and ADR procedures used by the Department;

(B) to serve as a resource for any training needed to implement the negotiated rulemaking and ADR procedures; and

(C) to collect data concerning the effectiveness of the negotiated rulemaking and ADR procedures. The ADR Administrator also may conduct ADR proceedings.

(3) Alternative Dispute Resolution (ADR) Procedures--Alternative processes to judicial forums or administrative agency contested case proceedings for the voluntary settlement of contested matters through the facilitation of an impartial third-party.

(4) Claim--A demand for damages by the contractor based upon the Department's alleged breach of the contract.

(5) Commission--Texas Commission of Licensing and Regulation.

(6) Contested case or proceeding--A proceeding in which the legal rights, duties, or privileges of a party are to be determined by the Commission and/or Executive Director after an opportunity for adjudicative hearing.

(7) Counterclaim--A demand by the Department relating to the contractor's claim.

(8) Day--A calendar day. If an act is required to occur on a day falling on a Saturday, Sunday, or holiday, the first working day which is not one of these days should be counted as the required day for purpose of this chapter.

(9) Department--Texas Department of Licensing and Regulation.

(10) General Counsel--The attorney designated by the Texas Department of Licensing and Regulation, who provides legal representation to the Commission and the Department.

(11) Interested parties--All persons who have timely submitted bids or proposals to provide goods or services pursuant to a contract with the Department or who have requested in writing to the Department to be notified of a vendor protest.

(12) Mediation--A confidential, informal dispute resolution process in which an impartial person, the mediator, facilitates communication between or among the parties to promote reconciliation, settlement, or understanding among them.

(13) Mediator--The person who presides over a mediation proceeding. The mediator shall encourage and assist the parties in reaching a settlement but may not compel or coerce the parties to enter into a settlement agreement. The mediator may be a Department employee, an employee from another Texas state agency, or a person in the mediation profession who is not a Texas state employee ("private mediator").

(14) Parties--The contractor and the Department, having entered into a contract in connection with which a claim of breach of contract has been filed under Subchapter D.

(15) Person--Any individual, partnership, corporation, or other legal entity, including a state agency or governmental subdivision.

(16) Protesting Party--Any actual or prospective bidder, offeror, proposer, or contractor who submits a protest to the Department under Subchapter C.

(17) Purchasing Officer--A Departmental employee who has received certification as a Texas Public Purchaser and who is responsible for assisting with Departmental purchases, and who has been designated the Purchasing Officer for the purchase in question.

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 February 23, 2009.

TRD-200900778
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-7348

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SUBCHAPTER B. PROCUREMENTS

16 TAC §55.20, §55.30

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed under Texas Government Code, Chapter 2156, which requires state agencies making purchases to adopt the Texas Comptroller of Public Accounts' rules related to bid opening and tabulation; Texas Government Code, Chapter 2161, which requires a state agency to adopt the Texas Comptroller of Public Accounts' rules as the agency's own rules for construction projects and purchases of goods and services; and Texas Government Code, Chapter 2260, which requires each state agency to develop rules to address contract disputes with vendors and to resolve those disputes through negotiation and/or mediation. Finally, the new rules are proposed in accordance with Texas Government Code, Chapters 552 and 2009; and Texas Civil Practice and Remedies Code, Chapters 107 and 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§55.20. Historically Underutilized Businesses Program.

Pursuant to Texas Government Code, Chapter 2161, §2161.003, the Commission adopts by reference the rules of the Texas Comptroller of Public Accounts in 34 TAC Part 1, Chapter 20, Subchapter B.

§55.30. Bid Opening and Tabulation.

(a) The Commission adopts by reference the rules of the Texas Comptroller of Public Accounts in 34 TAC §20.35.

(b) The adoption of this rule is required by Texas Government Code, §2156.005(d).

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 February 23, 2009.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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SUBCHAPTER C. VENDOR PROTESTS

16 TAC §55.40

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed under Texas Government Code, Chapter 2156, which requires state agencies making purchases to adopt the Texas Comptroller of Public Accounts' rules related to bid opening and tabulation; Texas Government Code, Chapter 2161, which requires a state agency to adopt the Texas Comptroller of Public Accounts' rules as the agency's own rules for construction projects and purchases of goods and services; and Texas Government Code, Chapter 2260, which requires each state agency to develop rules to address contract disputes with vendors and to resolve those disputes through negotiation and/or mediation. Finally, the new rules are proposed in accordance with Texas Government Code, Chapters 552 and 2009; and Texas Civil Practice and Remedies Code, Chapters 107 and 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§55.40. Protest Procedures.

(a) A protesting party who wishes to submit a grievance regarding the solicitation, evaluation, or award of a contract may formally protest to the Purchasing Officer. Such protests must be in writing and received by the Purchasing Officer within 10 business days after the protesting party knows, or should have known, of the occurrence of the action which is protested. Filed protests must conform to the requirements of this subsection and subsection (c), and shall be resolved in accordance with the procedure set forth in subsections (d) - (j). Copies of the protest must be mailed, hand-delivered or sent by facsimile transmission to the Purchasing Officer and other interested parties.

(b) In the event of a timely protest under this section, the Department shall not proceed further with the solicitation or with the award of the contract unless the Executive Director, after consultation with the Purchasing Officer and the General Counsel, makes a written determination that the award of the contract without delay is necessary to protect the best interests of the Department and the State.

(c) Formal protest must be sworn and contain:

(1) a specific identification of the statutory or regulatory provision(s) that the action complained of is alleged to have violated;

(2) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in paragraph (1);

(3) a precise statement of the relevant facts;

(4) identification of the issue or issues the protesting party argues must be resolved;

(5) argument and authorities the protesting party offers in support of the protest; and

(6) a statement that copies of the protest have been mailed, hand-delivered or sent by facsimile transmission to the Department and all other identifiable interested parties.

(d) The Purchasing Officer shall have the authority, prior to an appeal to the Executive Director to settle and resolve the dispute concerning the solicitation or award of a contract. The Purchasing Officer may solicit written responses to the protest from interested parties.

(e) If the protest is not resolved by mutual agreement, the Purchasing Officer may proceed, after consultation with the General Counsel, with the issuance of a written determination on the protest as follows:

(1) The Purchasing Officer may determine that no violation of rules or statutes has occurred and shall so inform the protesting party, the Executive Director, and any other interested parties by letter that includes the reasons for the determination.

(2) If the Purchasing Officer determines that a violation of the rules or statutes may have occurred in a case where a contract has not been awarded, the Purchasing Officer shall so inform the protesting party, the Executive Director and other interested parties by letter that includes the reasons for the determination and the appropriate remedial action.

(3) If the Purchasing Officer determines that a violation of the rules or statutes may have occurred in a case where a contract has been awarded, the Purchasing Officer shall so inform the protesting party, the Executive Director and other interested parties by letter that includes the reasons for the determination, which may include a declaration that the contract is void.

(f) The protesting party may appeal a determination of a protest by the Purchasing Officer to the Executive Director. An appeal of the Purchasing Officer's determination must be in writing and must

be received in the Department's office no later than 10 business days after the date of the Purchasing Officer's determination. The appeal shall be limited to a review of the Purchasing Officer's determination. Copies of the appeal must be mailed or delivered by the protesting party to the Purchasing Officer and other interested parties and must contain a certified statement that such copies have been provided.

(g) The Executive Director may confer with the General Counsel in a review of the matter appealed. The Executive Director has the discretion to consider documentation timely submitted by Departmental staff and interested parties. The Executive Director also has the discretion to refer the matter to the Commission for consideration at a regularly scheduled open meeting or may go forward with issuing a written decision on the protest.

(h) If a protest is appealed to the Executive Director under subsection (f) and thereafter is referred to the Commission by the Executive Director under subsection (g), specific requirements apply as follows:

(1) The Executive Director shall deliver copies of the appeal and responses of interested parties, if any, to the Commission.

(2) The Commission may consider documents that Departmental staff or interested parties have submitted and may confer with the General Counsel in their review of the appeal.

(3) The Commission's determination of the appeal shall be made on the record and reflected in the minutes of the open meeting, and shall be final.

(i) A protest or appeal that is not filed timely will not be considered unless good cause for the delay is shown or unless the Executive Director determines that a protest or appeal raises issues significant to procurement practices or procedures.

(j) A decision issued either by the Commission in open meeting, or in writing by the Executive Director, shall be the final administrative action of the Department.

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

Filed with the Office of the Secretary of State on February 23, 2009.

TRD-200900808
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-7348

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SUBCHAPTER D. NEGOTIATION OF CERTAIN CONTRACT DISPUTES

16 TAC §§55.50 - 55.61

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed under Texas Government Code, Chapter 2156, which requires state agencies making purchases to adopt the Texas Comptroller of Public Accounts' rules related to bid opening and tabulation; Texas Government Code, Chapter 2161, which requires a state agency to adopt the Texas Comptroller of Public Accounts' rules as the agency's own rules for construction projects and purchases of goods and services; and Texas Government Code, Chapter 2260, which requires each state agency to develop rules to address contract disputes with vendors and to resolve those disputes through negotiation and/or mediation. Finally, the new rules are proposed in accordance with Texas Government Code, Chapters 552 and 2009; and Texas Civil Practice and Remedies Code, Chapters 107 and 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§55.50. Applicability.

(a) In addition to the words and terms defined in §55.10, other words and terms, when used in this subchapter, shall have the meaning assigned by Texas Government Code, Chapter 2260, unless the context clearly indicates otherwise.

(b) This subchapter applies to claims for breach of contract asserted by a contractor against the Department under Texas Government Code, Chapter 2260.

(c) This subchapter does not apply to contracts:

(1) between the Department and the federal government or its agencies, another state, or another nation;

(2) between the Department and another unit of state government;

(3) between the Department and a local governmental body, or a political subdivision of another state;

(4) between a subcontractor and a contractor;

(5) within the exclusive jurisdiction of state or local regulatory bodies;

(6) within the exclusive jurisdiction of federal courts or regulatory bodies; or

(7) that are funded solely by federal grant funds.

§55.51. Prerequisites to Suit.

The procedures contained in this subchapter and Subchapter E are exclusive and required prerequisites to suit against the Department under Texas Civil Practice and Remedies Code, Chapter 107 and Texas Government Code, Chapter 2260.

§55.52. Sovereign Immunity.

This subchapter does not waive the Department's sovereign immunity to suit or liability.

§55.53. Notice of Claim for Breach of Contract.

(a) A contractor asserting a claim of breach of contract under Texas Government Code, Chapter 2260, shall file notice of the claim as provided by this section.

(b) The notice of claim shall:

(1) be in writing and signed by the contractor or the contractor's authorized representative;

(2) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service, to the Department officer designated in the contract to receive a notice of claim of breach of contract under Texas Government Code, Chapter 2260; if no person is designated in the contract, the notice shall be delivered to the Department; and

(3) state in detail:

(A) the nature of the alleged breach of contract, including the date of the event that the contractor asserts as the basis of the claim and each contractual provision allegedly breached;

(B) a description of damages that resulted from the alleged breach, including the amount and method used to calculate those damages; and

(C) the legal theory of recovery, i.e., breach of contract, including the relationship between the alleged breach and the damages claimed.

(c) The notice of claim shall be delivered no later than 180 days after the date of the event that the contractor asserts as the basis of the claim.

§55.54. Department Counterclaim.

(a) If the Department asserts a counterclaim under Texas Government Code, Chapter 2260, the Department shall file notice of the counterclaim as provided by this section.

(b) The notice of counterclaim shall:

(1) be in writing;

(2) be delivered by hand, certified mail return receipt requested or other verifiable delivery service to the contractor or representative of the contractor who signed the notice of claim of breach of contract; and

(3) state in detail:

(A) the nature of the counterclaim;

(B) a description of damages or offsets sought, including the amount and method used to calculate those damages or offsets; and

(C) the legal theory supporting the counterclaim.

(c) The notice of counterclaim shall be delivered to the contractor no later than 60 days after the Department's receipt of the contractor's notice of claim.

(d) Nothing herein precludes the Department from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

§55.55. Duty to Negotiate.

The parties shall negotiate in accordance with the timetable set forth in §55.56 to attempt to resolve all claims and counterclaims filed under this subchapter. No party is obligated to settle with the other party as a result of the negotiation. The parties may agree to mediate a claim in accordance with Subchapter E.

§55.56. Timetable.

(a) Following receipt of a contractor's notice of claim, the Department or designated representative shall review the contractor's claim and the Department's counterclaim, if any, and initiate negotiations with the contractor to attempt to resolve the claim and counterclaim.

(b) Subject to subsection (c), the parties shall begin negotiations within a reasonable period of time, not to exceed 120 days after the date the Department receives the contractor's notice of claim.

(c) The parties may conduct negotiations according to an agreed schedule as long as they begin negotiations no later than the deadline set forth in subsection (b).

(d) Subject to subsection (e), the parties shall complete the negotiations that are required by this subchapter as a prerequisite to a contractor's request for contested case hearing no later than 270 days after the Department receives the contractor's notice of claim.

(e) The parties may agree in writing to extend the time for negotiations on or before the 270th day after the Department receives the contractor's notice of claim. The agreement shall be signed by representatives of the parties with authority to bind each respective party.

(f) The contractor may request a contested case hearing before the State Office of Administrative Hearings (SOAH) pursuant to §55.61 after the 270th day after the Department receives the contractor's notice of claim, or the expiration of any extension agreed to under subsection (e).

(g) The parties may agree to mediate the dispute at any time before the 120th day after the Department receives the contractor's notice of claim and before the expiration of any extension agreed to by the parties pursuant to subsection (e). The mediation shall be governed by Subchapter E.

(h) Nothing in this section is intended to prevent the parties from commencing negotiations earlier than the deadline established in subsection (b), or from continuing or resuming negotiations after the contractor requests a contested case hearing before SOAH.

§55.57. Conduct of Negotiation.

(a) A negotiation under this division may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties. The parties may conduct negotiations with the assistance of one or more neutral third parties. The parties may choose to mediate their dispute in accordance with Subchapter E.

(b) To facilitate meaningful evaluation and negotiation of the claims and any counterclaims, the parties may exchange relevant documents that support their respective claims, defenses, counterclaims or positions.

(c) The Department may also negotiate, mediate, or settle with a contractor concerning any assertion by a contractor which does not

constitute either a notice of claim or a claim under this subchapter or Texas Government Code, Chapter 2260. Such actions by the Department do not constitute a waiver of sovereign immunity or of statutory or regulatory requirements for a notice of claim.

§55.58. Settlement Approval Procedures.

The parties' settlement approval procedures shall be disclosed prior to, or at the beginning of negotiations. To the extent possible, the parties shall select negotiators who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

§55.59. Settlement Agreement.

(a) A settlement agreement may resolve an entire claim or any designated and severable portion of a claim.

(b) To be enforceable, a settlement agreement must be in writing and signed by the Department, or the Department's authorized representative, and a representative of the contractor who has authority to bind the contractor.

(c) A partial settlement does not waive a contractor's rights under Texas Government Code, Chapter 2260, as to the parts of the claim that are not resolved.

§55.60. Cost of Negotiation.

Unless the parties agree otherwise, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of attorneys' fees, consultant's fees and expert's fees.

§55.61. Contested Case Hearings for Contract Disputes.

(a) If a claim of breach of contract is not resolved in its entirety through negotiation or mediation in accordance with this subchapter or Subchapter E on or before the 270th day after the Department receives the notice of claim, or after the expiration of any extension agreed to by the parties pursuant to §55.56(e), the contractor may file a request with the Department for a contested case hearing before State Office of Administrative Hearings (SOAH).

(b) A request for a contested case hearing must state the legal and factual basis for the claim and must be delivered to the Department within 90 days after the 270th day or the expiration of any written extension agreed to pursuant to §55.56(e).

(c) The Department shall forward the contractor's request for contested case hearing to the SOAH within a reasonable period of time, not to exceed 30 days, after receipt of the request. Referral of a request for hearing to SOAH does not constitute waiver by the Department of statutory or regulatory requirements for the notice of claim, the claim, or the request for hearing.

(d) The parties may agree to submit the case to the SOAH before the 270th day after the notice of claim is received by the Department if they have achieved a partial resolution of the claim or if an impasse has been reached in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

(e) Contested case hearings shall be conducted in compliance with Texas Government Code, Chapter 2260, this subchapter, and the rules and procedures of the SOAH applicable to hearings on contract claims.

(f) Provisions of Chapter 60 of this title, regarding requests for and conduct of contested case hearings, do not apply to hearings conducted under this subchapter.

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

Filed with the Office of the Secretary of State on February 23, 2009.

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William H. Kuntz, Jr.
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Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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SUBCHAPTER E. MEDIATION OF CERTAIN CONTRACT DISPUTES

16 TAC §§55.70 - 55.82

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed under Texas Government Code, Chapter 2156, which requires state agencies making purchases to adopt the Texas Comptroller of Public Accounts' rules related to bid opening and tabulation; Texas Government Code, Chapter 2161, which requires a state agency to adopt the Texas Comptroller of Public Accounts' rules as the agency's own rules for construction projects and purchases of goods and services; and Texas Government Code, Chapter 2260, which requires each state agency to develop rules to address contract disputes with vendors and to resolve those disputes through negotiation and/or mediation. Finally, the new rules are proposed in accordance with Texas Government Code, Chapters 552 and 2009; and Texas Civil Practice and Remedies Code, Chapters 107 and 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment

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

§55.70. Applicability.

(a) In addition to the words and terms defined in §55.10, other words and terms, when used in this subchapter, shall have the meaning assigned by Texas Government Code, Chapter 2260, unless the context clearly indicates otherwise.

(b) This subchapter applies to claims for breach of contract asserted by a contractor against the Department under Texas Government Code, Chapter 2260.

(c) This subchapter does not apply to contracts:

(1) between the Department and the federal government or its agencies, another state, or another nation;

(2) between the Department and another unit of state government;

(3) between the Department and a local governmental body, or a political subdivision of another state;

(4) between a subcontractor and a contractor;

(5) within the exclusive jurisdiction of state or local regulatory bodies;

(6) within the exclusive jurisdiction of federal courts or regulatory bodies; or

(7) that are funded solely by federal grant funds.

§55.71. Prerequisites to Suit.

The procedures contained in this subchapter and Subchapter D are exclusive and required prerequisites to suit against the Department under Texas Civil Practice and Remedies Code, Chapter 107 and Texas Government Code, Chapter 2260.

§55.72. Sovereign Immunity.

This subchapter does not waive the Department's sovereign immunity to suit or liability.

§55.73. Mediation.

The parties may agree to mediate, through an impartial third party who is acceptable to both parties, a claim filed under Subchapter D. The parties may be assisted in the mediation by legal counsel or other individual.

§55.74. Appointment of the Mediator.

(a) For each claim referred for mediation, the ADR Administrator shall:

(1) preside over the mediation proceeding;

(2) assign a Departmental mediator;

(3) appoint a mediator from another state agency; or

(4) appoint a private mediator.

(b) A private mediator may be hired provided that:

(1) the parties unanimously agree to use a private mediator;

(2) the parties unanimously agree to the selection of the person to serve as the private mediator; and

(3) the private mediator agrees to be subject to the direction of the ADR Administrator and to all time limits imposed by the ADR Administrator, statute or regulation.

(c) If a private mediator or a mediator from another state agency is used, the costs for the services of the mediator shall be apportioned equally among the parties, unless otherwise agreed upon by the parties, and shall be paid directly to the mediator.

(d) Unless the parties agree otherwise in writing, each party shall be responsible for its own costs incurred in connection with the mediation, including without limitation, costs of document reproduction, attorney's fees, consultant fees and expert fees.

(e) The ADR Administrator may assign a substitute or additional mediator to a proceeding as the ADR Administrator deems necessary.

§55.75. Qualifications of the Mediator.

(a) All mediators must have completed a minimum of 40 hours of Texas mediation training as prescribed under Texas Civil Practices and Remedies Code, Chapter 154.

(b) All mediators shall subscribe to the ethical guidelines for mediators adopted by the ADR Section of the State Bar of Texas.

§55.76. Disqualifications of the Mediator.

(a) If the mediator is a State Office of Administrative Hearings ALJ, that person will not also sit as the ALJ for the case if the claim goes to hearing.

(b) If the mediator is an employee of the Department and the dispute does not settle, that mediator will not have any further contact or involvement concerning the claim.

§55.77. Qualified Immunity of the Mediator.

The mediator shall have the qualified immunity prescribed by the Texas Civil Practice and Remedies Code §154.055, if applicable.

§55.78. Confidentiality of Mediation and Final Settlement Agreement.

(a) A mediation conducted under this division is confidential in accordance with Texas Government Code, §2009.054 and Texas Civil Practice and Remedies Code §154.053 and §154.073.

(b) The confidentiality of a final settlement agreement, to which the Department is a signatory that is reached as a result of the mediation is governed by the Public Information Act, Texas Government Code, Chapter 552.

§55.79. Settlement Approval Procedures.

The parties' settlement approval procedures shall be disclosed by the parties prior to the mediation. To the extent possible, the parties shall select representatives who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

§55.80. Initial Settlement Agreement.

Any settlement agreement reached during mediation shall be signed by representatives of the contractor and the Department, and shall describe any procedures that the parties must follow to obtain final and binding approval of the agreement.

§55.81. Final Settlement Agreement.

A final settlement agreement reached during or as a result of a mediation that resolves an entire claim or counterclaim, or any designated and severable portion of a claim or counterclaim, shall comply with §55.59.

§55.82. Referral to State Office of Administrative Hearings.

If mediation does not resolve the claim to the satisfaction of the contractor, the contractor may request that the claim be referred to State Office of Administrative Hearings in accordance with §55.61.

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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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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CHAPTER 60. TEXAS COMMISSION OF LICENSING AND REGULATION

The Texas Department of Licensing and Regulation ("Department") proposes the repeal of existing rules at 16 Texas Administrative Code Chapter 60, §§60.1, 60.10, 60.60 - 60.66, 60.80 - 60.84, 60.100, 60.101, 60.150 - 60.160, 60.170 - 60.173, 60.200, 60.210, 60.220, 60.230, 60.240, and 60.241; and proposes new rules §§60.1, 60.10, 60.20 - 60.24, 60.30, 60.31, 60.40, 60.50 - 60.54, 60.80 - 60.83, 60.100 - 60.102, 60.200, 60.300 - 60.311, and 60.400 - 60.409, regarding procedural rules related to the Texas Commission of Licensing and Regulation ("Commission") and the Department.

JUSTIFICATION

The current rules at 16 TAC Chapter 60 implement the statutory requirements under Texas Occupations Code, Chapter 51, the enabling statute for the Commission and the Department. As the result of a rule review conducted in accordance with Texas Government Code §2001.039 see the October 12, 2008, issue of the *Texas Register* (33 TexReg 8562). The Department is proposing that the current rules be repealed and replaced with two new rule chapters. The Department has determined that these changes are necessary to ensure that the rules: (1) include and accurately reflect all of the requirements of Texas Occupations Code, Chapter 51 and other statutes affecting state agencies; (2) reflect the Commission's and the Department's current policies, procedures and practices; and (3) do not contain provisions that are more appropriately located elsewhere, such as an employee handbook.

EXPLANATION OF NEW RULES

The current rules at 16 TAC Chapter 60 address the responsibilities of the Commission and the Department, and include provisions addressing licensees, applicants, vendors and potential contractors. Proposed new Chapter 55, which is published in the Proposed Rules section of this issue of the *Texas Register,* addresses administrative services issues including procurements, contracts, and vendor contract disputes. Proposed new Chapter 60 addresses the role and responsibilities of the Commission and the Department and various issues involving licensees, license applicants, and other interested parties. The proposed new rules include many of the provisions found in the current Chapter 60 rules, which are being repealed.

Proposed new Chapter 60 has 10 subchapters. Subchapter A states the statutory authority for adopting rules and provides definitions used in the chapter. Subchapter B provides details regarding the powers and responsibilities of the Commission and the Department and provides information regarding public meetings and advisory boards. Subchapter C provides details regarding the statutory authority of the Department to issue and renew licenses and documents current licensing practices and procedures that are applicable to all licensing programs.

Subchapter D documents the Commission's and Department's authority under Texas Occupations Code, Chapter 53 to deny an initial or renewal license application, to suspend or revoke a current license, or to deny a person the opportunity to take an examination if the person has a criminal conviction. Subchapter E provides information regarding examinations including rescheduling, security, and results. Subchapter F sets out the fees that are applicable for all programs.

Subchapter G addresses the rulemaking authority of the Commission and the Department. Subchapter H provides information regarding the Department's complaint handling processes. Subchapter I sets out the processes and procedures for contested cases. Subchapter J reflects the agency's use of mediation to resolve disputes in contested cases.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed repeal and new rules are in effect, there will be no direct cost to state or local government as a result of enforcing or administering the proposed rules.

PUBLIC BENEFITS

Mr. Kuntz also has determined that for each year of the first five-year period the proposed repeal and new rules are in effect, the public benefit will be rules that provide more information to the public and that reflect the current policies, practices and procedures of the Commission and the Department. In addition, because of the structure and organization of the proposed new rules, it should be easier for licensees, applicants, and the general public to find the specific information they are searching for in the rules.

PROBABLE ECONOMIC COSTS

Mr. Kuntz has determined that there are no anticipated economic costs to small or micro-businesses or to persons who are required to comply with the repeal and new rules as proposed.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

Since the agency has determined that the rules will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

PUBLIC COMMENTS

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

SUBCHAPTER A. AUTHORITY AND RESPONSIBILITIES

16 TAC §60.1, §60.10

(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 Licensing and Regulation or in the Texas

Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The repeal is proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.1. Authority.
§60.10. Definitions.

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 February 23, 2009.

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William H. Kuntz, Jr.
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Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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SUBCHAPTER B. ORGANIZATION

16 TAC §§60.60 - 60.66

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

The repeal is proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The repeal is proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.60. Responsibilities of the Commission--General Provisions.
§60.61. Responsibilities of the Commission--Meetings.
§60.62. General Powers and Duties of the Commission.
§60.63. Responsibilities of the Department and Executive Director.
§60.64. Duration of Advisory Committee/Boards/Councils.
§60.65. Petition for Adoption of Rules.
§60.66. Negotiated Rulemaking.

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. FEES

16 TAC §§60.80 - 60.84

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

The repeal is proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The repeal is proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.80. Program Fees.

§60.81. Charges for Providing Copies of Public Information.

§60.82. Dishonored Check Fee.

§60.83. Late Renewal Fees.

§60.84. Examination Fee Refund or Examination Rescheduling.

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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William H. Kuntz, Jr.
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Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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SUBCHAPTER D. PRACTICE AND PROCEDURE

16 TAC §§60.100, 60.101, 60.150 - 60.160, 60.170 - 60.173

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

The repeal is proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The repeal is proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.100. Purpose and Scope.

§60.101. Filing, Computation of Time, and Notice.

§60.150. Disposition by Agreement.

§60.151. Alternative Dispute Resolution.

§60.152. Referral of Contested Matter for Alternative Dispute Resolution Procedures.

§60.153. Appointment of Mediator.

§60.154. Qualifications of Mediators.

§60.155. Commencement of ADR.

§60.156. Stipulations.

§60.157. Agreements.

§60.158. Confidentiality.

§60.159. Place and Nature of Hearings.

§60.160. Failure to Attend Hearing and Default.

§60.170. The Adjudicative Hearing Record.

§60.171. Proposals for Decision.

§60.172. Filing of Exceptions and Replies.

§60.173. Final Orders, Motions for Rehearing, and Emergency Orders.

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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William H. Kuntz, Jr.
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SUBCHAPTER E. ADMINISTRATION
DIVISION 1. VEHICLES

16 TAC §60.200

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

The repeal is proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The repeal is proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.200. Assignment and Use of Agency Vehicles.

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

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DIVISION 2. TRAINING

16 TAC §60.210

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

The repeal is proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The repeal is proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.210. Employee Training and Education.

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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William H. Kuntz, Jr.
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DIVISION 3. HISTORICALLY UNDERUTILIZED BUSINESSES

16 TAC §60.220

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

The repeal is proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The repeal is proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.220. Historically Underutilized Businesses 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.

Filed with the Office of the Secretary of State on February 23, 2009.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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DIVISION 4. BID OPENING AND TABULATION

16 TAC §60.230

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

The repeal is proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The repeal is proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.230. Bid Opening and Tabulation.

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

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DIVISION 5. VENDOR PROTESTS

16 TAC §60.240, §60.241

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

The repeal is proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The repeal is proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.240. Definitions.

§60.241. Protest Procedures.

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 60. PROCEDURAL RULES OF THE COMMISSION AND THE DEPARTMENT
SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §60.1, §60.10

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed in accordance with Texas Occupations Code, Chapters 53 and 55; Texas Government Code, Chapters 551, 552, 2001, 2008, 2009, and 2110; and Texas Civil Practice and Remedies Code, Chapter 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.1. Authority.

This chapter is promulgated under the authority of Texas Occupations Code, Chapter 51. This chapter applies except in the event of a conflict with other statutory provisions related to specific programs regulated by the Commission and the Department.

§60.10. Definitions.

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

(1) Advisory Board--A board, committee, council, or other body that is established by law to advise the Commission or Department on rules, policies, and/or technical matters.

(2) ALJ--Administrative law judge employed by the State Office of Administrative Hearings.

(3) Alternative Dispute Resolution (ADR) Administrator--The trained coordinator designated by the Commission:

(A) to coordinate and oversee the negotiated rulemaking and ADR procedures used by the Department;

(B) to serve as a resource for any training needed to implement the negotiated rulemaking and ADR procedures; and

(C) to collect data concerning the effectiveness of the negotiated rulemaking and ADR procedures. The ADR Administrator also may conduct ADR proceedings.

(4) Alternative Dispute Resolution (ADR) Procedures--Alternative processes to judicial forums or administrative agency contested case proceedings for the voluntary settlement of contested matters through the facilitation of an impartial third-party.

(5) APA--The Administrative Procedure Act (Texas Government Code, Chapter 2001).

(6) Applicant--Any person seeking a license from the Department.

(7) Commission--Texas Commission of Licensing and Regulation.

(8) Complainant--Any person who has filed a complaint with the Department against any person whose activities are subject to the jurisdiction of the Department.

(9) Contested case or proceeding--A proceeding in which the legal rights, duties, or privileges of a party are to be determined by the Commission and/or Executive Director after an opportunity for adjudicative hearing.

(10) Department--Texas Department of Licensing and Regulation.

(11) Director of Enforcement--The person who directs and oversees investigations, prosecutions, and other activities of the enforcement division of the Texas Department of Licensing and Regulation.

(12) Emergency--Any of the following events that prevent a person from taking a scheduled examination:

(A) death of a spouse or family member within the second degree of consanguinity;

(B) personal medical necessity;

(C) medical necessity of a spouse or dependent; or

(D) severe weather or act of God that prevents the person from reaching the examination site.

(13) Executive Director--The head administrative official of the Texas Department of Licensing and Regulation.

(14) Final Decision Maker--The Commission and/or the Executive Director, both of whom are authorized by law to render the final decision in a contested case.

(15) License--A license, certificate, registration, title, commission, or permit issued by the Department.

(16) License holder--A person who holds a license issued by the Department.

(17) Mediation--A confidential, informal dispute resolution process in which an impartial person, the mediator, facilitates communication between or among the parties to promote reconciliation, settlement, or understanding among them.

(18) Mediator--The person who presides over a mediation. The mediator shall encourage and assist the parties in reaching a settlement but may not compel or coerce the parties to enter into a settlement agreement. The mediator may be a Department employee, an employee from another Texas state agency, or a person in the mediation profession who is not a Texas state employee ("private mediator").

(19) Negotiated Rulemaking--A consensus-based process in which the Department develops a proposed rule by using a neutral facilitator and a balanced negotiating committee composed of representatives of all interests that the rule will affect including those interests represented by the Department itself. See Negotiated Rulemaking Act, Texas Government Code, Chapter 2008.

(20) Party--A person admitted to participate in a contested case.

(21) Penalty or Administrative Penalty--A monetary fine imposed by the Commission or the Executive Director on a licensee or other person who has violated this chapter or a statute or rule governing a program regulated by the Department.

(22) Person--Any individual, partnership, corporation, or other legal entity, including a state agency or governmental subdivision.

(23) Pleading--A written document submitted by a party, or a person seeking to participate in a case as a party, which requests procedural or substantive relief, makes claims, alleges facts, makes legal argument, or otherwise addresses matters involved in the case.

(24) Presiding Officer--The Commission member designated by the Governor to serve as the lead Commission official as defined under Texas Occupations Code, §51.056.

(25) Respondent--Any person, regardless of whether the person is licensed or unlicensed, who is charged with violating a law establishing a regulatory program administered by the Department or a rule adopted by or an order issued by the Commission or the Executive Director.

(26) Rule--Any Commission statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the Department or Commission.

(27) Sanction--An action by the Commission or Executive Director against a license holder or another person, including the denial, suspension, or revocation of a license, the reprimand of a license holder, the placement of a license holder on probation, or refusal to renew.

(28) SOAH--State Office of Administrative Hearings.

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 B. POWERS AND RESPONSIBILITIES

16 TAC §§60.20 - 60.24

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed in accordance with Texas Occupations Code, Chapters 53 and 55; Texas Government Code, Chapters 551, 552, 2001, 2008, 2009, and 2110; and Texas Civil Practice and Remedies Code, Chapter 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.20. General Powers and Duties of the Commission.

(a) The Commission shall have primary responsibility for policy-making activities including but not limited to:

(1) setting fees;

(2) adopting rules;

(3) imposing sanctions and penalties; and

(4) issuing final orders in contested cases.

(b) The Commission shall have the sole responsibility for the adoption of rules proposed by the Department or the Commission.

(c) The Commission shall provide reasonable accommodations, as required by the Americans with Disabilities Act of 1990, Public Law 101-336 and any subsequent amendments, for the public to participate in the programs regulated by the Department.

(d) Upon request, the Commission shall provide reasonable access to persons who do not speak English to the programs regulated by the Department.

§60.21. Commission Meetings--Procedures.

(a) Every regular, special, or called meeting of the Commission shall be open to the public as provided by the Government Code, Chapter 551 ("the Open Meetings Act").

(b) Meetings will be conducted according to the current edition of *Robert's Rules of Order Newly Revised* in all instances to which they are applicable as long as they are not inconsistent with the constitution, the statutes and the rules of the Commission. Any *Robert's Rules of Order Newly Revised* may be modified as deemed necessary by the presiding officer for the proper conduct of the meeting subject to an objection by a Commission member.

(c) A quorum for the Commission is a majority of all the members of the Commission as designated by statute. When a quorum is present, a motion before the Commission is carried by an affirmative vote of the majority of the Commissioner members present that are participating in the vote.

(d) The presiding officer may limit the number and length of comments provided on any item on the agenda subject to an objection from a Commission member.

(e) As a member of the Commission, the presiding officer may make motions without the necessity of relinquishing the chair subject to an objection from a Commission member.

(f) The Commission shall provide the public with a reasonable opportunity to appear before the Commission and to speak on any issue under the Commission's jurisdiction. Persons wishing to speak at a Commission meeting may sign in at the beginning of the meeting and may speak during the public comment portion of the meeting.

§60.22. General Powers and Duties of the Department and the Executive Director.

(a) The Executive Director shall have primary responsibility to manage the operations and administration of the Department as provided by Texas Occupations Code Chapter 51 and other applicable law, including but not limited to:

(1) issuing licenses;

(2) resolving complaints;

(3) conducting investigations and inspections;

(4) imposing agreed order sanctions and administrative penalties; and

(5) administering exams.

(b) The Executive Director may approve agreed orders in contested cases and shall have authority to issue other orders as provided by law or as delegated by the Commission.

(c) The Executive Director may propose rules for publication in the *Texas Register* as delegated by the Commission.

(d) The Executive Director may implement any emergency orders or proclamations issued by the Governor to suspend or amend existing statutes and rules. The Executive Director will notify the Commission of the Department's actions to comply with the Governor's emergency orders or proclamations.

§60.23. Commission and Executive Director--Imposing Sanctions and Penalties.

(a) The Commission or Executive Director may deny a license application or license renewal, or suspend or revoke any license, if:

(1) the license was obtained or attempted to be obtained by fraud or false representation;

(2) any required documents submitted as part of the initial or renewal application packet are falsified;

(3) the person refused to permit or interfered with an inspection or investigation by an authorized representative of the Commission or Executive Director;

(4) the person permitted the use or display of his license by a person not authorized by law to use that license;

(5) the person has been convicted of a crime or an offense that carries the possibility of confinement in a state or federal facility; or

(6) the person violates a law establishing a regulatory program administered by the Department, or a rule or order of the Commission or the Department.

(b) The Commission or Executive Director shall consider the factors set forth in Texas Occupations Code, §51.302(b) and may:

(1) issue a written reprimand to the person that specifies the violation;

(2) revoke, suspend, or deny the person's license;

(3) place on probation a person whose license has been suspended;

(4) refuse to renew the person's license; or

(5) impose administrative penalties on the person.

(c) If the suspension of a license is probated, the Commission or Executive Director may require the person to:

(1) report regularly to the Executive Director on matters that are the basis of the probation;

(2) limit practice to the areas prescribed by the Commission or Executive Director;

(3) complete professional education until the person attains a degree of skill satisfactory to the Commission or Executive Director in those areas that are the basis for the probation; or

(4) complete any other remedial actions agreed to by the parties.

(d) If a person has outstanding or unpaid administrative penalties, which were imposed by the Commission or the Executive Director, the Department may place a hold on the person's license and the person will not be able to renew the license until the administrative penalties are paid.

§60.24. Advisory Boards.

(a) Unless otherwise provided by law, the presiding officer of the Commission, with the Commission's approval, shall appoint the members of each advisory board.

(b) The purpose, duties, manner of reporting, and membership requirements of each advisory board are detailed in the statutes and rules of the specific program regulated by the Department.

(c) In accordance with Texas Government Code, §2110.008, the Commission establishes the following periods during which the advisory boards listed will continue in existence. The automatic abolishment date of each advisory board will be the date listed for that board unless the Commission subsequently establishes a different date:

(1) Advisory Board on Barbering--09/01/2010;

(2) Advisory Board on Cosmetology--09/01/2010;

(3) Architectural Barriers Advisory Committee--09/01/2010;

(4) Air Conditioning and Refrigeration Advisory Council--09/01/2010;

(5) Auctioneer Education Advisory Board--09/01/2010;

(6) Board of Boiler Rules--09/01/2010;

(7) Electrical Safety and Licensing Advisory Board--09/01/2010;

(8) Elevator Advisory Board--09/01/2010;

(9) Licensed Court Interpreter Advisory Board--09/01/2010;

(10) Medical Advisory Committee--09/01/2010;

(11) Property Tax Consultants Advisory Council--09/01/2010;

(12) Towing and Storage Advisory Board--09/01/2010;

(13) Vehicle Protection Product Warrantor Advisory Board--09/01/2010;

(14) Water Well Drillers Advisory Council--09/01/2010; and

(15) Weather Modification Advisory Committee--09/01/2010.

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. LICENSE APPLICATIONS

16 TAC §60.30, §60.31

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed in accordance with Texas Occupations Code, Chapters 53 and 55; Texas Government Code, Chapters 551, 552, 2001, 2008, 2009, and 2110; and Texas Civil Practice and Remedies Code, Chapter 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.30. Initial License Applications.

(a) All license applications must be submitted on Department-approved forms.

(b) An applicant must complete all licensure requirements within one year of the date the application is received by the Department, or the application shall be deemed void.

(c) If the applicant does not meet the deadline established in subsection (b), the applicant must reapply for a new license by complying with the requirements and procedures, including any examination requirements and payment of fees.

§60.31. License Renewal Applications.

(a) All license renewal applications must be submitted on Department-approved forms.

(b) A license holder will be notified by the Department, not later than the 30th day before the date a person's license is scheduled to expire, of impending expiration of the license.

(c) Non-receipt of a license renewal notice from the Department does not exempt a person from any requirements of this chapter or the chapter governing the specific program.

(d) To renew and maintain continuous licensure, the license holder must complete all of the renewal requirements under this chapter and the chapter governing the specific program, including continuing education requirements, prior to the expiration of the license.

(e) A complete renewal application, along with applicable fees, must be filed with the Department or postmarked prior to license expiration to avoid payment of a late renewal fee.

(f) Any continuing education that is required to be fulfilled as part of the renewal application must be completed prior to the license expiration date to avoid payment of a late renewal fee.

(g) A late renewal, if available, means the license holder will have an unlicensed period from the expiration date of the expired license to the issuance date of the renewed license. During the unlicensed period, a person may not perform any act that requires a license under this chapter or the chapter governing the specific program.

(h) A license holder must complete all license renewal requirements within one year of the date the license expires, or the renewal application shall be deemed void.

(i) If the licensee does not meet the deadline established in subsection (h), the person must reapply for a new license by complying with the requirements and procedures, including any examination requirements and payment of 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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SUBCHAPTER D. CRIMINAL CONVICTIONS

16 TAC §60.40

STATUTORY AUTHORITY

The new rule is proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed in accordance with Texas Occupations Code, Chapters 53 and 55; Texas Government Code, Chapters 551, 552, 2001, 2008, 2009, and 2110; and Texas Civil Practice and Remedies Code, Chapter 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water

Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.40. Individuals with Criminal Convictions.

(a) Texas Occupations Code, Chapter 53 provides that the Commission or Executive Director may suspend or revoke an existing license, disqualify a person from receiving a license, or deny to a person the opportunity to be examined for a license because of a person's conviction of a felony or misdemeanor if the crime directly relates to duties and responsibilities of a licensee. This subsection applies to persons who are not imprisoned at the time the Commission or Executive Director considers the conviction.

(b) A person currently incarcerated because of a felony conviction may not sit for a license examination, obtain a license, or renew a previously issued license under this chapter or any statute governing a program regulated by the Department.

(c) A person whose license is revoked by operation of law under Texas Occupations Code, §53.021(b) must wait until release from imprisonment before applying for a new license.

(d) In considering whether a criminal conviction directly relates to the duties and responsibilities of the occupation for which the person is applying, the Commission and/or Executive Director shall consider the factors listed in Texas Occupations Code, §53.022 and the Criminal Conviction Guidelines established in accordance with Texas Occupations Code, §53.025.

(e) In determining the present fitness of a person who has been convicted of a crime, the Commission and/or Executive Director shall consider the factors and guidelines referenced in subsection (d) and the factors listed in Texas Occupations Code, §53.023.

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SUBCHAPTER E. EXAMINATIONS

16 TAC §§60.50 - 60.54

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed in accordance with Texas Occupations Code, Chapters 53 and 55; Texas Government Code, Chapters 551, 552, 2001, 2008, 2009, and 2110; and Texas Civil Practice and Remedies Code, Chapter 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.50. Examination Rescheduling.

A person may reschedule an examination at no charge if the person:

(1) notifies the examination provider at least two days prior to the date of the examination; or

(2) provides the Department, as soon as possible, with documentation acceptable to the Department of the person's inability to take the examination because of an emergency.

§60.51. Examination Fee Refund.

To obtain a refund of an examination fee, a person who is unable to take the examination must:

(1) provide written notice to the Department not less than 10 days prior to the date of the examination; or

(2) provide the Department, as soon as possible, with documentation acceptable to the Department of the person's inability to take the examination because of an emergency.

§60.52. Examination Security.

(a) When an examination is required to obtain a license, an applicant or prospective applicant may make use of only such assistance as is available and authorized for all persons taking the examination. A person who uses or provides unauthorized assistance in connection with an examination violates this section. Conduct that violates this section includes but is not limited to the following:

(1) obtaining or attempting to obtain from any source examination questions or answers for use by an applicant, prospective applicant, or any other person, including a person associated with a school or examination preparation course;

(2) providing or attempting to provide examination questions or answers to an applicant, prospective applicant, or any other person, including a person associated with a school or examination preparation course;

(3) presenting a falsified or fraudulent document to gain entry to an examination;

(4) presenting a falsified or fraudulent document concerning an individual's results from an examination;

(5) taking an examination for another person;

(6) as an applicant or prospective applicant, knowingly allowing another person to take an examination for the applicant or prospective applicant;

(7) while taking an examination, using any materials not authorized by the Department or testing service for use in the examination, including but not limited to notes or study aides;

(8) bringing to the examination site or leaving the examination site with examination questions or answers obtained from the current examination or from previous examination attempts;

(9) while taking an examination, communicating with any person, other than an authorized representative of the Department or testing service, about the examination; or

(10) for open book examinations, bringing any materials into the examination, including hand-written notes in approved reference materials, other than those materials approved by the Department or testing service.

(b) The contents of any examination that is required for the issuance of a Department license are confidential.

§60.53. Access to Examinations.

(a) Reasonable accommodation for examinations will be made available as required by the Americans with Disabilities Act of 1990, Public Law 101-336.

(b) Upon request, examinations may be offered in a foreign language at the expense of the requestor.

§60.54. Examination Results.

(a) Examination results are valid for one year from the date of the examination, unless stated otherwise in specific program statutes or rules.

(b) An applicant who fails to meet the time period prescribed by subsection (a) must reapply to retake the examination.

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

Filed with the Office of the Secretary of State on February 23, 2009.

TRD-200900795
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-7348

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SUBCHAPTER F. FEES

16 TAC §§60.80 - 60.83

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed in accordance with Texas Occupations Code, Chapters 53 and 55; Texas Government Code, Chapters 551, 552, 2001, 2008, 2009, and 2110; and Texas Civil Practice and Remedies Code, Chapter 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.80. Program Fees.

(a) Most fees set by the Commission are published in the rules relating to the statutes assigned to the Department. These program fees include fees for initial applications, renewals, duplicate licenses, examinations, and any other fees specific to a particular program.

(b) All program fees are non-refundable unless stated otherwise.

§60.81. Charges for Providing Copies of Public Information.

In providing public information the Department adheres to the standards for cost of copies as adopted under 1 TAC Part 3, Chapter 70, §§70.1 - 70.12.

§60.82. Dishonored Check Fee.

If a check, drawn to the Texas Department of Licensing and Regulation is dishonored by a payor, the Department shall charge a fee of $50 to the drawer or endorser for processing the dishonored check. The Department shall notify the drawer or endorser of the fee by sending a request for payment of the dishonored check and the processing fee by certified mail to the last known business address of the person as shown in the records of the Department. If the Department has sent a request for payment in accordance with the provisions of this section, the failure of the drawer or endorser to pay the processing fee within 15 days after the Department has mailed the request is a violation of these rules and subject to enforcement.

§60.83. Late Renewal Fees.

(a) A person whose license has been expired for 90 days or less may renew the license by paying a late renewal fee equal to 1 and 1/2 times the renewal fee.

(b) A person whose license has been expired for more than 90 days but less than one year may renew the license by paying a late renewal fee equal to two times the renewal fee.

(c) A person paying a late renewal fee is not required to pay the renewal fee in addition to the late renewal fee.

(d) Pursuant to Texas Occupations Code, §55.002, an individual who fails to renew a license in a timely manner is exempt from the requirement to pay a late renewal fee and is not subject to any other penalty as a result of failing to renew the license in a timely manner if the individual furnishes to the Department satisfactory documentation that the individual failed to renew the license in a timely manner because the individual was on active duty in the United States armed forces serving outside this state. An individual to whom this subsection applies may renew the license by paying the renewal fee.

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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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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SUBCHAPTER G. RULEMAKING

16 TAC §§60.100 - 60.102

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed in accordance with Texas Occupations Code, Chapters 53 and 55; Texas Government Code, Chapters 551, 552, 2001, 2008, 2009, and 2110; and Texas Civil Practice and Remedies Code, Chapter 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.100. Rulemaking.

The Commission and the Department will follow the rulemaking procedures established in the Administrative Procedures Act (Texas Government Code, Chapter 2001), except when §60.101 of this subchapter is applicable.

§60.101. Negotiated Rulemaking.

(a) It is the Commission's policy to engage in negotiated rulemaking procedures under Texas Government Code, Chapter 2008, when appropriate. When the Commission finds that proposed rules are likely to be complex, or controversial, or to affect disparate groups, negotiated rulemaking may be proposed.

(b) When negotiated rulemaking is proposed, the Commission will appoint a convener to assist in determining whether it is advisable to proceed. The convener shall perform the duties and responsibilities contained in Texas Government Code, Chapter 2008.

(c) If the convener recommends proceeding with negotiated rulemaking and the Commission adopts the recommendation, the Department shall initiate negotiated rulemaking according to the provisions of Texas Government Code, Chapter 2008.

§60.102. Petition for Adoption of Rules.

Any interested party may request adoption of a rule(s) by submitting a letter of request to the Department with a draft of the rule(s) attached. As a minimum the request should contain:

(1) items to be deleted should be bracketed or lined through;

(2) items added should be underlined; and

(3) the rationale for the requested rule change.

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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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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SUBCHAPTER H. COMPLAINT HANDLING

16 TAC §60.200

STATUTORY AUTHORITY

The new rule is proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed in accordance with Texas Occupations Code, Chapters 53 and 55; Texas Government Code, Chapters 551, 552, 2001, 2008, 2009, and 2110; and Texas Civil Practice and Remedies Code, Chapter 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.200. Complaints.

(a) Complaints against a person or entity regulated by the Department are accepted in all forms, and under all circumstances, except as provided under subsection (b).

(b) A complaint must be filed within two years of the event giving rise to the complaint. Complaints filed after the above stated period will not be accepted by the Department unless the complainant can show good cause to the Executive Director for the late filing.

(c) Unless stated otherwise in the statutes or rules governing a specific program regulated by the Department, the Executive Director shall require license holders to notify consumers and service recipients of the name, mailing address, and telephone numbers of the Department for purposes of directing complaints to the Department. The notification shall be included on:

(1) the written contract for services of an individual or entity regulated by the Department;

(2) a sign prominently displayed in the place of business of each individual or entity regulated by the Department if the consumers or service recipients must visit the place of business for said service or products; and

(3) a bill for service provided by an individual or entity regulated by the Department.

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

Filed with the Office of the Secretary of State on February 23, 2009.

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William H. Kuntz, Jr.
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Texas Department of Licensing and Regulation
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SUBCHAPTER I. CONTESTED CASES

16 TAC §§60.300 - 60.311

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed in accordance with Texas Occupations Code, Chapters 53 and 55; Texas Government Code, Chapters 551, 552, 2001, 2008, 2009, and 2110; and Texas Civil Practice and Remedies Code, Chapter 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.300. Purpose and Scope.

(a) Unless otherwise provided by statute or by the provisions of this subchapter, this subchapter will govern the institution, conduct, and determination of all contested cases under the APA.

(b) SOAH acquires jurisdiction over a contested case at certain stages of the adjudicative matter, as prescribed under the APA. SOAH's rules of procedure, 1 TAC Chapter 155, govern during the period when SOAH has jurisdiction over the contested case.

(c) In the case of a conflict between SOAH's rules of procedure and the rules in this subchapter, SOAH's rules of procedure will control for the time period starting after the Request to Docket Case form has been filed and concluding after the final amendments or corrections to the proposal for decision have been filed.

(d) The rules in this subchapter shall not be construed so as to enlarge, diminish, modify, or otherwise alter the jurisdiction, powers, or authority of the Commission, the Executive Director, or the substantive rights of any person or agency.

§60.301. Filing of Documents.

(a) The original of all pleadings and other documents requesting action or relief in a contested case, shall be filed with SOAH once it acquires jurisdiction. Pleadings, other documents, and service to SOAH shall be directed to the Docketing Division of the State Office of Administrative Hearings at its address in Austin, Texas. The time and date of filing shall be determined by the file stamp affixed by SOAH. Unless otherwise ordered by the ALJ, only the original and no additional copies of any pleading or document shall be filed.

(b) Unless otherwise provided by law, after a proposal for decision has been issued, originals of documents requesting relief, such as exceptions to the proposal for decision or requests to reopen the hearing, shall be filed with the Department's Executive Director and/or Commission and a copy served on the Department's enforcement division, at their address in Austin, Texas; or by facsimile if the documents contain 20 or fewer pages including exhibits. Filings may be made until 5:00 p.m. on business days. Copies shall be filed with SOAH.

§60.302. Notice of Alleged Violations.

(a) If, after investigation of a possible violation and the facts surrounding that possible violation, the Department determines that a violation has occurred, the Department shall issue a notice of the alleged violation, stating the facts on which the conclusion that a violation occurred is based, recommending that an administrative penalty or administrative sanction, or both, be imposed on the person charged, and recommending the amount of that proposed penalty and/or type of sanction.

(b) The written Notice of Alleged Violation shall include:

(1) a brief summary of the alleged violation(s);

(2) a statement of the amount of the penalty and/or sanction recommended; and

(3) a statement that the Respondent has the right to a hearing to contest the alleged violation, the amount of the recommended penalty and/or sanction, or both.

(c) Not later than the 20th day after the date on which the notice is received, the Respondent may accept the determination of the Department, including the recommended penalty and/or sanction, or make a written request for a hearing on that determination. There is a rebuttable presumption that notice is received three days after the notice is mailed. Upon receipt of a written request for hearing, the Department shall submit a Request for Docket Case form to SOAH accompanied by legible copies of all pertinent documents, including but not limited to the Notice of Hearing or other document describing the agency action giving rise to a contested case. In accordance with 1 TAC §155.9, the Department shall request one or more of the following actions on the Request to Docket Case form:

(1) Setting of hearing;

(2) Assignment of an ALJ; and/or

(3) Setting of alternative dispute resolution proceeding, including but not limited to mediated settlement conference, mediation, or arbitration.

§60.303. Notice of Other Proceedings.

The Department shall provide notice to all parties in accordance with Texas Government Code §2001.052, and Texas Occupations Code, Chapter 51.

§60.304. Disposition by Agreement.

(a) Disposition by agreement of any contested case may be made by stipulation, agreed settlement, or consent order, unless precluded by law.

(b) The Commission may designate its chairperson and/or the Executive Director to adopt or reject stipulations, settlement agreements, or consent orders.

(c) Parties agreeing to disposition by agreement shall prepare written stipulations, consent order, or settlement agreement, containing proposed findings of fact and conclusions of law, which shall be signed by all the agreeing parties and their designated representatives.

(d) Upon receipt of the written stipulations, consent order, or settlement agreement the Executive Director and/or the Commission may:

(1) adopt the written stipulations, consent order, or settlement agreement and issue a final order;

(2) reject the written stipulations, consent order, or settlement agreement and remand the contested case for a hearing before SOAH;

(3) reject the written stipulations, consent order, or settlement agreement and order further investigation by the Department; or

(4) take such other action as the Executive Director and/or the Commission find just.

§60.305. Place and Nature of Hearings.

Every effort shall be made to conduct administrative hearings in Austin, Texas, to achieve the Department's mission to ensure effective and economical use of public resources while adhering to the provisions of 1 TAC §155.13.

§60.306. Failure to Attend Hearing and Defaults.

(a) If, within twenty days after receiving a Notice of Alleged Violation, the Respondent fails to accept the Department's determination and recommended administrative penalty and/or sanction, or fails to make a written request for a hearing on the determination, the Department may propose entry of a default order against the Respondent unless otherwise provided by applicable law. There is a rebuttable presumption that notice is received three days after the notice was mailed.

(b) Where a Respondent fails to answer to the Notice of Alleged Violation, the Department may present to the Commission and/or the Executive Director a motion for default order along with a proposed default order containing findings of fact and conclusions of law. Respondents will be notified as to the time and place the motion for default order will be considered. If a Respondent attends at the time and place prescribed in the notice, an administrative hearing may be set in accordance with §60.302(c) of this subchapter.

(c) After receiving a notice proposing denial of an application or a notice proposing denial of an opportunity to take an examination, an Applicant may request a hearing in writing within twenty days of receipt of the notice or forfeit the right to a hearing unless otherwise

provided by applicable law. There is a rebuttable presumption that notice is received three days after the notice was mailed.

(d) 1 TAC §155.55 applies where a Respondent fails to appear on the day and time set for administrative hearing. In that case, the Department's staff may move either for dismissal of the case from SOAH's docket or for the issuance of a default proposal for decision by the ALJ.

(e) Any document served upon a party is prima facie evidence of receipt if it is directed to the party's last known complete, correct address as shown by the Department's records. This presumption is rebuttable. Failure to claim properly addressed certified or registered mail will not support a finding of non-delivery.

§60.307. Hearing Costs.

(a) Costs associated with the contested case hearing before SOAH shall be determined according to the provisions in 1 TAC §155.43, except as noted in subsections (b) and (c).

(b) On the written request by a party to a case or on request of the ALJ, a written transcript of all or part of the proceedings shall be prepared. The cost of the transcript is borne by the requesting party. This section does not preclude the parties from agreeing to share the costs associated with the preparation of a transcript. If only the ALJ requests a transcript, costs will be assessed to the Respondent(s) or Applicant(s), as appropriate.

(c) Any party who needs a certified or licensed language interpreter for presentation of its case shall be responsible for requesting the services of an interpreter by contacting SOAH and by following SOAH procedures provided in 1 TAC Chapter 155.

§60.308. Proposals for Decision.

Proposed decisions for contested cases issued by a SOAH ALJ shall be brought before the Commission for decision, in accordance with the APA.

§60.309. Filing of Exception and Replies.

(a) Any party of record may, within 15 days after the date of service of a proposal for decision, file exceptions to the proposal for decision with the Executive Director of the Department and/or the Commission, as appropriate. Replies to such exceptions may be filed within 15 days after the deadline for filing such exceptions. Copies of exceptions and replies shall be filed with SOAH and served on the enforcement division of the Department as provided by §60.301(b) of this subchapter.

(b) A request for extension of time within which to file exceptions or replies shall be filed with the Department and SOAH, a copy thereof shall be served on all other parties of record by the party making such a request. An extension of time may be granted by agreement of parties or by order of the ALJ assigned to the case upon a showing of good cause.

§60.310. Final Orders, Motions for Rehearing, and Emergency Orders.

(a) A decision or order in a contested case shall be in writing and shall be signed by the Commission, the Executive Director or both, as applicable. Decisions or orders shall include findings of fact and conclusions of law separately stated. A party notified by mail of a decision or order shall be presumed to have been notified on the third day after the date on which the notice is mailed.

(b) The timely filing of a motion for rehearing is a prerequisite to appeal. A motion for rehearing must be filed by a party not later than the 20th day after the date on which the party or the party's attorney of record is notified of the decision or order.

(c) In the absence of a timely filed motion for rehearing, a decision or order is final on the expiration of the period for filing a motion for rehearing as described in subsection (b). The decision is not appealable.

(d) If a timely motion for rehearing is filed as described in subsection (b), the Commission or Executive Director will act on a motion for rehearing not later than the 45th day after the date on which the party or the party's attorney of record is notified of the decision or order. The Commission or Executive Director may by written order extend the time for taking action, but may not extend the time beyond the 90th day after the date on which the party or the party's attorney of record is notified of the decision or order. The decision or order is final and appealable on the date an order overruling a motion for rehearing is signed or on the date the motion is overruled by operation of law.

(e) If the Commission or the Executive Director finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a decision or order, that finding shall be recited in the decision or order as well as the fact that the decision or order is final and effective on the date signed. The decision or order is final and appealable on the date signed and no motion for rehearing is required as a prerequisite for appeal.

(f) A petition for judicial review must be filed in a District Court of Travis County Texas within 30 days after the order is final and appealable, as provided under the APA. A party filing a petition for judicial review must also comply with the requirements of Texas Occupations Code, §51.307.

(g) A party who appeals a final decision in a contested case must pay all costs for the preparation of the original or a certified copy of the record of the agency proceeding that is required to be transmitted to the reviewing court.

(h) If, after judicial review, the penalty is reduced or not assessed, the Executive Director shall remit to the person charged the appropriate amount, plus accrued interest if the penalty has been paid, or shall execute a release of the bond if a supersedeas bond has been posted. The accrued interest on amounts remitted by the Executive Director under this subsection shall be paid at a rate equal to the rate charged on loans to depository institutions by the New York Federal Reserve Bank, and shall be paid for the period beginning on the date that the assessed penalty is paid to the Department and ending on the date the penalty is remitted.

§60.311. Corrected Orders.

The Executive Director may enter a corrected order to correct a clerical mistake in an order of the Commission.

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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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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SUBCHAPTER J. MEDIATION FOR CONTESTED CASES

16 TAC §§60.400 - 60.409

STATUTORY AUTHORITY

The new rules are proposed as the result of a rule review conducted in accordance with Texas Government Code §2001.039. The new rules are proposed under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. In addition, the new rules are proposed in accordance with Texas Occupations Code, Chapters 53 and 55; Texas Government Code, Chapters 551, 552, 2001, 2008, 2009, and 2110; and Texas Civil Practice and Remedies Code, Chapter 154.

STATUTORY PROVISIONS AFFECTED

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, the Commission's and Department's enabling statute. In addition, the following statutes establishing specific programs regulated by the Department are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Business and Commerce Code, Chapter 92 (Rental Purchase Agreements-Loss Damage Waivers); Texas Government Code, Chapters 57 (Licensed Court Interpreters) and 469 (Architectural Barriers); Texas Health and Safety Code, Chapters 76 (Discount Health Care Programs), 754 (Elevators and Escalators), and 755 (Boilers); Texas Labor Code, Chapters 91 (Staff Leasing Services) and 92 (Temporary Common Worker Employers); and Texas Occupations Code, Chapters 953 (For Profit Legal Service Contract Companies), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors and Technicians), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetology), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2105 (Talent Agencies), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Tow Trucks and Operators), and 2501 (Personnel Employment Services). No other statutes, articles, or codes are affected by the proposal.

§60.400. Alternative Dispute Resolution--Mediation.

In addition to the procedures under §60.304 of this chapter, the Department uses mediation as an alternative method for resolving contested cases consistent with Texas Government Code, Chapters 2001 and 2009; Texas Civil Practice and Remedies Code, Chapter 154; and the model guidelines for the use of ADR by state agencies developed by SOAH.

§60.401. Referral of Contested Matter for Mediation.

The Department's Director of Enforcement, on behalf of the Department, may seek to resolve a contested matter through mediation involving all parties, and if so, shall refer the matter for mediation in accordance with this subchapter.

§60.402. Appointment of Mediator.

(a) For each matter referred for mediation, the ADR Administrator shall:

(1) preside over the mediation proceeding;

(2) assign a Departmental mediator;

(3) appoint a mediator from another state agency; or

(4) appoint a private mediator.

(b) A private mediator may be appointed provided that:

(1) the parties unanimously agree to use a private mediator;

(2) the parties unanimously agree to the selection of the person to serve as the private mediator; and

(3) the private mediator agrees to be subject to the direction of the ADR Administrator and to all time limits imposed by the ADR Administrator, statute or regulation.

(c) If a private mediator or a mediator from another state agency is used, the costs for the services of that mediator shall be apportioned equally among the parties, unless otherwise agreed upon by the parties, and shall be paid directly to the private mediator or the other state agency.

(d) Unless the parties agree otherwise in writing, each party shall be responsible for its own costs incurred in connection with the mediation, including without limitation, costs of document reproduction, attorney's fees, consultant fees and expert fees.

(e) The ADR Administrator may assign a substitute or additional mediator to a proceeding as the ADR Administrator deems necessary.

§60.403. Qualifications of Mediators.

(a) All mediators must have completed a minimum of 40 hours of Texas mediation training as prescribed under Texas Civil Practices and Remedies Code, Chapter 154.

(b) All mediators shall subscribe to the ethical guidelines for mediators adopted by the ADR Section of the State Bar of Texas.

§60.404. Disqualifications of Mediators.

(a) If the mediator is a SOAH ALJ, that person will not also sit as the ALJ for the case if the contested matter goes to hearing.

(b) If the mediator is an employee of the Department and the dispute does not settle, that mediator will not have any further contact or involvement concerning the contested matter.

§60.405. Qualified Immunity of the Mediator.

The mediator shall have the qualified immunity prescribed by the Texas Civil Practice and Remedies Code, §154.055, if applicable.

§60.406. Commencement of Mediation.

(a) Mediation may begin, at the discretion of the Director of Enforcement, anytime after the Department anticipates initiation of an adverse action against an applicant or respondent. The Department may issue a Notice of Mediation along with a Notice of Alleged Violation or with a notice of a proposed denial of licensure or opportunity to take an examination. Prior to the submission of a Request for Docket Case form to SOAH, and with agreement of all parties, the ADR Administrator may schedule mediation upon any party's request.

(b) After a Request for Docket Case form has been submitted to SOAH, the contested case is subject to SOAH's procedures under 1 TAC Chapter 155, and it is at the discretion of the ALJ whether mediation may apply or may continue to apply to a contested case.

§60.407. Stipulations.

When mediation does not result in the full settlement of a matter, the parties in conjunction with the mediator, may limit the contested issues through the entry of written stipulations. Such stipulations shall

be forwarded or formally presented to the ALJ assigned to conduct the contested case hearing on the merits and shall be made part of the hearing record.

§60.408. Agreements.

(a) All agreements between or among parties that are reached as a result of mediation must be committed to writing and the terms of the agreement will be incorporated in an order that is subject to approval by the Executive Director or Commission.

(b) A final written agreement to which the Department is a signatory that is reached as a result of the mediation is subject to or excepted from required disclosure in accordance with Texas Government Code, Chapter 552.

§60.409. Confidentiality.

(a) Except as provided in subsections (c) and (d), a communication relating to the subject matter made by a participant in mediation, whether before or after the institution of formal mediation proceedings, is confidential, is not subject to disclosure, and may not be used as evidence in any further proceeding.

(b) Any notes or records made regarding a mediation are confidential, and participants, including the mediator, may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of a mediation process is admissible or discoverable only if it is admissible or discoverable independent of the mediation.

(d) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the judge to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure.

(e) All communications in the mediation between parties and between each party and the mediator are confidential. No shared information will be given to the other party unless the party sharing the information explicitly gives the mediator permission to do so. Material provided to the mediator will not be provided to other parties and will not be filed or become part of the contested case record. All notes taken during the mediation conference will be destroyed at the end of the process.

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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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER B. LICENSING OF SALES AGENTS

16 TAC §401.153

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §401.153 (Qualifications for License). The purpose of the proposed amendments is to redefine the term "professional gambler" as used in the State Lottery Act, Texas Government Code, Chapter 466 and the rules of the Commission. The Commission published amendments to §401.153 (Qualifications for License) in the November 14, 2008, issue of the *Texas Register* (33 TexReg 9168). At a public meeting on February 20, 2009, the Commission voted to withdraw the proposed amendments and propose new amendments to §401.153 (Qualifications for License).

Kathy Pyka, Controller, has determined that for each year of the first five years the amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Michael Anger, Director of the Lottery Operations Division, has determined that for each year of the first five years the proposed amendments would be in effect, the public benefit anticipated from the adoption of the proposed amendments is providing licensees and others with a clear meaning of the term "professional gambler" as it relates to qualifications for licensing of sales agents.

The Commission requests comments on the amendments from any interested person. Comments on the proposed amendments may be submitted to Pete Wassdorf, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at www.legal.input@lottery.state.tx.us. Comments must be received within 60 days after publication of this proposal in order to be considered.

The amendments are proposed under the specific requirement of Texas Government Code Chapter 466, Subchapter E, §466.205(b), and the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The amendments are also proposed under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Government Code, §466.205(b).

§401.153. Qualifications for License.

(a) (No change.)

(b) The director may grant or deny an application for a license under this subchapter based on any one or more factors listed in subsection (a) of this section. In addition, the director shall deny an application for a license under this subchapter upon a finding that the applicant:

(1) has been convicted of a felony, criminal fraud, gambling or a gambling-related offense, or a misdemeanor involving moral turpitude, if less than 10 years has elapsed since the termination of the sentence, parole, mandatory supervision, or probation served for the offense;

(2) is or has been a professional gambler. The term "professional gambler" means a person who:

(A) has engaged in conduct in Texas proscribed by Title 10, Chapter 47, §§47.02, 47.03, 47.04, or 47.05 of the Texas Penal Code as the primary source of income. (The term "primary source of income" as used in this subparagraph means more than 50 percent of the person's income on an annual basis);

(i) In adopting the definitions in subsection (b)(2)(A) of this section, the conduct proscribed by the Texas Penal Code does not include any conduct for which an exception to criminal prosecution applies, or any conduct for which a person may be entitled to an affirmative defense, including, but not limited to those affirmative defenses allowed under §47.09 of the Texas Penal Code.

(ii) In adopting the definitions in subsection (b)(2)(A) of this section, the conduct proscribed by the Texas Penal Code does not include any conduct which would be excepted from prosecution because the conduct was excepted from a definition under Texas Penal Code §47.01, which is essential to prosecution; or

(B) has been convicted under the laws of any state, or governing jurisdiction outside of the United States of being a professional gambler, as defined by the law of that jurisdiction; or

(C) has, on three or more occasions been convicted of a gambling offense in any state or governing jurisdiction.

~~[(2) A "professional gambler" is a person whose profession is, or whose major source of income derives from, playing games of chance for profit;]~~

(3) - (10) (No change.)

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

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

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES
SUBCHAPTER A. ADMINISTRATION
16 TAC §402.104

The Texas Lottery Commission (Commission) proposes new 16 TAC §402.104 (Professional Gambler and Gambling Promoter). The purpose of the new rule is to define the terms "professional gambler" and "gambling promoter" as used in the Bingo Enabling Act, Texas Occupations Code, Chapter 2001. The Commission published a proposed new §402.104 (Professional Gambler and Gambling Promoter) in the November 14, 2008, issue of the *Texas Register* (33 TexReg 9171). At a public meeting on February 20, 2009, the Commission voted to withdraw the proposed rule and to propose a new Professional Gambler and Gambling Promoter rule.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years proposed new rule will be in effect, the public benefit anticipated is providing licensees and others with clear and concise meanings of the terms "professional gambler" and "gambling promoter" as related to the eligibility of a person for a manufacturer's or distributor's license.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed rule may be submitted to Pete Wassdorf, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at www.legal.input@lottery.state.tx.us. Comments on the proposed new rule must be received within 60 days after publication in order to be considered.

The new rule is proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed new rule implements Texas Occupations Code, Chapter 2001.

§402.104. Professional Gambler and Gambling Promoter.

(a) The term "gambling promoter" means a person who has:

(1) engaged in conduct in Texas proscribed by Title 10, Chapter 47, §47.03 of the Texas Penal Code; or

(2) been convicted in any state, or governing jurisdiction outside of the United States under a law that is fundamentally equivalent to promotion of gambling as proscribed by Title 10, Chapter 47, §47.03 of the Texas Penal Code.

(b) The term "professional gambler" means a person who:

(1) has engaged in conduct in Texas proscribed by Title 10, Chapter 47, §§47.02, 47.03, 47.04, or 47.05 of the Texas Penal Code as the primary source of income. (The term "primary source of income" as used in this paragraph, means more than 50 percent of the person's income on an annual basis.); or

(2) has been convicted under the laws of any state, or governing jurisdiction outside of the United States of being a professional gambler, as defined by the law of that jurisdiction; or

(3) has, on three or more occasions been convicted of a gambling offense in any state or governing jurisdiction;

(c) In adopting the definitions in subsections (a) and (b) of this section, the conduct proscribed by the Texas Penal Code does not include any conduct for which an exception to criminal prosecution applies, or any conduct for which a person may be entitled to an affirmative defense, including, but not limited to those affirmative defenses allowed under §47.09 of the Texas Penal Code.

(d) In adopting the definitions in subsections (a) and (b) of this section, the conduct proscribed by the Texas Penal Code does not include any conduct which would be excepted from prosecution because the conduct was excepted from a definition under Texas Penal Code §47.01, which is essential to prosecution.

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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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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SUBCHAPTER D. LICENSING REQUIREMENTS

16 TAC §402.402

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.402 (relating to Registry of Bingo Workers). The purpose of the proposed amendments is to remove reference to a 'primary' operator, to clarify the consequences of failing to renew a worker's registration timely, and the consequences of submission of an incomplete worker registry application. Additionally, the proposed amendments include an explanation of when fingerprint cards are required, the option of requesting a hearing when found non-qualified to be listed on the registry, and when a worker whose listing on the registry has been denied or revoked may reapply. Finally, the proposed amendments set forth a definition for "usher", and language has been added at subsection (b) to specify that any person that carries out or performs the functions of a caller, cashier, manager, operator, usher, or salesperson, as defined in subsection (a), must be listed on the Registry of Approved Bingo Workers.

Kathy Pyka, Controller, 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 for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the public benefit anticipated is to provide to individuals specific information about the consequences of submitting an incomplete application and failing to renew their registration. In addition, the proposed amendments explain the specific process for requesting a hearing and provide clarification as to when a non-qualified person may reapply to be listed on the registry and when fingerprint cards are required.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed rule may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at www.legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:00 a.m. on March 18, 2009, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The amendments are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Texas Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction. The proposed amendments implement Texas Occupations Code, Chapter 2001.

§402.402. Registry of Bingo Workers.

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

(1) Caller--an individual who operates the bingo ball selection device and announces the balls selected.

(2) Cashier--an individual who sells and records bingo card and pull tab sales to bingo players and/or pays winners the appropriate prize.

(3) Completed Application--A registry application or renewal form prescribed by the Commission which is legible and lists at a minimum the applicant's complete legal name, address, social security number or registry number, date of birth, race, gender and signature.

(4) [~~(3)~~] Manager--an individual who oversees the day-to-day operation of the bingo premises.

(5) [~~(4)~~] Operator--means an active bona fide member of a licensed authorized organization that has been designated on a form prescribed by the Commission prior to acting in the capacity as the organization's [~~primary~~] operator. [~~An individual designated by an authorized organization as an "alternate operator" shall perform all the duties and responsibilities of an operator in the absence of the primary operator.~~]

[~~(5) Sales Person--an individual who monitors bingo players, sells bingo cards and pull tabs, verifies winners and/or awarding prizes. A sales person may be referred to as a floor worker, runner or usher.~~]

(6) Salesperson--an individual who monitors bingo players, sells bingo cards and pull tabs, verifies winning cards and pull-tabs and/or delivers the prize money to the winners; may be referred to as an usher, floor worker, or runner.

(7) Usher--an individual who monitors bingo players, sells bingo cards and pull tabs, verifies winning cards and pull-tabs and/or delivers the prize money to the winners; may be referred to as a salesperson, floor worker or runner.

(b) Who must be listed on the Registry of Approved Bingo Workers. Any person who carries out or performs the functions of a caller, cashier, manager, operator, usher, or salesperson as defined in subsection (a) of this section [~~The following persons~~] must be listed on the Registry of Approved Bingo Workers prior to being involved in the conduct of bingo.[~~:~~]

[~~(1) Operator~~]

[~~(2) Manager~~]

[~~(3) Cashier~~]

[~~(4) Usher~~]

[~~(5) Caller~~]

[~~(6) Salesperson~~]

(c) Each individual must submit a completed Texas Application for Registry of Approved Bingo Workers as prescribed by the Commission to remain on the Registry of Approved Bingo Workers.

(d) The registrant will be added to the registry as soon as possible after the Commission has determined that the person is eligible to be involved in the conduct of bingo or act as an operator.

(e) For purposes of the Registry of Approved Bingo Workers, each operator must be designated on the licensed authorized organization's license to conduct bingo application pursuant to the Texas Occupations Code, §2001.102(10) as the member who will be responsible for the conduct of bingo under the terms of the license and the Bingo Enabling Act. [~~An individual included on the registry may not serve as the primary operator for an organization until the approved license to conduct bingo has been issued to the licensed organization listing the individual as the operator, received by the organization, and displayed at the location.~~] An organization must submit the name of a registered operator on a form prescribed by the Commission prior to the individual's [~~operator~~] acting in the capacity of an [~~primary~~] operator. An operator who fails to renew their intent to remain on the registry prior to the registry expiration may not serve as an operator in any manner, including signing applications and forms on behalf of the organization, until re-listed on the registry after filing the required forms.

(f) Expiration of listing on registry of approved bingo workers. A registrant's listing on the registry is valid for three years from the last date of inclusion on the registry, unless the individual's listing is removed for cause prior to the expiration of three years. Every three years after the date the person's name is listed on the registry the individual shall submit a completed renewal form prescribed by the Commission stating the person's intent to remain on the registry. Failure to timely submit the prescribed form will result in the deletion of the worker's name from the registry. A person whose name is deleted from the registry due to failure to verify the intent to remain on the registry may be re-listed on the registry by filing the required form. A registered worker who fails to timely submit the prescribed form to renew listing on the registry may not be involved in the conduct of bingo until the worker is again added to the registry. Payment for serving in a position listed in subsection (b) of this section by a person not listed on the registry is not an authorized expense. It is the responsibility of the licensed authorized organization to review the registry to confirm that the worker's registration is current.

(g) How to be listed on the Registry of Approved Bingo Workers. For a person to be listed on the Registry of Approved Bingo Workers, a person must:

(1) submit a completed [~~complete a~~] Texas Application for Registry of Approved Bingo Workers form as prescribed by the Commission;

(2) submit the required fee for the cost of the card or form; [~~and~~]

(3) submit a verifiable FBI or DPS fingerprint card if at the time of registration:

(A) the person is residing outside of Texas; or

(B) the person maintains a driver's license or registration in another state; and

(4) [~~(3)~~] be determined by the Commission to not be ineligible under Texas Occupations Code, §2001.105(a)(6).

(h) Incomplete Applications. The Commission will notify the applicant at the address provided if the registry application or renewal form submitted is not complete and will identify what is missing. The original application will be returned to the applicant for correction and resubmission. It is the responsibility of the registry applicant to resubmit a completed application before it may be processed. Failure to submit an FBI or DPS fingerprint card, if required, is grounds for denial or removal of the registration.

(i) [~~(h)~~] An individual listed on the registry must notify the Commission of any changes to information contained on the Texas Application for Registry of Approved Bingo Workers on file with the Commission within 30 days of the change in information. Such notification shall be in writing or other approved electronic means.

(j) [~~(i)~~] Identification Card for Approved Bingo Worker.

(1) The Commission will issue an identification card indicating that the person is listed in the registry. A registered worker and operator must wear his/her identification card while on duty.

(2) The identification card worn by the registered worker or operator while on duty must be visible. The identification card shall list the individual's name and unique registration number, as issued by the Commission. An individual may obtain the unique registration number from the Registry of Approved Bingo Workers on the Commission's website or by requesting the number from the Commission.

(3) An identification card is not transferable and may be worn only by the individual identified on the card.

(4) Upon request by a Commission employee, a person described in subsection (a) of this section shall present personal photo identification in order to verify the identification card is that person's card.

(k) [~~(j)~~] How to Obtain Approved Identification Cards.

(1) A completed identification card may be obtained from the Commission by submitting the required fee and submitting the required form.

(2) The fee for an identification card or identification card form may not exceed $5.00.

(3) A person who has been approved to work in charitable bingo may complete an identification card form provided by the Commission for use while on duty. Blank identification card forms may be

obtained from the Commission. The person requesting the identification card form(s) must submit the required fee and the required form for the blank identification card form.

(4) The identification card prepared by the individual may only be on a prescribed Commission card form and must be legible and include the individual's name and registration number.

(l) [~~(k)~~] A licensed authorized organization which is reporting conduct where there is a substantial basis for believing that the conduct would constitute grounds for removal or refusal to list on the registry shall make the report in writing to: Bingo Registry, Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630.

(m) [~~(l)~~] The provisions of the Texas Occupations Code, §2001.313 related to the registry of bingo workers do not apply to an authorized organization that does not have an annual license to conduct bingo who receives a temporary license to conduct bingo.

(n) [~~(m)~~] If the Commission proposes to refuse to add or proposes to remove the person from the Registry of Approved Bingo Workers consistent with Texas Occupations Code, §2001.313, the Commission will give notice of the proposed action as provided by Government Code, Chapter 2001.

(o) A person receiving notice that the Commission intends to refuse to add to or intends to remove the person from the Registry of Approved Bingo Workers may request a hearing. Failure to submit a written request for a hearing within 30 calendar days of the date of the notice will result in the denial of the application or removal of the registered worker from the registry.

(p) A person who has been denied or removed from the registry through the hearing process because of an offense listed under Texas Occupations Code, §2001.105(b), may only reapply to be listed ten years after the termination date of a sentence, parole, mandatory supervision, or community supervision served for the offense. Applications received earlier will not be processed.

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
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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 2. ENVIRONMENTAL POLICY
SUBCHAPTER A. ENVIRONMENTAL REVIEW AND PUBLIC INVOLVEMENT FOR TRANSPORTATION PROJECTS

43 TAC §2.1

The Texas Department of Transportation (department) proposes amendments to §2.1, concerning general and emergency action procedures for environmental review and public involvement requirements for transportation projects. The amendments to §2.1 are proposed in conjunction with the proposed repeal of 43 TAC §11.56 and new 43 TAC §11.56, relating to connection with regionally significant highway.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, Chapter 203 provides that the Texas Transportation Commission (commission) may lay out, construct, maintain, and operate a modern state highway system. Transportation Code, §201.604, requires the commission by rule to provide for the commission's environmental review of the department's transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.)

Senate Bill 792 (SB 792), 80th Legislature, 2007, granted local authorities the first option in building projects within their jurisdictions and provided those authorities with the powers to construct and complete those projects in a manner consistent with the practices and procedures by which the local authority finances, constructs, or operates a project. Senate Bill 792 also authorized the department to assist those authorities in the completion of projects by providing use of the right of way owned by the department and access to the state highway system without requiring payment for those resources. The amendments to §2.1 allow the local governments to follow their own environmental review for those projects.

Amendments to §2.1(b)(3) divide the paragraph into subparagraphs (A) and (B). New §2.1(b)(3)(A)(ii) exempts a project developed by a local governmental entity under Transportation Code, §228.011 or §228.0111, from the environmental review and public involvement requirements of 43 TAC Chapter 2, Subchapter A, because of the local control requirements of SB 792. Transportation Code, §228.011 includes the following county toll projects: Beltway 8 Tollway East, between US 59 North and US 90 East; Hardy Downtown Connector, consisting of the proposed direct connection from the Hardy Toll Road southern terminus at Loop 610 to downtown Houston; State Highway 288, between US 59 and Grand Parkway South (State Highway 99); US 290 Toll Lanes, between IH 610 West and the Grand Parkway Northwest (State Highway 99); Fairmont Parkway East, between Beltway 8 East and Grand Parkway East (State Highway 99); South Post Oak Road Extension, between IH 610 South and near the intersection of Beltway 8 and Hillcroft in the vicinity of the Fort Bend Parkway Tollway; Westpark Toll Road Phase II, between Grand Parkway (State Highway 99) and FM 1463; Fort Bend Parkway, between State Highway 6 and the Brazos River; and Montgomery County Parkway, between State Highway 242 and the Grand Parkway (State Highway 99). Transportation Code, §228.0111, includes a project that is not covered by Transportation Code, §228.011, and that is constructed by a regional tollway authority under Transportation Code, Chapter 366, a regional mobility authority under Transportation Code, Chapter 370, or a county acting under Transportation Code, Chapter 284.

New §2.1(b)(3)(B) provides that in the agreement for a project excepted under §2.1(b)(3) the department must ensure that the entity responsible for the project complies with all state and federal environmental review and public involvement laws applicable to the entity. This amendment is necessary to conform the provision to changes made by new §2.1(b)(3)(A)(ii).

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Dianna Noble, P.E., Director, Environmental Affairs Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Noble has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be the implementation of SB 792 which grants local authorities the first option in building projects within their jurisdictions. There are no anticipated economic costs for persons required to comply with the section as proposed. There will be no adverse economic effect on small businesses.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and determined that the action is subject to the Coastal Management Program (CMP) and that it is consistent with the CMP goals and policies under the rules of the Coastal Coordination Council. The proposed amendments concern the method used to evaluate the environmental impacts of a transportation project and do not dictate the siting of a project.

Transportation Code, §228.011 and §228.0111, remove toll projects within the boundaries of local toll project entities from the department and assign the responsibility for those projects to the local entities. New §2.1(b)(3) exempts projects developed by local governmental entities under Transportation Code, §228.011 and §228.0111 from environmental review by the department, leaving the responsibility with the entities.

Title 31 TAC §501.11(a), concerning the CMP's Statutory and Constitutionals Limits, states, "A goal or policy may not require an agency or subdivision to perform an action that would exceed the constitutional or statutory authority of the agency or subdivision to which the goal or policy applies." In transferring environmental responsibility for certain highway projects connecting to the state highway system to local entities, §2.1 is consistent with the changes of responsibility provided by Transportation Code, §228.011 and §228.0111 and the responsibility for CMP compliance continues to be the local entity's obligation under 31 TAC §501.11 as authorized under those sections. The effect of the amendment is that local entities will use their procedures rather than the procedures of the department for the exempted projects.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §2.1 may be submitted to Dianna Noble, P.E., Director, Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on April 6, 2009.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.604, which requires the commission by rule to provide for the commission's environmental review of the department's transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.).

CROSS REFERENCE TO STATUTE

Transportation Code, §§201.604, 228.011, and 228.0111.

§2.1. General; Emergency Action Procedures.

(a) (No change.)

(b) Applicability; Exception.

(1) This subchapter prescribes the environmental review and public involvement requirements for:

(A) a department transportation project;

(B) a transportation project of a private or public entity in which the project is funded in whole or in part by the department; or

(C) a transportation project of a private or public entity when the project requires commission or department approval.

(2) Transportation project. A transportation project is a highway improvement, rest area, aviation, toll project, public transportation, rail transportation project, ferry landing project, ferry maintenance, transportation enhancement, or a project for the construction or operation of a facility that is a part of the Trans-Texas Corridor. A highway improvement project is a highway construction or maintenance project under one or more of Transportation Code, Chapters 201, 203, 221, 223, 227, or 228.

(3) Exception.

(A) Notwithstanding paragraph (1) of this subsection, the requirements of this subchapter do not apply to a project that is not on the state highway system and:

(i) that the department funds solely with money held in a project subaccount created under Transportation Code, §228.012; or [-]

(ii) that is developed by a county or other local governmental entity under Transportation Code, §228.011 or §228.0111.

(B) An [~~A project~~] agreement entered into by the department for a project excepted under this paragraph must [~~shall~~] ensure that the entity responsible for implementing such a project complies with all environmental review and public involvement requirements applicable to that entity under state and federal law in connection with the project.

(c) - (h) (No change.)

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

Filed with the Office of the Secretary of State on February 20, 2009.

TRD-200900748
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-8683

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CHAPTER 11. DESIGN
SUBCHAPTER C. ACCESS CONNECTIONS TO STATE HIGHWAYS

The Texas Department of Transportation (department) proposes the repeal of §11.56, and new §11.56, concerning connection with regionally significant highway. The repeal of §11.56 and new §11.56 are being proposed in conjunction with amendments to 43 TAC §2.1, relating to general and emergency action procedures for environmental review and public involvement requirements for transportation projects.

EXPLANATION OF PROPOSED REPEAL AND NEW SECTION

Transportation Code, Chapter 203 provides that the Texas Transportation Commission (commission) may lay out, construct, maintain, and operate a modern state highway system.

Due to the significant cost associated with the construction and maintenance of highways, it is imperative that the highway system provide maximum traffic handling capacity and reasonable access for as long as practical. Access management is one method of preserving the substantial investment in the ground transportation system by preserving the roadway level of service. Adjacent development and uncontrolled access points along highways can contribute to congestion and early deterioration of the operation of the highway, thereby reducing the ability of the state highway system to safely and efficiently move higher volumes of traffic. Access management is an engineering and planning method of balancing the needs of mobility and safety on a highway system with the needs of access to adjacent land. Access management can significantly enhance traffic safety by reducing traffic accidents, personal injury, and property damage. Access management promotes a more coordinated intergovernmental, long term approach to land use and transportation decisions in the context of quality of life, economic development, livable communities, and public safety.

Transportation Code, Chapter 228, provides general authority for state highway toll projects. Senate Bill 792 (SB 792), 80th Legislature, 2007, added provisions to Transportation Code, Chapter 228 that granted local authorities the first option for building toll projects within their jurisdictions and provides the local authorities with the powers to construct and complete these projects. Senate Bill 792 also authorized the department to assist the local authorities in the completion of projects by providing the use of the right of way owned by the department and access to the state highway system without requiring payment for those resources.

Current §11.56 assigns broad environmental review and approval authority to the department, and requires a public or private entity to comply with 43 TAC Chapter 2, Subchapter C to connect a regionally significant highway to a segment of the state highway system. Current §11.56 is being repealed and replaced with a new §11.56. The rule changes the focus of the environmental requirements on the projects' connection to the state highway system.

New §11.56 is added to provide a uniform means by which public and private entities with the authority to construct, maintain, and operate regionally significant highway facilities may obtain permission to connect those facilities to the state highway system. While most such entities are required to obtain commission approval to construct regionally significant highways, certain entities with independent authority may construct regionally significant highways that do not necessarily conform to the Transportation Improvement Program (TIP). Adding regionally significant highways that are not in the TIP, especially in non-attainment areas, can threaten the entire area's transportation conformity under the federal Clean Air Act, resulting in sanctions that could severely hamper the state's federal highway program. The current rules govern connection to the state highway system, but do not give the department the ability to deny connections based on these conformity concerns, design and construction issues, or noncompliance with federal requirements.

This new rule will ensure that proper statewide planning is employed in the construction of major highway facilities that connect to the state highway system, that the facilities are properly designed and constructed in compliance with federal laws, and that environmental impacts are adequately considered.

New §11.56(a), Purpose, provides the purpose of the section and is the same as the current subsection (a). It requires approval from the commission for a connection from a regionally significant highway to a segment of the state highway system.

New §11.56(b), Request, requires the entity seeking approval to send to the executive director a written request containing a detailed schematic indicating the location of the connection, an overpass, underpass, intersection, or interchange, and the location of the logical termini of the connection. This differs from current subsection (b) which requires a schematic indicating the location of interchanges and mainlanes.

New §11.56(c), Approval criteria, authorizes the commission to approve a request if the highway to be connected is identified in a conforming TIP, the requestor agrees to use the department's design and construction criteria as set out in §11.56(d), and the requestor satisfies the applicable requirements concerning public involvement and impacts of the connection set out in §11.56(e). The requirement of compliance with §11.56(e) ensures public involvement in the process and that the social, environmental, and economic impacts of the connection are considered.

New §11.56(c) is similar to current subsection (c). However, current subsection (c) contains a process for waiving the design and construction requirements and the environmental requirements for the part of the project that is not a connection. The waivers are omitted from the new subsection as unnecessary because the subsection applies only to the connection area of a project.

New §11.56(d), Design and construction, specifies that the design and construction criteria set forth in 43 TAC §26.33 apply for purposes of the subsection. The new subsection is essentially the same as the current subsection (d).

New §11.56(e)(1), Environmental review and public involvement, specifies that subsection (e) applies only to construction activities and utility adjustments within rights of way owned by the department and, if a terminus of the proposed connection is outside of the department's right of way, between the connection terminus and the department's right of way. Focusing the environmental review and public involvement on the connection portion of the project addresses the state's requirements concerning adequate consideration of environmental, safety, and mobility concerns.

New §11.56(e)(2) exempts from the environmental review and public involvement requirements local authority projects developed under Transportation Code, §228.011 or §228.0111, and projects that the department funds solely with money held

in a project subaccount created under Transportation Code, §228.012. Senate Bill 792 requires that the local authority have the primary authority for the projects in a manner consistent with the practices and procedures by which the local authority finances, constructs, or operates a project and requires the commission and the department to allow the local authority access to the state highway system.

New §11.56(e)(3) requires the requestor to perform and document all environmental studies, environmental compliance, and public involvement activities. Section 11.56(e)(3) clarifies that the requestor's environmental compliance and public involvement activities will not be performed under memoranda of agreement, programmatic agreements, or other environmental agreements between the department and a state or federal agency as the project sponsor is performing the environmental compliance and public involvement. To ensure that stakeholders' interests and concerns are addressed, the requestor is required to apply for, obtain, and comply with all permits and approvals required by state and federal law, and to establish all commitments needed to address public, state agency, and federal agency concerns.

New §11.56(e)(4) requires that the environmental documents, environmental studies, environmental compliance, and public involvement activities must comply with the requirements of 43 TAC Chapter 2, Subchapter A, relating to Environmental Review and Public Involvement for Transportation Projects.

New §11.56(e)(5) requires the requestor to submit the environmental documents and supporting documentation to the department to ensure that the documentation is completed and to provide department review of the documentation. The department reviews and determines whether or not the requestor has completed agency coordination relating to the environmental review of the proposed access connection, and has responded to public comments.

New §11.56(e)(6) provides that if Federal Highway Administration (FHWA) regulations specify that a project or connection requires FHWA approval, the requestor has to perform the necessary environmental and public involvement activities and produce an environmental document that meets FHWA requirements.

New subsection (e) differs significantly from current subsection (e) because the process is being changed to streamline the process and to allow for more local responsibility for the performance of environmental review and public involvement in that review.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeal and new section as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the section.

Dianna Noble, P.E., Director, Environmental Affairs Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeal and new section.

PUBLIC BENEFIT AND COST

Ms. Noble has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the repeal and new section will be to focus the environmental requirements on the connection, which is the portion of the project that affects the state highway system, enabling the local entities to follow their own procedures for the other areas of their project. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and determined that the action is subject to the Coastal Management Program (CMP) and it is consistent with the CMP goals and policies under the rules of the Coastal Coordination Council. The proposed repeal and the new section concern the method by which to evaluate the environmental impacts of a transportation project, and do not dictate the siting of a project.

Transportation Code, §228.011 and §228.0111, remove toll projects within the boundaries of local toll project entities and certain other projects that are developed off of the highway system from the department and assign the responsibility for those projects to the local entities. New §11.56(e)(2) exempts projects under Transportation Code, §§228.011, 228.0111, and 222.012, from environmental review by the department.

Title 31 TAC §501.11(a), concerning the CMP's Statutory and Constitutionals Limits, states, "A goal or policy may not require an agency or subdivision to perform an action that would exceed the constitutional or statutory authority of the agency or subdivision to which the goal or policy applies." In transferring environmental responsibility for certain highway projects connecting to the state highway system to local entities, §11.56 is consistent with the changes of responsibility provided by Transportation Code, §228.011 and §228.0111 and the responsibility for CMP compliance becomes the local entity's obligation under 31 TAC §501.11 as authorized under those sections.

New §11.56 also provides changes for entities not covered under Transportation Code, §§228.011, 228.0111, or 228.012. In those cases, the department will continue its monitoring of the local entities by reviewing the local entities' environmental documentation to ensure that such an entity has complied with the CMP with respect to a connector to the state highway system.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §11.56 and new §11.56 may be submitted to Dianna Noble, P.E., Director, Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on April 6, 2009.

43 TAC §11.56

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

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.604, which requires the commission by rule to provide for the commission's environmental review of the department's transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.), and Transportation Code, §203.031,

which provides the commission with the authority to control access to highways.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 203, and Transportation Code, §§201.604, 228.011, and 228.0111.

§11.56. Connection with Regionally Significant Highway.

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 February 20, 2009.

TRD-200900749
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-8683

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43 TAC §11.56

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.604, which requires the commission by rule to provide for the commission's environmental review of the department's transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.), and Transportation Code, §203.031, which provides the commission with the authority to control access to highways.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 203, and Transportation Code, §§201.604, 228.011, and 228.0111.

§11.56. Connection with Regionally Significant Highway.

(a) Purpose. A public or private entity may not connect a regionally significant highway to a segment of the state highway system without the approval of the commission. This section prescribes the procedure by which the commission will consider approval.

(b) Request. An entity seeking approval to connect a regionally significant highway to a segment of the state highway system must send a written request to the executive director. The request must include a detailed schematic indicating the location of the connection, including an overpass, underpass, intersection, or interchange, and the location of the logical termini of the connection.

(c) Approval criteria. The commission will approve a request made under this section if:

(1) the highway to be connected is identified in a conforming Transportation Improvement Program;

(2) the requestor agrees to design and construct the connection in compliance with subsection (d) of this section; and

(3) the requestor satisfies the applicable requirements under subsection (e) of this section concerning public involvement and a study of the social, environmental, and economic impacts of the connection.

(d) Design and construction. The requestor shall design and construct the connection in accordance with the schematics required by subsection (b) of this section and §26.33(d), (f), and (g) - (l) of this title (relating to Design and Construction), which for the purposes of this subsection apply as if the requestor were a regional mobility authority.

(e) Environmental review and public involvement.

(1) This subsection applies only to construction activities and utility adjustments related to the proposed connection that are:

(A) within rights of way owned by the department; and

(B) if a terminus of the proposed connection is outside of the department's right of way, between the terminus and the department's right of way.

(2) This subsection does not apply to a project developed by a county or other local governmental entity under Transportation Code, §228.011 or §228.0111, or that the department funds solely with money held in a project subaccount created under Transportation Code, §228.012.

(3) The requestor, as project sponsor, shall perform and document all environmental studies, environmental compliance, and public involvement activities arising as a result of construction of the proposed access connection. The requestor will not perform its environmental compliance and public involvement activities under memoranda of agreement, programmatic agreements, or other environmental agreements between the department and a state or federal agency. The requestor shall apply for, obtain, and comply with all permits and approvals required by state and federal law, and shall establish all commitments needed to address public, state agency, and federal agency concerns.

(4) The requestor's environmental documents, environmental studies, environmental compliance, and public involvement activities must comply with the requirements of 43 TAC Chapter 2, Subchapter A, of this title (relating to Environmental Review and Public Involvement for Projects).

(5) The requestor shall submit the environmental documentation, including supporting documents, to the department, and request the department review the environmental documentation. The department shall review the environmental documentation and supporting documents and shall determine whether or not the requestor has completed agency coordination relating to the environmental impact of the proposed access connection, and has responded to public comments relating to the connection. If the department determines that the requestor has not demonstrated completion of agency coordination or response to public comment related to the connection, the requestor shall provide any additional documentation requested by the department. The commission will not grant access connection until the requestor satisfies the requirements of this paragraph.

(6) If Federal Highway Administration (FHWA) regulations specify that a project or connection requires FHWA approval, the requestor shall perform all environmental and public involvement activities as the project sponsor, and shall produce an environmental document that meets FHWA requirements.

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

Filed with the Office of the Secretary of State on February 20, 2009.

TRD-200900750

Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: April 5, 2009
For further information, please call: (512) 463-8683

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 16. ECONOMIC REGULATION

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER B. LICENSING OF SALES AGENTS

16 TAC §401.153

The Texas Lottery Commission withdraws the proposed amendment to §401.153 which appeared in the November 14, 2008, issue of the *Texas Register* (33 TexReg 9168).

Filed with the Office of the Secretary of State on February 23, 2009.

TRD-200900773
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: February 23, 2009
For further information, please call: (512) 344-5012

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CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES

SUBCHAPTER A. ADMINISTRATION

16 TAC §402.104

The Texas Lottery Commission withdraws the proposed new §402.104 which appeared in the November 14, 2008, issue of the *Texas Register* (33 TexReg 9171).

Filed with the Office of the Secretary of State on February 23, 2009.

TRD-200900772
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: February 23, 2009
For further information, please call: (512) 344-5012

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 172. TEMPORARY AND LIMITED LICENSES

SUBCHAPTER B. TEMPORARY LICENSES

22 TAC §172.8

The Texas Medical Board (Board) withdraws the proposed amendment to §172.8, relating to Faculty Temporary License, which appeared in the January 9, 2009, issue of the *Texas Register* (34 TexReg 168).

Filed with the Office of the Secretary of State on February 17, 2009.

TRD-200900645
Mari Robinson, J.D.
Interim Executive Director
Texas Medical Board
Effective date: February 17, 2009
For further information, please call: (512) 305-7016

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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 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 5. COMMUNITY SERVICES PROGRAMS

SUBCHAPTER A. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §§5.1 - 5.15

The Texas Department of Housing and Community Affairs adopts the repeal of 10 TAC Chapter 5, Subchapter A, §§5.1 - 5.15, concerning the Community Services Block Grant, without changes to the proposal as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7818) and will not be republished.

The repeal is adopted in order to allow adoption of new rules governing the Community Affairs Division Program, to consolidate the Comprehensive Energy Assistance Program rules under the Chapter 5 Community Affairs Programs rules with new rules being adopted as part of the 2009 rule cycle.

Public hearings on the repeal were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth, and Austin. No comments were received regarding the adoption of this repeal.

The Board approved the final order adopting this repeal on December 18, 2008.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its 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.

Filed with the Office of the Secretary of State on February 20, 2009.

TRD-200900751
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: March 12, 2009
Proposal publication date: September 19, 2008
For further information, please call: (512) 475-3916

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SUBCHAPTER C. EMERGENCY SHELTER GRANTS PROGRAM

10 TAC §§5.200 - 5.211

The Texas Department of Housing and Community Affairs adopts the repeal of 10 TAC Chapter 5, Subchapter C, §§5.200 - 5.211, concerning the Emergency Shelter Grants Program without changes to the proposal as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7819) and will not be republished.

The repeal is adopted in order to allow adoption of new rules governing the Community Affairs Division Program, to consolidate the Comprehensive Energy Assistance Program rules under the Chapter 5 Community Affairs Programs rules with new rules being adopted as part of the 2009 rule cycle.

Public hearings on the repeal were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth and Austin. No comments were received regarding the adoption of this repeal.

The Board approved the final order adopting this repeal on December 18, 2008.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its 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.

Filed with the Office of the Secretary of State on February 20, 2009.

TRD-200900752
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: March 12, 2009
Proposal publication date: September 19, 2008
For further information, please call: (512) 475-3916

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CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§5.1 - 5.20

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 5, Subchapter A,

§§5.1 - 5.20 concerning Community Affairs Programs, General Provisions Rules. Sections 5.3 - 5.5, 5.10, 5.11, 5.13, 5.14, 5.16, 5.17, and 5.20 are adopted with changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7819). Sections 5.1, 5.2, 5.6 - 5.9, 5.12, 5.15, 5.18 and 5.19 are adopted without changes and will not be republished.

The purpose of the new chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8.

Public hearings on the new subchapter were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth, and Austin. Additionally, written comments were accepted by mail, e-mail, and facsimile through October 20, 2008.

Public comments and the Department's responses are presented in the order in which the subchapters and sections appear in the new chapter. Following the section number is the title of the section as it appears in the rule. Following the comment is a parenthetical containing a number or series of numbers. Each number corresponds to a person who commented on the particular rule section. Following the identification of the section and related commenters is a summary of the comment and staff's response, including the reasons why the agency agreed or disagreed with the comment and a statement of the factual basis for the new section.

Public comments on the proposed rule were received by Texas Association of Community Action Agencies, Inc.

§5.3(b)(7). Definitions. Community Action Agencies.

COMMENT: Comment received about adding revised language to the definition.

DEPARTMENT RESPONSE: Staff concurred and revised the second sentence portion within quotes as follows: "...of at least "one-third elected..." to be consistent with the CSBG Act.

§5.3(b)(20). Definitions. Eligible Entity.

COMMENT: Comment received about revising the language for clarification.

DEPARTMENT RESPONSE: Staff concurred and revised the last sentence by adding the date of the Act after the word "organization" and, before the word "entity." Staff also added the following language: "that was an eligible" for clarification.

§5.3(b)(24). Definitions. Families with Young Children.

ADMINISTRATIVE CHANGE.

Staff added clarifying language to the definition of Families with Young Children. Staff revised this for clarification and consistency that a family with young children is a family that includes a child age 5 or younger.

§5.3(b)(25). Definitions. USDHHS.

COMMENT: Comment received that the agency name acronym was incomplete.

DEPARTMENT RESPONSE: Staff revised this acronym by adding the "D.".

§5.3(b)(41)(A). Definitions. Persons with Disabilities.

ADMINISTRATIVE CHANGE.

Staff revised the reference from §7(6) to the correct reference of §7(9).

§5.3(b)(44). Definitions. Private Nonprofit Organization.

COMMENT: Commenter suggested a private nonprofit organization only being an organization which has status as a 501(c)(3) tax-exempt entity. Also, the paragraph reference (3) was omitted from text.

DEPARTMENT RESPONSE: The CSBG Act only specifies private nonprofit organization and does not specify §501(c)(3). Staff amended the §501(c) reference by adding the paragraph reference "(3)."

§5.3(b)(64). Definitions. U.S.C.--United States Code.

COMMENT: Comment received about amending definition, to remove "of Regulations."

DEPARTMENT RESPONSE: Staff concurred and amended definition as suggested.

§5.4. Prohibitions.

COMMENT: Comment received regarding needed revisions to be consistent with federal law.

DEPARTMENT RESPONSE: Staff revised as follows: subsection (a) was revised, new subsection (b) was added, subsection (b) became subsection (c), and subsection (c) became subsection (d). Language was modified to reflect federal prohibitions pursuant to OMB Circular A-122. CAAs are not prohibited from lobbying. The CSBG Act does not prohibit or mention lobbying. And, OMB Circular A-122 only restricts the use of federal funds for lobbying, it does not prohibit a federal grantee from using other funds to do so; there are a number of exceptions. State law is more restrictive than federal law and lobbying is prohibited by Texas Government Code.

§5.5(b) and (c). Certificate and Disclosure Regarding Certain Lobbying Activities.

COMMENT: Comment received suggesting clarification in accordance with federal law. For §5.5(b), the reference in the first sentence regarding finding the necessary form was amended from the Office of Management (OMB) website to the U.S. Department of Health and Human Services (USDHHS) website. In the second sentence of subsection (c), the referenced form was amended from the "Department's" website to the "USDHHS" website. In the third sentence of subsection (c), the following language was added after "Congress:" "in connection with the awarding or modifying of a federal contract, loan, cooperative agreement or grant."

DEPARTMENT RESPONSE: Staff does not concur with the comment to qualify lobbying activities by inserting the word "certain". Minor revisions were made to §5.5(b) and (c) for clarification purposes.

§5.10(b). Procurement Standard.

COMMENT: Comment received suggesting that this section needed clarifying language.

DEPARTMENT RESPONSE: Staff concurred with this comment and revised language. For clarification purposes, the second sentence of this section was revised by adding language as follows: ...between the OMB Circulars "or federal laws" and state...federal funds, the "federal law or" OMB Circulars will prevail.

§5.11. Procurement/Cooperative Purchasing Program.

ADMINISTRATIVE CHANGE.

Staff amended this section to correct the contact information for the program to: State of Texas Co-Op Purchasing Program, Texas Comptroller of Public Accounts, Web address: http://www.window.state.tx.us/procurement/prog/coop/; e-mail: coop@cpa.state.tx.us; phone number: (512) 463-3368.

§5.16(a)(1), (a)(3), (a)(4), (a)(4)(A), (a)(4)(B), (b) and (d). Monitoring of Subrecipients.

COMMENTS: Commenter requested definition for "high risk" in subsection (a)(1). In some instances the term has implied a subrecipient with severe management and/or fiscal deficiencies and in other instances the term has implied a subrecipient with multiple and high dollar contracts with the Department.

Commenter suggested that the rule should state that the Department will notify a subrecipient when it is declared "high risk" and an explanation for the designation should be provided.

Commenter suggested that the rule should state what the subrecipient needs to do to lift the designation, if the designation is based on deficiencies.

Commenter suggested that the rule should state consequences other than being subject to unannounced visits, e.g. cost reimbursement rather than advances.

COMMENT Subsection (a)(3): Commenter suggested posting the monitoring instrument on the Department's website to be used to perform monitoring reviews. Disclosure of the 'monitoring instrument' via the Department's website will allow transparency and the Department's expectations of the subrecipients.

COMMENT Subsection (a)(4): Commenter encouraged timely resolutions following the onsite monitoring review, a monitoring report should be prepared and submitted to the subrecipients within "ninety (90)" days. Comment was also made that an appeals process regarding monitoring of programs should be established in this section.

COMMENT: Subsection (a)(4)(A). Finding--Commenter suggested the clarification language for the first sentence should include "clearly" as follows: The written description of a "clearly" deficient condition which is significantly substandard according to the monitoring standards.

COMMENT Subsection (a)(4)(B): Commenter suggested best practice(s) to enhance program, operational, financial or administrative practices. Commenter also suggested that the Department clarify and simplify language to avoid misinterpretation between a 'recommended' improvement and 'corrective action' as required under a "finding."

COMMENT Subsection (b): Commenter suggested clarifying language to be added as follows: Subrecipients "not exempt from the single audit requirements" are responsible for... The rationale for this was that subrecipients exempt from the single audit requirements will not have such an audit to submit.

COMMENT Subsection (d): Commenter suggested that for clarification purposes, the Department should add the following language: ...the following sanctions "assuring due process, unless otherwise required:"

DEPARTMENT RESPONSE: Staff revised subsection (a)(1) to separate the assessment of risk. Unannounced monitoring review was also moved to subsection (a)(2).

Staff concurred with comment and revised as follows:

Subsection (a): The Department's Community Affairs Division (CAD) is responsible for ensuring that the Community Services Block Grant (CSBG), Comprehensive Energy Assistance Program (CEAP), Weatherization Assistance Program (WAP), and Emergency Shelter Grant Program (ESGP) program activities are completed and that the funds are expended in accordance with the contract provisions and applicable state and federal rules, regulations, policies, and related statutes. In order to ensure such, the Department will conduct monitoring reviews of the subrecipients to evaluate the effectiveness of subrecipient's performance and program compliance through on-site and desk monitoring as described in §5.15 of this chapter (relating to Federal Funding Accountability and Transparency Act (FFATA)) following the requirements of §678B of PL 105-285 Subtitle B, §2605(B)(10) of PL 97-35, as amended, 10 CFR §440.23(d), and 24 CFR §576.61 and §576.57(f) and (g), respectively.

Subsection (a)(1) was revised to read as follows: "CAD employs a subrecipient monitoring procedure that is based upon an assessment of associated risks. The factors may include but are not limited to the status of the most recent monitoring report, timeliness of grant reporting, results of the last on-site monitoring review, number and funding amount of Department funded contracts, final expenditure rate, and single audit status or other factors. Ranking of subrecipients will determine whether an on-site review or a desk review is completed unless Department management determines an on-site review is needed." The following was deleted: "CAD may conduct...on-site monitoring review."

Subsection (a)(2) was a previously a part of subsection (a)(1) and became subsection (a)(2). CAD may conduct unannounced on-site monitoring reviews of subrecipients identified as at risk for contract termination, if deficiencies identified from prior monitoring activities persist or remain unresolved for an unreasonable period of time. In the event of reports of fraud and abuse or other extenuating circumstances, the Department may make an unannounced on-site monitoring review. The word "high" was removed from the first sentence from between "identified as" and "at risk.."

Subsection (a)(2) became subsection (a)(3).

Subsection (a)(4) was added as follows: "Technical assistance and training will be provided to the subrecipient to address program deficiencies."

Subsection (a)(3) became subsection (a)(5).

Subsection (a)(4) became subsection (a)(6): Staff concurs with adding "onsite" to the language. However, monitoring reports should be submitted to subrecipients within forty-five (45) days. Subrecipients must provide a response to the deficiencies noted and state any concerns at this time.

Subsection (a)(4)(A) became subsection (a)(6)(A): Staff did not concur with comment. Deficient correlates to substandard which does not have a range within its definition.

Subsection (a)(4)(B) became subsection (a)(6)(B): Staff concurred with comment and revised the language to read: "Recommended Improvement--Suggested best practice(s) to enhance program, operational, financial, or administrative practices."

Subsection (a)(5) became subsection (a)(7).

Subsection (b) became subsection (a)(7)(Z)(a): Staff concurred with comment and revised language as follows: "not exempt

from the single audit requirements" between "Subrecipients" and "are responsible for submitting..."

Subsection (c) became subsection (a)(7)(Z)(b).

§5.17(a), (c) - (f), and (g)(3). Corrective Action and Contract Termination.

ADMINISTRATIVE CHANGE: Staff made an administrative change to the heading of this section from "Corrective Action and Contract Termination" to "Sanctions and Contract Close Out."

COMMENT: Commenter suggested that subsection (a) needed clarification.

DEPARTMENT RESPONSE: Staff revised as follows: ...state and federal "laws and" regulations and...

COMMENT: Commenter suggested that subsections (c) - (f) needed clarification for consistency.

DEPARTMENT RESPONSE: The revised version was changed to subsection (c)(1) - (5), which also amended subsection (g) to subsection (d). Subsection (g)(3) is now subsection (d)(3).

COMMENT: Comment received regarding a possible typo and clarification that was needed for who would be the one to do the physical inventory of client files, etc.

DEPARTMENT RESPONSE: Staff concurred and amended the language from "Department" to "Subrecipient." Language was amended to: ... "the Subrecipient will take a physical inventory of client files,..."

§5.20(a). Determining Income Eligibility.

COMMENT: Comment received suggesting correction to a typo for the acronym of the U.S. Department of Health and Human Services (USDHHS).

DEPARTMENT RESPONSE: Staff concurred and made correction.

The Board approved the final order adopting the new subchapter with recommended changes, on November 13, 2008.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§5.3. Definitions.

(a) To ensure a clear understanding of the terminology used in the context of the Community Affairs Programs, a list of terms and definitions has been compiled as a reference.

(b) The following words and terms in this chapter shall have the following meaning unless the context clearly indicates otherwise.

(1) CAA--Community Action Agency.

(2) CFR--Code of Federal Regulations.

(3) Children--Household dependents not exceeding eighteen (18) years of age.

(4) Collaborative Application--An application from two or more organizations which will use Emergency Shelter Grants Program (ESGP) funds to provide services to the target population as part of a local continuum of care. If a unit of general local government applies for only one organization, this will not be considered a collaborative application. Partners in the collaborative application must coordinate services and prevent duplication of services.

(5) Community Action Plan--A plan required by the Community Services Block Grant (CSBG) Act which describes the local (subrecipient) service delivery system, how coordination will be developed to fill identified gaps in services, how funds will be coordinated with other public and private resources and how the local entity will use the funds to support innovative community and neighborhood based initiatives related to the grant.

(6) Cooling--Modifications including, but not limited to, the repair or replacement of air conditioning units, evaporative coolers, and refrigerators.

(7) Community Action Agencies (CAAs)--Local private and public non-profit organizations that carry out the Community Action Program (CAP), which was founded by the 1964 Economic Opportunity Act to fight poverty by empowering the poor in the United States. Each CAA must have a board consisting of at least one-third elected public officials, not fewer than one-third representatives of low-income individuals and families, chosen in accordance with democratic selection procedures, and the remainder are members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community.

(8) Community Affairs Division (CAD)--The Division at the Texas Department of Housing and Community Affairs which administers the CSBG, ESGP, Comprehensive Energy Assistance Program (CEAP), Weatherization Assistance Program (WAP), and Section 8 Housing Choice Voucher Programs.

(9) The Community Services Block Grant (CSBG)--A grant which provides U.S. federal funding for Community Action Agencies (CAAs) and other eligible entities that seek to address poverty at the community level. Like other block grants, CSBG funds are allocated to the states and other jurisdictions through a formula.

(10) Community Services Block Grant (CSBG) Act--The CSBG Act is a law passed by Congress authorizing the Community Services Block Grant. The CSBG Act was amended by the Community Services Block Grant Amendments of 1994 and the Coats Human Services Reauthorization Act of 1998 under 42 U.S.C. §§9901, et seq. The act authorized establishing a community services block grant program to make grants available through the program to states to ameliorate the causes of poverty in communities within the states.

(11) CSBG Subrecipient--Includes CSBG eligible entities and other organizations that are awarded CSBG funds.

(12) Department--The Texas Department of Housing and Community Affairs.

(13) Discretionary Funds--Those CSBG funds maintained in reserve by a State, at its discretion, for CSBG allowable uses as authorized by §675C of the CSBG Act, and not designated for distribution on a statewide basis to CSBG eligible entities and not held in reserve for state administrative purposes.

(14) DOE--The United States Department of Energy.

(15) DOE WAP Rules--10 CFR Part 440 of the Code of Federal Regulations describing the Weatherization Assistance for Low Income Persons as administered through the Department of Energy.

(16) Dwelling Unit--A house, including a stationary mobile home, an apartment, a group of rooms, or a single room occupied as separate living quarters.

(17) Equipment--A tangible non-expendable personal property including exempt property, charged directly to the award, having a useful life of more than one year, and an acquisition cost of $5,000 or more per unit. For CSBG, CEAP, and WAP, if the unit ac-

quisition cost exceeds $5,000, approval from the TDHCA Community Affairs Division must be obtained before the purchase takes place. For ESGP, if the unit acquisition cost exceeds $500, approval from TDHCA Community Affairs Division must be obtained before the purchase is made.

(18) Elderly Person--A person who is sixty (60) years of age or older.

(19) Electric Base-Load Measure--Weatherization measures which address the energy efficiency and energy usage of lighting and appliances.

(20) Eligible Entity--Those local organizations in existence and designated by the federal government to administer programs created under the federal Economic Opportunity Act of 1964. This includes community action agencies, limited-purpose agencies, and units of local government. The CSBG Act defines an eligible entity as an organization that was an eligible entity on the day before the enactment of the Coats Human Services Reauthorization Act of 1998, (October 27, 1998), or is designated by the Governor to serve a given area of the State and that has a tripartite board or other mechanism for local governance.

(21) Emergency--Defined by the LIHEAP Act of 1981 (Title XXVI of the Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. §8622):

(A) natural disaster;

(B) a significant home energy supply shortage or disruption;

(C) significant increase in the cost of home energy, as determined by the Secretary;

(D) a significant increase in home energy disconnections reported by a utility, a State regulatory agency, or another agency with necessary data;

(E) a significant increase in participation in a public benefit program such as the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. §§2011, et seq.), the national program to provide supplemental security income carried out under title XVI of the Social Security Act (42 U.S.C. §§1381, et seq.) or the State temporary assistance for needy families program carried out under Part A of Title IV of the Social Security Act (42 U.S.C. §§601, et seq.), as determined by the head of the appropriate federal agency;

(F) a significant increase in unemployment, layoffs, or the number of households with an individual applying for unemployment benefits, as determined by the Secretary of Labor; or

(G) an event meeting such criteria as the Secretary, at the discretion of the Secretary, may determine to be appropriate.

(22) Energy Repairs--Weatherization related repairs necessary to protect or complete regular weatherization energy efficiency measures.

(23) Energy Audit--The energy audit software and procedures used to determine the cost effectiveness of weatherization measures to be installed in a dwelling unit.

(24) Families with Young Children--A family that includes a child age five (5) or younger.

(25) USDHHS--U.S. Department of Health and Human Services.

(26) High Energy Burden--Determined by dividing a household's annual home energy costs by the household's annual gross income. The percentage at which energy burden is considered high is defined by data gathered from the State Data Center.

(27) High Energy Consumption--Household energy expenditures exceeding the median of low-income home energy expenditures expressed in the data collected from the State Data Center.

(28) Homeless or homeless individual--An individual who:

(A) lacks a fixed, regular, and adequate nighttime residence; or

(B) has a primary nighttime residence that is:

(i) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(ii) an institution that provides a temporary residence for individuals intended to be institutionalized; or

(iii) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. (Exclusion: The term "homeless" or "homeless individual" does not include any individual imprisoned or otherwise detained pursuant to an Act of Congress or a State law.)

(29) Household--Any individual or group of individuals who are living together in a dwelling unit as one economic unit. For energy programs, these persons customarily purchase residential energy in common or make undesignated payments for energy.

(30) Inverse Ratio of Population Density Factor--The number of square miles of a county divided by the number of poverty households of that county.

(31) Local Units of Government--City, county, or council of governments.

(32) Low Income--Income in relation to family size which:

(A) For CEAP, WAP, and CSBG is at or below 125% of the Federal Income guidelines;

(B) For ESGP is at or below 100% of the poverty level, determined in accordance with criteria established by the Director of the Office of Management and Budget;

(C) Is the basis on which cash assistance payments have been paid during the preceding twelve (12) month-period under titles IV and XVI of the Social Security Act or applicable state or local law; or

(D) If a State elects, is the basis for eligibility for assistance under the Low Income Home Energy Assistance Act of 1981, provided that such basis is at least 125% of the poverty level determined in accordance with criteria established by the Director of the Office of Management and Budget.

(33) Low Income Home Energy Assistance Program (LIHEAP)--A federally funded block grant program that is implemented to serve low income households who seek assistance for their home energy bills and/or weatherization services.

(34) Migrant Farm worker--An individual or family that is employed in agricultural labor or related industry and is required to be absent overnight from their permanent place of residence.

(35) Multifamily Dwelling Unit--A structure containing more than one dwelling unit.

(36) National Performance Indicator--An individual measure of performance within the Department's reporting system for mea-

suring performance and results of subrecipients of funds. There are currently twelve indicators of performance which measure self-sufficiency, family stability, and community revitalization.

(37) Needs Assessment--An assessment of community needs in the areas to be served with CSBG funds. The assessment is a required part of the Community Action Plan per Assurance 11 of the CSBG Act.

(38) OMB--Office of Management and Budget, a federal agency.

(39) Outreach--The method that attempts to identify clients who are in need of services, alerts these clients to service provisions and benefits, and helps them use the services that are available. Outreach is utilized to locate, contact and engage potential clients.

(40) Performance Statement--A document which identifies the services to be provided by a CSBG subrecipient. The document is an attachment to the CSBG contract entered into by the Department and the CSBG subrecipient.

(41) Persons with Disabilities--Any individual who is:

(A) a handicapped individual as defined in §7(9) of the Rehabilitation Act of 1973;

(B) under a disability as defined in §1614(a)(3)(A) or §223(d)(1) of the Social Security Act or in §102(7) of the Developmental Disabilities Services and Facilities Construction Act; or

(C) receiving benefits under 38 U.S.C., Chapter 11 or 15.

(42) Population Density--The number of persons residing within a given geographic area of the state.

(43) Poverty Income Guidelines--The official poverty income guidelines as issued by the U.S. Department of Health and Human Services annually.

(44) Private Nonprofit Organization--An organization which has status as a §501(c)(3) tax-exempt entity. Private nonprofit organizations applying for ESGP funds must be established for charitable purposes and have activities that include, but are not limited to, the promotion of social welfare and the prevention or elimination of homelessness. The entity's net earnings may not inure to the benefit of any individual(s).

(45) Public Organization--A unit of local government, as established by the Legislature of the State of Texas. Includes, but may not be limited to, cities, counties, and councils of governments.

(46) Referral--The process of providing information to a client household about an agency, program, or professional person that can provide the service(s) needed by the client.

(47) Rental Unit--A dwelling unit occupied by a person who pays rent for the use of the dwelling unit.

(48) Renter--A person who pays rent for the use of the dwelling unit.

(49) Seasonal Farm Worker--An individual or family that is employed in seasonal or temporary agricultural labor or related industry and is not required to be absent overnight from their permanent place of residence. In addition, at least 20% of the household annualized income must be derived from the agricultural labor or related industry.

(50) Secretary--Chief Executive of the U.S. Department of Health and Human Services.

(51) Service--The provision of work or labor that does not produce a tangible commodity.

(52) Shelter--Defined by the Department as a dwelling unit or units whose principal purpose is to house on a temporary basis individuals who may or may not be related to one another and who are not living in nursing homes, prisons, or similar institutional care facilities.

(53) Single Family Dwelling Unit--A structure containing no more than one dwelling unit.

(54) Social Security Act--42 U.S.C. §§601, et seq., CSBG works with activities carried out under Title IV Part A to assist families to transition off of state programs.

(55) State--The State of Texas or the Texas Department of Housing and Community Affairs.

(56) Subcontractor--An organization with whom the subrecipient contracts with to administer programs.

(57) Subrecipient--According to each program subchapter, subrecipient may be defined as organizations with whom the Department contracts with and provides CSBG funds; ESGP funds; DOE funds or, LIHEAP funds.

(58) Supplies--All personal property excluding equipment, intangible property, and debt instruments, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement ("subject inventions"), as defined in 37 CFR Part 401, "Rights to Inventions Made by Non-profit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements."

(59) TAC--Texas Administrative Code.

(60) Targeting--Focusing assistance to households with the highest program applicable needs.

(61) Terms and Conditions--Binding provisions provided by a funding organization to grantees accepting a grant award for a specified amount of time.

(62) Treatment as a State or Local Agency--For purposes of 5 U.S.C. Chapter 15 any entity that assumes responsibility for planning, developing, and coordinating activities under the CSBG Act and receives assistance under CSBG Act shall be deemed to be a State or local agency.

(63) Units of General Local Government--A unit of local government which has, among other responsibilities, the authority to assess and collect local taxes and to provide general governmental services.

(64) U.S.C.--United States Code.

(65) Vendor Agreement--An agreement between the subrecipient and energy vendors that contains assurance as to fair billing practices, delivery procedures, and pricing for business transactions involving LIHEAP beneficiaries.

(66) WAP--Weatherization Assistance Program.

(67) WAP PAC--Weatherization Assistance Program Policy Advisory Council. The WAP PAC was established by the Department in accordance with 10 CFR §440.17 to provide advisory services in regards to the WAP program.

(68) Weatherization Material--The material listed in Appendix A of 10 CFR Part 440.

(69) Weatherization Project--A project conducted in a single geographical area which undertakes to reduce heating and cooling demand of dwelling units that are energy inefficient.

§5.4. Prohibitions.

(a) Pursuant to the Office of Management and Budget Circular A-122, "Cost Principles for Non-Profit Organizations," specifically §25 titled "Lobbying," costs associated with lobbying are unallowable.

(b) Section 678(F)(b)(2) of the CSBG Act prohibits the use of program funds for political activity, voter registration activity or voter registration. The Hatch Act, 5 U.S.C., Chapter 15 and the amendments to the Hatch Act and the repeal of §675(e) and §675(C)(6) of the Community Services Block Grant (CSBG) Act do not affect the prohibition of §678(F)(b)(2).

(c) Knowingly hiring an undocumented worker is prohibited, 8 U.S.C. §1324a.

(d) Discrimination is prohibited.

(1) Civil Rights Act of 1964, (42 U.S.C. §§2000, et seq.) Age Discrimination Act of 1975 (42 U.S.C. §§6101, et seq.). Rehabilitation Act of 1973 (29 U.S.C. §794), and Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. §§12131, et seq.) shall apply to all programs or activities administered by subrecipients including the nondiscrimination provisions of the CSBG (42 U.S.C. §§9901, et seq.).

(2) All subrecipients receiving federal funds must be equal opportunity employers and render services without regard to race, color, religion, sex, national origin, age, handicap, political affiliation or belief. Information on equal opportunity and nondiscrimination shall be made available to participants, employees, subcontractors, and interested parties.

§5.5. Certificate and Disclosure Regarding Lobbying Activities.

(a) Subrecipients of federal funding, including those who receive federal funds through the Department, are subject to the anti-lobbying provisions commonly referred to as "the Byrd Amendments" (31 U.S.C. §1352). The legislation imposes certain requirements for disclosure and certification on recipients of federal contracts, grants, cooperative agreements, and loans, including the requirement that each recipient of a federal contract in excess of $100,000 must complete the Standard Form-LLL "Disclosure of Lobbying Activities" form.

(b) A §501(c)(3) nonprofit organization which pays any person funds from any source (even non-federal funds) to lobby Congress or which pays an employee of any federal agency in connection with this grant, must complete the "Disclosure of Lobbying Activities" form available on the U.S. Department of Health and Human Services (USDHHS) website. A completed form must be submitted to the Department prior to engaging in lobbying activities. The subrecipient must also file quarterly updates about its employment of lobbyists if material changes occur in the organization's use of lobbyists.

(c) For each contract, grant, cooperative agreement, or loan in excess of $100,000, the subrecipient must complete the "Certification Regarding Lobbying" form and return it to the Department. This form is located on the USDHHS website. By completing the certification, the subrecipient verifies that no federally appropriated funds have been used to lobby the United States Congress in connection with the awarding or modifying of a federal contract, loan, cooperative agreement or grant.

(d) Pursuant to the 1996 Simpson-Craig Amendment to the Lobbying Disclosure Act, 2 U.S.C. §1611, §501(c)(4) non-profit organizations, typically civic leagues or employee associations, may not receive any federal funding if such organizations engage in lobbying. The law establishes civil penalties for noncompliance, with possible penalties ranging from $10,000 to $100,000.

§5.10. Procurement Standards.

(a) Procurement procedures must meet minimum guidelines, according to Office of Management and Budget (OMB) Circulars A-87, A-102, A-110, A-122 (as applicable), the Uniform Grant Management Common Rule, Texas Government Code, Chapter 783, and 10 CFR Part 600 (Financial Assistance Rule).

(b) All subrecipients including non-profits must comply with all of the referenced statutes and regulations listed in subsection (a) of this section. In case of any conflict between the OMB Circulars or federal laws and state laws involving federal funds, the federal law or OMB Circulars will prevail.

(c) Additional Department requirements are:

(1) Small purchase procedures:

(A) This procedure may be used only on those services, supplies, or equipment costing in the aggregate of $25,000 or less. For Emergency Shelter Grant Program (ESGP), the threshold is $500 and more per unit;

(B) Subrecipient must establish a clear, accurate description of the specifications for the technical requirements of the material, equipment, or services to be procured; and

(C) Subrecipient must obtain a written price or documented rate quotation from an adequate number of qualified sources. An adequate number is, at a minimum, three different sources.

(2) Sealed bids:

(A) Subrecipient must formally advertise, for a minimum of three (3) days, in newspapers or through notices posted in public buildings throughout the service area. Advertising beyond the subrecipient's service area is allowable and recommended by the Department. The advertisement should include, at a minimum, a response time of fourteen (14) days prior to the closing date of the bid request. Cities and counties must comply with the statutorily imposed publication requirements in addition to those requirements stated herein; and

(B) When advertising for material or labor services, subrecipient shall indicate a period for which the materials or services are sought (e.g. for a one-year contract with an option to renew for an additional four (4) years). This advertised time period shall determine the length of time which may elapse before re-advertising for material or labor services, except that advertising for labor services must occur at least every five (5) years.

(3) Competitive proposals:

(A) The Request for Proposal (RFP) must be publicized. The preferred method of advertising is the local service area newspapers. This advertisement should, at a minimum, allow fourteen (14) days before the RFP is due. The due date must be stated in the advertisement; and

(B) The time period for services shall be one year, plus four (4) additional years at a maximum.

(4) Non-competitive proposals:

(A) The service, supply, or equipment is available only from a single source;

(B) A public emergency exists preventing the time required for competitive solicitation; and

(C) After solicitation of a number of sources, competition is determined inadequate.

(5) Required contract provisions shall include the following contract provisions or conditions in procurement contracts or subcontracts:

(A) Contracts in excess of $25,000 shall include contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances where subcontractors violate or breach the contract terms, and provide for such remedial actions as may be appropriate;

(B) All contracts in excess of $25,000 shall include suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the subrecipient;

(C) Contracts shall include a provision with regard to independent subcontractor status to hold harmless and indemnify subrecipient from and against any and all claims, demands and course of action asserted by any third party arising out of or in connection with the services to be performed under contract;

(D) Contracts shall include a provision regarding conflict of interest. Subrecipient's employees, officers, and/or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from subcontractors, or potential subcontractors; and

(E) Contracts shall include a provision to prevent fraud and abuse.

(i) Subrecipient shall establish, maintain, and utilize internal control systems and procedures sufficient to prevent, detect, and correct incidents of waste, fraud, and abuse in all Department funded programs and to provide for the proper and effective management of all program and fiscal activities funded by this contract. Subrecipient's internal control systems and all transactions and other significant events must be clearly documented and the documentation made readily available for review by Department.

(ii) Subrecipient shall give Department complete access to all of its records, employees, and agents for the purpose of monitoring or investigating the program. Subrecipient shall fully cooperate with Department's efforts to detect, investigate, and prevent waste, fraud, and abuse. Subrecipient shall immediately notify the Department of any identified instances of waste, fraud, or abuse.

(iii) Department will notify the funding source upon identification of possible instances of waste, fraud, and abuse or other serious deficiencies.

(iv) Subrecipient may not discriminate against any employee or other person who reports a violation of the terms of this contract or of any law or regulation to Department or to any appropriate law enforcement authority, if the report is made in good faith.

(F) Contracts shall include a provision to the effect that any alterations, additions, or deletions to the terms of the contract which are required by changes in federal law and regulations or state statute are automatically incorporated into the contract without written and administrative code amendment hereto, and shall become effective on the date designated by such law and or regulation; and any alterations, additions, or deletions to the terms of the contract shall be amended hereto in writing and executed by both parties to the contract.

(G) Contracts shall include the following provision assuring legal authority to sign the contract.

(i) Subcontractor represents that it possesses the practical ability and the legal authority to enter into the contract, receive and manage the funds authorized by the contract, and to perform the services subcontractor has obligated itself to perform under the contract.

(ii) The person signing the contract on behalf of the subcontractor warrants that he/she has been authorized by the subcontractor to execute the contract on behalf of the subcontractor and to bind the subcontractor to all terms set forth in the contract.

(iii) Department shall have the right to suspend or terminate the contract if there is a dispute as the legal authority of either the subcontractor or the person signing the contract to enter into the contract or to render performances thereunder. Should such suspension or termination occur, the subcontractor is liable to the subrecipient for any money it has received for performance of provisions of the contract.

§5.11. Procurement/Cooperative Purchasing Program.

The State of Texas conducts procurement for many materials, goods, and appliances. The State of Texas procurement process complies with the required procurement provisions. For more detail about how to purchase from the State contract, please contact: State of Texas Co-Op Purchasing Program, Texas Comptroller of Public Accounts, Web address: http://www.window.state.tx.us/procurement/prog/coop/; e-mail: coop@cpa.state.tx.us; phone number: (512) 463-3368. If subrecipients choose to use the Cooperative Purchasing Program, they will need documentation of annual fee payment.

§5.13. Bonding Requirements.

(a) The following requirements relate only to construction or facility improvements.

(1) For contracts exceeding $100,000 the Department may accept the bonding policy and requirements of the subrecipient, provided the Department has made a written finding that the Department is adequately protected.

(2) For contracts in excess of $100,000, and for which the subrecipient cannot make a determination that the Department's interest is adequately protected, a "bid guarantee" from each bidder equivalent to five (5) of the bid price shall be requested. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified. A bid bond in the form of all of the following may represent a "bid guarantee."

(A) A performance bond on the part of the subrecipient for 100% of the contract price. A "performance bond" is one executed in connection with a contract, to secure fulfillment of all subcontractors' obligations under such contract.

(B) A payment bond on the part of the subcontractor for 100% of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(C) Where bonds are required, in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR Part 223, "Surety Companies Doing Business with the United States."

(b) Cities and counties must comply with the bond requirements of Texas Civil Statutes, Articles 2252 and 5160, and Local Government Code §252.044 and §262.032, as applicable.

§5.14. Subrecipient Contract.

(a) Upon Board approval, the Department's Executive Director and subrecipients shall enter into and execute an agreement for the receipt of funds. The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver modifications and/or amendments to the contract.

(b) Within sixty (60) days following the conclusion of a contract issued by the Department, the subrecipient shall provide a full accounting of funds expended under the terms of the contract.

(c) Failure of a subrecipient to provide an accounting of funds expended under the terms of the contract may be sufficient reason for the Department to deny any future contract to the subrecipient.

§5.16. Monitoring of Subrecipients.

(a) The Department's Community Affairs Division (CAD) is responsible for ensuring that the Community Services Block Grant (CSBG), Comprehensive Energy Assistance Program (CEAP), Weatherization Assistance Program (WAP), and Emergency Shelter Grant Program (ESGP) program activities are completed and that the funds are expended in accordance with the contract provisions and applicable State and Federal rules, regulations, policies, and related statutes. In order to ensure such, the Department will conduct monitoring reviews of the subrecipients to evaluate the effectiveness of subrecipient's performance and program compliance through on-site and desk monitoring as described in §5.15 of this chapter (relating to Federal Funding Accountability and Transparency Act (FFATA)) following the requirements of §678B of PL 105-285 Subtitle B, §2605(B)(10) of PL 97-35, as amended, 10 CFR §440.23(d), and 24 CFR §576.61 and §576.57(f) and (g), respectively.

(1) CAD employs a subrecipient monitoring procedure that is based upon an assessment of associated risks. The factors may include but are not limited to the status of the most recent monitoring report, timeliness of grant reporting, results of the last on-site monitoring review, number and funding amount of Department funded contracts, final expenditure rate, and single audit status or other factors. Ranking of subrecipients will determine whether an on-site review or a desk review is completed unless Department management determines an on-site review is needed.

(2) CAD may conduct unannounced on-site monitoring reviews of subrecipients identified as at risk for contract termination, if deficiencies identified from prior monitoring activities persist or remain unresolved for an unreasonable period of time. In the event of reports of fraud and abuse or other extenuating circumstances the Department may make an unannounced on-site monitoring review.

(3) Follow-up reviews may be performed to ensure implementation of corrective action of subrecipients that failed to meet the goals, standards, and requirements established by the Department.

(4) Technical assistance and training will be provided to the subrecipient to address program deficiencies.

(5) A monitoring instrument is used to perform monitoring reviews. Support documentation is retained by the Department to verify: the achievement of performance goals; conduct of eligible activities; and compliance with other contractual regulatory provisions and financial accountability. Monitoring reviews of subrecipients also include reviewing annual financial reports and any related management letters and financial documents.

(6) Following the onsite monitoring review, a monitoring report is prepared and submitted to the subrecipients outlining any administrative, program, and financial deficiencies. The monitoring report also includes notes, recommend improvements, corrective actions or a corrective action plan.

(A) Finding--The written description of a deficient condition which is significantly substandard according to the monitoring standards. Findings may also be deficiencies found with regard to compliance with program rules, required cost principles, federal, state and/or local laws, and generally accepted accounting procedures or Generally Accepted Accounting Principles. In general, findings require corrective action to create an acceptable level of risk for disbursement of funds. The description of a finding might include the cause and effect of the deficient condition.

(B) Recommended Improvement--Suggested best practice(s) to enhance program, operational, financial, or administrative practices.

(C) Note--An explanatory tool to further describe and clarify findings or recommended improvements. A note may also be used to include additional information related to the monitoring review but not related to a finding or recommended improvement.

(7) Subrecipients are required to have at a minimum the following documents available, and any other requested documents, for the monitoring review:

(A) Roster of staff (name, title, salary and status)--All Community Affairs programs;

(B) Current agency organization chart;

(C) List of Board of Directors to include: names, addresses and telephone numbers, tenure on the board, section represented by the board member, list of committees--CSBG and ESGP;

(D) Board election/selection materials--CSBG;

(E) Board minutes (previous six meetings) and attendance roster--CSBG and ESGP;

(F) List of neighborhood centers with names of staff--CSBG and CEAP;

(G) Personnel policies;

(H) Bylaws--CSBG and ESGP;

(I) Travel policies and records;

(J) Chart of accounts;

(K) Accounting records (journals/ledgers) and support documentation;

(L) Amount of Cash on Hand (at time of monitoring);

(M) Bank reconciliation records;

(N) Agency's proof of fidelity bond coverage;

(O) Documentation of match requirements--ESGP;

(P) Closeout data for prior program year--CEAP and WAP;

(Q) Access to client files and documentation of performance--All Community Affairs programs;

(R) Declaration of Income Statement (DIS) Policy/Procedure--All Community Affairs programs;

(S) Appeals Procedures--CEAP and WAP;

(T) Subcontract agreements with appropriate procurement packages (if applicable)--All Community Affairs programs;

(U) Procurement policy;

(V) Documentation of current contract inventory--All Community Affairs programs;

(W) Documentation of coordination with other local programs (including contact person and phone numbers)--CSBG;

(X) Copies of most recent monitoring reports and/or performance reviews of all programs administered by the organization;

(Y) Copy of the most recent Single Audit Report--Organizations that expend more than $500,000 in federal funds during a fiscal year must have a single audit conducted for that year (A-133 Subpart B.200). Organizations that do not exceed the $500,000 federal fund expenditure threshold are exempt from the single audit requirements. If an organization is not required to have a single audit performed, the organization must provide the end-of-the-year financial statements (balance sheet, income statement, and statement of cash flow); and

(Z) If applicable, documentation of the most recent Head Start Onsite Monitoring Document review, including results, responses, and current status--CSBG.

(b) Subrecipients not exempt from the single audit requirements are responsible for submitting their Single Audit Report within thirty (30) days of completion of their audit and no later than nine (9) months after the end of the audit period (fiscal year end) to the Department's Portfolio Management and Compliance Division as well as to the CA Division. Refer to 31 U.S.C. §7502.

(c) Monitoring reviews of subrecipients will include a review of the subrecipients annual financial reports and any related management letters and financial documents.

§5.17. Sanctions and Contract Close Out.

(a) Subrecipients that have entered into contract with the Department to administer programs are required to follow state and federal laws and regulations and rules governing these programs.

(b) Except as expressly modified by law or the terms of a subrecipient's contract, the subrecipient shall comply with the cost principles and uniform administrative requirements set forth in the Uniform Grant and Contract Management Standards (UGMS), 1 TAC §§5.141, et seq.

(c) If a subrecipient fails to comply with the requirements, rules, and regulations of the CSBG, CEAP, WAP, or ESGP programs, and in the event monitoring or other reliable sources reveal material deficiencies in performance, or if the subrecipient fails to correct any deficiency within the time allowed by federal or state law, the Department will apply one or more of the following sanctions:

(1) Deny the subrecipient's requests for advances and place it on a cost reimbursement method of payment until proof of compliance with the rules and regulations are received by the Department;

(2) Withhold all payments from the subrecipient (both reimbursements and advances) until proof of compliance with the rules and regulations are received by the Department, reduce the allocation of funds (with the exception of Community Services Block Grant (CSBG) funds to eligible entities) or impose sanctions as deemed appropriate by the Department Executive Director, at any time, if the Department identifies possible instances of fraud, abuse, fiscal mismanagement, or other serious deficiencies in the subrecipients' performance;

(3) Suspend performance of the contract or reduce funds until proof of compliance with the rules and regulations are received by the Department or a decision is made by the Department to initiate proceedings for contract termination;

(4) Elect not to provide future grant funds to the subrecipient until appropriate actions are taken to ensure compliance; or

(5) Terminate the contract. Adhering to the requirements governing each specific program administered by the Department, as needed, the Department may determine to proceed with the termination of a contract, in whole or in part, at any time the Department establishes there is good cause for termination. Such cause may include, but is not limited to, fraud, abuse, fiscal mismanagement, or other serious deficiencies in the subrecipient's performance. For CSBG contract termination procedures, please refer to §5.206 of this chapter (relating to Termination and Reduction of Funding).

(d) Contract Close-out. When the Department moves to terminate a contract, the following procedures will be implemented.

(1) The Department will issue a termination letter to the subrecipient no less than thirty (30) days prior to terminating the contract. The Department may determine to take one of the following actions: suspend funds immediately; establish a cost reimbursement plan for closeout proceedings; or provide instructions to the subrecipient to prepare a proposed budget and written plan of action that supports the closeout of the contract. The plan must identify the name and current job titles of staff that will perform the close-out and an estimated dollar amount to be incurred. The Department will respond within ten (10) working days from receipt of the plan.

(2) If the Department determines that cost reimbursement is an appropriate method of providing funds to accomplish closeout, the subrecipient will submit backup documentation for all current expenditures associated with the closeout. The required documentation will include, but not be limited to, the chart of accounts, detailed general ledger, revenue and expenditure statements, time sheets, payment vouchers and/or receipts, and bank reconciliations.

(3) No later than thirty (30) days after the contract is terminated, the Subrecipient will take a physical inventory of client files, including case management files, and will submit to the Department an inventory of equipment with a unit acquisition cost of $5,000 or greater for Comprehensive Energy Assistance Program (CEAP), Weatherization Assistance Program (WAP) and CSBG or a unit acquisition cost of $500 or greater for ESGP.

(4) The terminated subrecipient will have thirty (30) days from the date of the physical inventory to copy all current client files. Client files must be boxed by county of origin. Current and active case management files also must be copied, inventoried, and boxed by county of origin.

(5) Within thirty (30) days following the subrecipient's due date for copying and boxing client files, Department staff will retrieve copied client files.

(6) The terminated subrecipient will prepare and submit no later than sixty (60) days from the date the contract is terminated, a final report (TDHCA Form 85) containing a full accounting of all funds expended under the contract.

(7) A final Monthly Financial Funding Programmatic Report for all remaining expenditures incurred during the close-out period must be received by the Department no later than sixty (60) days from the date the Department determines that the closeout of the program and the period of transition are complete.

(8) The subrecipient will submit to the Department no later than sixty (60) days after the termination of the contract, an inventory (TDHCA Form 27) of the non-expendable personal property (as defined in Attachment N of the Uniform Grant Management Standards) acquired in whole or in part with funds received under the contract.

(9) The Department will transfer title to equipment having a unit acquisition cost (the net invoice unit price of an item of equipment) of:

(A) $5,000 or greater for CEAP, WAP, and CSBG; or

(B) $500 or greater for ESGP to the Department or to any other entity receiving funds under the program in question. The Department will make arrangements to remove equipment covered by this paragraph within ninety (90) days following termination of the contract.

(10) Upon selection of a new service provider, the Department will transfer to the new provider client files and, as appropriate, equipment.

(11) As required by OMB Circular A-133, a current year Single Audit must be performed for all agencies that have exceeded the federal expenditure threshold of $500,000. The Department will allow a proportionate share of program funds to pay for accrued audit costs, when an audit is required, for a Single Audit that covers the date up to the closeout of the contract. The terminated subrecipient must have a binding contract with a CPA firm on or before the termination date of the contract. The actual costs of the Single Audit and accrued audit costs including support documentation must be submitted to the Department no later than sixty (60) days from the date the Department determines the close-out is complete.

(12) Subrecipients shall submit within sixty (60) days after the date of the close-out process all financial, performance, and other applicable reports to the Department. The Department may approve extensions when requested by the subrecipient. However, unless the Department authorizes an extension, the subrecipient must abide by the sixty (60) day contractual requirement of submitting all referenced reports and documentation to the Department.

§5.20. Determining Income Eligibility.

(a) The U.S. Department of Health and Human Services (USDHHS) annually provides poverty income guidelines for use in determining client eligibility. Community Affairs Division programs are required to follow these guidelines.

(b) The subrecipients shall establish the client eligibility level at 125% of the federal poverty level in effect at the time the client makes an application for services.

(c) To determine income eligibility for program services, subrecipients must base annualized eligibility determinations on household income from thirty (30) days prior to the date of application for assistance. Each subrecipient must maintain documentation of income from all sources for all household members for the entire thirty (30) day period prior to the date of application and multiply the monthly amount by twelve (12) to annualize income. Income documentation must be collected from all income sources for all household members eighteen (18) years and older for the entire thirty (30) day period.

(d) If proof of income is unavailable, the applicant must complete and sign a Department approved Declaration of Income Statement.

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 February 20, 2009.

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SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §§5.201 - 5.217

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 5, Subchapter B, §§5.201 - 5.217 concerning the Community Services Block Grant (CSBG). Sections 5.201, 5.203, 5.206, 5.207, 5.209, 5.211, 5.213 - 5.215 and 5.217 are adopted with changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7829). Sections 5.202, 5.204, 5.205, 5.208, 5.210, 5.212 and 5.216 are adopted without changes and will not be republished.

The purpose of the new chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8.

Public hearings on the new subchapter were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth, and Austin. Additionally, written comments were accepted by mail, e-mail, and facsimile through October 20, 2008.

Public comments and the Department's responses are presented in the order in which the subchapters and sections appear in the new chapter. Following the section number is the title of the section as it appears in the rule. Following the comment is a parenthetical containing a number or series of numbers. Each number corresponds to a person who commented on the particular rule section. Following the identification of the section and related commenters is a summary of the comment and staff's response, including the reasons why the agency agreed or disagreed with the comment and a statement of the factual basis for the new section.

Public comments on the proposed rule were received by: (1) Texas Association of Community Action Agencies, Inc. and (4) Community Services, Inc.

§5.201(a). Background.

COMMENT (1): Commenter suggested additional language to ensure consistency with and avoid violation of the CSBG Act.

DEPARTMENT RESPONSE: Staff concurred with the commenter and made minor revisions to subsection (a) as well as §5.17(c)(4) of this chapter in order to provide further clarification.

§5.203(a). Distribution of CSBG Funds.

COMMENT (1): Commenter made recommendation to remove the date of the U.S. Census to prevent from having to change the TAC each time a new Census is released.

DEPARTMENT RESPONSE: Staff concurred and removed the date of the U.S. Census to prevent from having to change the TAC each time a new Census is released.

§5.206(a)(6)(B) and (a)(6)(C). Termination and Reduction of Funding.

COMMENT (1): Commenter recommended adding clarification in accordance with federal law to these sections.

DEPARTMENT RESPONSE: Subsection (a)(6)(B). For clarification in accordance with federal law, the Department added: "The ALJ will issue a proposal for decision based on the facts and a recommendation will be presented to the Department's Governing Board for final review."

Subsection (a)(6)(C). Staff concurred and added further clarification in accordance with federal law regarding termination or reduction of funding.

§5.207(b)(1). Subrecipient Performance.

ADMINISTRATIVE CHANGE: Staff added clarifying language to the third sentence. The word "funds" was added between the words "and" and "must."

§5.207(b) and (b)(2). Subrecipient Performance.

COMMENT (1): Commenter suggested the deobligation of funds was inconsistent with the right of the agency to carry over funds into the next year and the due process accorded for reduction or termination of funds. Commenter recommended that all recaptured funds should be distributed to all eligible entities by using the approved formula; it was changed to: "Unexpended Funds. The Department reserves the right to deobligate funds." In addition, commenter suggested correcting the federal agency name.

DEPARTMENT RESPONSE: Subsection (b). Staff does not concur with this comment. The CSBG Act does not require the unexpended balances to be reallocated by formula. Staff removed 20% from the unexpended funds.

Subsection (b)(2). Staff corrected the federal agency name of U.S. Department of and Human Services by adding "Department of."

§5.211(a). Subrecipient Reporting Requirements.

ADMINISTRATIVE CHANGE: Staff corrected names and acronyms of the reports mentioned in this section.

§5.213(a). Board Structure.

COMMENT (1) and (4):

Subsection (a). Comment received regarding removing the word "only" from the first sentence because it was unnecessary. Commenter also requested clarification to reflect process.

DEPARTMENT RESPONSE: Staff concurred and the word "only" was removed from the first sentence after "Private nonprofit entities,...." Staff added additional words to the second sentence for clarification to reflect actual process which is consistent with subsection (a)(2) of this section. A portion of the second sentence was revised for clarification purposes as follows: "Some of the members of the board shall be selected by the private nonprofit entity and others through a democratic process;..."

§5.213(d)(2)(A). Board Structure.

COMMENT (4): Commenter suggested that in the second sentence of this section there was a typo: the word "are" between "...members shall be" and "representatives of..."

DEPARTMENT RESPONSE: Staff concurred and made the correction.

§5.215(a). Board Size.

COMMENT (1): Commenter suggested that the board size does not have to be divisible by three.

DEPARTMENT RESPONSE: Staff concurred and removed subsection (a) "divisible by three" from the board size requirement; subsection (b) was changed to subsection (a); and subsection (c) was changed to subsection (b). In accordance with §676B, Tripartite Boards of the CSBG Act, the board does not need to be divisible by three. Rather, the board shall be comprised of three sectors.

§5.217(a). Board Meeting Requirements.

COMMENT (1): Commenter suggested that the Board must follow the Texas Open Meetings Act, meeting at least every ten (10) weeks, once per calendar quarter and at minimum five (5) times per year and, must give each member a notice of meeting five (5) days in advance of the meeting.

DEPARTMENT RESPONSE: Staff concurred with this comment and revised the language to include that the Board must meet at least once per calendar quarter and at a minimum of five (5) times per year.

The Board approved the final order adopting the new subchapter with recommended changes, on November 13, 2008.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§5.201. Background.

(a) In addition to the following rules for the Community Services Block Grant (CSBG) program, the rules established in Subchapter A of this chapter also apply to the CSBG program, except those that relate to the suspension, reduction, withholding or termination of funding. The CSBG Act was amended by the "Community Services Block Grant Amendments of 1994" and the Coats Human Services Reauthorization Act of 1998. The Secretary is authorized to establish a community services block grant program and make grants available through the program to states to ameliorate the causes of poverty in communities within the states.

(b) The Texas Legislature designated the Department as the lead agency for the administration of the CSBG program pursuant to Texas Government Code, §2306.092. CSBG funds will be made available to eligible entities to carry out the purposes of the CSBG program.

§5.203. Distribution of CSBG Funds.

(a) The CSBG Act requires that no less than 90% of the state's allocation be allocated to eligible entities. The Department currently utilizes a multi-factor fund distribution formula to equitably provide CSBG funds throughout the state's 254 counties to the CSBG eligible entities. The formula incorporates the most current decennial U.S. Census figures at 125% of poverty; a $50,000 base; a $150,000 floor (the minimum funding level); a 98% weighted factor for poverty population; and, a 2% weighted factor for the inverse ratio of population density.

(1) Each eligible entity receives a base amount of $50,000;

(2) The weighted factors of poverty population and population density are applied to the funds remaining after the base award funds have been distributed to each eligible entity;

(3) The Department then determines if any eligible entity is below the $150,000 floor after the base amount and weighted factors (poverty population and population density) have been applied, then the minimum floor amount is reserved for those entities below $150,000;

(4) The remaining funds are distributed to the remaining eligible entities. As was done with the initial run of the formula, each of the remaining eligible entities receives the base amount of $50,000 and then the weighted factors (poverty population and population density) are applied to determine the allocation amounts for eligible entities funded above the $150,000.

(b) Five percent (5%) of the Department's annual allocation of CSBG funds and any funds not spent as identified in subsection (c) of this section, may be expended for activities as per 42 U.S.C. §9907(b)(A) - (H) and activities that may include:

(1) the provision of training and technical assistance to CSBG eligible entities;

(2) services to low-income migrant seasonal farm worker and Native American populations;

(3) assisting CSBG eligible entities in responding to natural or man-made disasters;

(4) funding for innovative and demonstration projects that assist CSBG target population groups to overcome at least one of the barriers to attaining self-sufficiency; and

(5) other projects/initiatives, including state conference expenses. The Department may provide monetary awards to subrecipients for outstanding performance. To ensure consistent and comparable results, the process for monetary awards to CSBG subrecipients will be standardized.

(c) Up to five percent (5%) of the Department's annual allocation of CSBG funds will be used for administrative purposes consistent with state and federal law.

§5.206. Termination and Reduction of Funding.

(a) If the Department determines, on the basis of a final decision in a review pursuant to the CSBG Act, that an eligible entity fails to comply with the terms of an agreement or the state plan, to provide services under the CSBG Act or to meet appropriate standards, goals, and other requirements established by the Department (including performance objectives), the Department shall:

(1) inform the entity of the deficiency to be corrected;

(2) require the entity to correct the deficiency;

(3) offer training and technical assistance, if appropriate, to help correct the deficiency, and, as appropriate, prepare and submit to the Secretary a report describing the training and technical assistance offered; or if the Department determines that such training and technical assistance are not appropriate, prepare and submit to the Secretary a report stating the reasons for the determination and the reasons for proceeding with termination proceedings;

(4) At the discretion of the Department (taking into account the seriousness of the deficiency and the time reasonably required to correct the deficiency), the Department shall allow the entity to develop and implement, within sixty (60) days after being informed of the deficiency, a Quality Improvement Plan (QIP) to correct such deficiency within a reasonable period of time, as determined by the Department. No later than thirty (30) days after receiving from an eligible entity a proposed QIP, the Department shall either approve such proposed plan or specify the reasons why the proposed plan cannot be approved;

(5) If the Department does not accept the QIP, the Department, after providing adequate notice of impending termination proceedings and an opportunity for a hearing, may initiate proceedings to terminate or reduce the funding of a subrecipient; and

(6) If the Department has implemented sanctions against a subrecipient and the subrecipient has failed to comply with the QIP or a corrective action plan, the Department may request of the subrecipient's Board of Directors the voluntary relinquishment of the CSBG program and their designation as a CSBG eligible entity. If the subrecipient accepts to voluntarily relinquish the CSBG program, the Department will commence contract termination proceedings. If the subrecipient rejects voluntarily relinquishment of the CSBG program or the Department does not accept the subrecipient's QIP, the Department will initiate procedures for a hearing.

(A) Pursuant to the CSBG Act, the Department will provide notice and an opportunity for a hearing.

(B) The Department will select an Administrative Law Judge (ALJ) to oversee the proceedings of the hearing. The Department will coordinate establishing a date, time and hearing location with the ALJ and will provide adequate notice to the subrecipient. The ALJ will determine whether there is cause, as defined by the CSBG Act, U.S.C. §9908(c), to terminate or reduce funding the subrecipient. The ALJ will issue a proposal for decision on the facts and a recommendation will be presented to the Department's Governing Board for final review.

(C) If the ALJ determines that there is cause to terminate or reduce funding, pursuant to 42 U.S.C. §9915, the Department will notify the subrecipient that it has the right under 42 U.S.C. §9915 to seek review of the decision by the USDHHS. If the USDHHS does not overturn the decision, or if the subrecipient does not seek USDHHS review, the Department will initiate proceedings to terminate and close-out the contract.

(b) Any right or remedy given to the Department by this chapter does not preclude the existence of any other right or remedy, nor shall any action or lack of action by the Department in the exercise of any right or remedy be deemed a waiver of any other right or remedy.

§5.207. Subrecipient Performance.

(a) Budgets. CSBG eligible entities and any other funded organizations shall submit a budget to facilitate the contract execution process. A certification of board approval of CSBG budget form issued by the Department must also be submitted with planned budgets.

(b) Unexpended Funds. The Department reserves the right to deobligate funds.

(1) The U.S. Department of Health and Human Services Administration for Children and Families issues terms and conditions for receipt of funds under the CSBG. Subrecipients of CSBG funds will comply with the requirements of the terms and conditions of the CSBG award. Services must be provided on or before September 30th of the subsequent year and funds must be fully expended.

(2) The Coats Human Services Reauthorization Act of 1998, allows states to recapture unexpended CSBG funds in excess of 20% of the CSBG funds obligated to an eligible entity. This may be superseded by Congressional action in the appropriation process or by the terms and conditions issued by U.S. Department of Health and Human Services in the CSBG award letter.

§5.209. State Application and Plan.

(a) The Department submits to the Secretary every two years a state plan and a CSBG application. The Department holds public hearings in different areas of the state to solicit public comment on

the intended use of CSBG funds. The Department will provide notice of the public hearings regarding the state plan no later than the 15th day before the date of the hearing and publish the draft state plan on the Department's web site at least ten (10) days before the first public hearing.

(b) Every two (2) years in conjunction with the development of the state plan, the Department submits the CSBG budget to the Texas State Legislature for review during the legislative hearings, as part of the Legislative Appropriations Request (LAR) process.

§5.211. Subrecipient Reporting Requirements.

(a) Monthly Performance and Expenditure Report. CSBG subrecipients must submit a monthly performance and expenditure report. Subrecipients shall submit the Monthly Expenditure Report and Monthly Performance Report no later than the twentieth (20th) day of the month after each month of the contract period. Even if a fund reimbursement is not being requested, an Expenditure Report must be submitted electronically on or before the twentieth (20th) day of each month of the grant period. A final Expenditure Report must be submitted within sixty (60) days after the CSBG contract ends. The "Community Affairs Contract User Guide System" may be accessed through the TDHCA website, www.tdhca.state.tx.us.

(b) Reporting. Federal requirements mandate all states to participate in the preparation of an annual performance measurement report (also referred to as the CSBG National Survey). To comply with the requirements of §678E of the CSBG Act, all CSBG eligible entities and other organizations receiving CSBG funds are required to participate.

§5.213. Board Structure.

(a) Private nonprofit entities, shall administer the CSBG program through a tripartite board that fully participates in the development, planning, implementation, and evaluation of the program to serve low-income communities. Some of the members of the board shall be selected by the private nonprofit entity and others through a democratic process; the board shall be composed so as to assure that the requirements of §676B(a)(2) of the CSBG Act are followed and are composed as follows:

(1) One-third of the members of the board shall be elected public officials, holding office on the date of the selection, or their representatives. In the event that there are not enough elected public officials reasonably available and willing to serve on the board, the entity may select appointive public officials to serve on the board. The entity may allow governing officials of the political jurisdiction to select and/or recommend an elected or appointive official to serve on the board. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board. Appointive public officials or their representatives or alternates may be counted in meeting the 1/3 requirement. Refer to subsection (d)(1)(B) of this section entitled "Permanent Representatives and Alternates" for related information;

(2) not fewer than 1/3 of the members are persons chosen in accordance with democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhood served; and each representative of low-income individuals and families selected to represent a specific neighborhood within a community under subsection (b)(1)(B) of this section, resides in the neighborhood represented by the member;

(3) the remainder are members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community served.

(b) For public organizations to be considered to be an eligible entity for purposes of the CSBG Act, §676B(b), the entity shall administer the CSBG grant through tripartite boards as follows:

(1) A tripartite board, which shall have members selected by the organization and shall be composed so as to assure that not fewer than 1/3 of the members are persons chosen in accordance with democratic selection procedures adequate to assure that these members:

(A) are representative of low-income individuals and families in the neighborhood served;

(B) reside in the neighborhood served; and

(C) are able to participate actively in the development, planning, implementation, and evaluation of programs funded under this chapter; or

(D) If conditions in subparagraphs (A) - (C) of this paragraph are not utilized, then another mechanism specified by the state which meets the tripartite requirements may be used. Public organizations that choose to utilize another mechanism must submit to the Department, for review and approval, a description of the mechanism to be utilized to select low-income representatives. The mechanism must assure decision-making and participation by low-income individuals in the development, planning, implementation, and evaluation of programs funded under this chapter.

(2) One-third of the members of the board shall be elected public officials, holding office on the date of the selection, or their representatives. In the event that there are not enough elected public officials reasonably available and willing to serve on the board, the entity may select appointive public officials to serve on the board. The entity may allow governing officials of the political jurisdiction to select and/or recommend an elected or appointive official to serve on the board. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board. Refer to subsection (d)(1)(B) of this section, entitled "Permanent Representatives and Alternates" for related information.

(3) The remainder of the members are officials or members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community served.

(c) Eligible entities administering the Head Start Program must comply with, the Head Start Act (42 U.S.C. §9837) that requires the governing body membership to comply with the requirements of §642(c)(1) of the Head Start Act. Exceptions shall be made to the requirements of clauses (i) - (iv) of §642(c)(1) of the Head Start Act for members of a governing body when those members oversee a public entity and are selected to their positions with the public entity by public election or political appointment.

(d) Selection. As per §676B of the CSBG Act, Private nonprofit entities and public organizations have the responsibility for selection and composition of the board.

(1) Public Officials:

(A) Elected public officials or appointed public officials, selected to serve on the board, shall have either general governmental responsibilities or responsibilities which require them to deal with poverty-related issues. They may not be officials with only limited, specialized, or administrative responsibilities; and

(B) Permanent Representatives and Alternates. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board.

(i) Permanent Representatives. The public officials selected by a private nonprofit entity or public organization to serve on the board may each choose one permanent representative to serve on the board in a full-time capacity. The public officials of the public organization may choose a representative to serve on the board or other governmental body. The representative need not be a public official but shall have full authority to act for the public official at meetings of the board. Permanent representatives may hold an officer position on the board. If a permanent representative is not chosen, then an alternate may be designated by the public official selected to serve on the board. Alternates may not hold an officer position on the board.

(ii) Alternate Representatives. If the private nonprofit entity or public organization board chooses to allow alternates, the alternates for low-income representatives shall be elected at the same time and in the same manner as the board representative is elected to serve on the board. Alternates for representatives of private sector organizations may be designated to serve on the board and should be selected at the same time the board representative is selected. In the event that the board member or alternate ceases to be a member of the organization represented, he/she shall no longer be eligible to serve on the board. Alternates may not hold an officer position on the board.

(2) Low-Income Representatives:

(A) An essential objective of community action is participation by low-income individuals in the programs which affect their lives; therefore, the CSBG Act and its amendments require representation of low-income individuals on boards or state-specified governing bodies. The CSBG statute requires that not fewer than one-third of the members shall be representatives of low-income individuals and families and that they shall be chosen in accordance with democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhoods served; and that each representative of low-income individuals and families selected to represent a specific neighborhood within a community resides in the neighborhood represented by the member; or

(B) Board members representing low-income individuals and families must be selected in accordance with a democratic procedure. This procedure, as detailed in subparagraph (D) of this paragraph, may be either directly through election, public forum, or, if not possible, through a similar democratic process such as election to a position of responsibility in another significant service or community organization such as a school PTA, a faith-based organization leadership group; or an advisory board/governing council to another low-income service provider;

(C) Every effort should be made by the nonprofit entity or public organization to assure that low-income representatives are truly representative of current residents of the geographic area to be served, including racial and ethnic composition, as determined by periodic selection or reselection by the community. "Current" should be defined by the recent or annual demographic changes as documented in the needs/community assessment. This does not preclude extended service of low-income community representatives on boards, but it does suggest that continued board participation of longer term members be revalidated and kept current through some form of democratic process; and

(D) The procedure used to select the low-income representative must be documented to demonstrate that a democratic selection process was used. Among the selection processes that may be utilized, either alone or in combination, are:

(i) Selection and elections, either within neighborhoods or within the community as a whole; at a meeting or conference, to which all neighborhood residents, and especially those who are poor, are openly invited;

(ii) Selection of representatives to a community-wide board by members of neighborhood or sub-area boards who are themselves selected by neighborhood or area residents;

(iii) Selection, on a small area basis (such as a city block); or

(iv) Selection of representatives by existing organizations whose membership is predominately composed of poor persons.

(3) Representatives of Private Groups and Interests:

(A) The private nonprofit entity or public organization shall select the remainder of persons to represent the private sector on the board or it may select private sector organizations from which representatives of the private sector organization would be chosen to serve on the board; and

(B) The individuals and/or organizations representing the private sector shall be selected in such a manner as to assure that the board will benefit from broad community involvement. The board composition for the private sector shall draw from officials or members of business, industry, labor, religious, law enforcement, education, school districts, representatives of education districts and other major groups and interests in the community served.

§5.214. Board Administrative Requirements.

(a) Powers of the Board for Private Nonprofit Entities. The board is responsible for abiding by the terms of contracts and shall determine the policies of the agency to assure accountability for public funding. The board shall function as the organization's governing body with the same legal powers and responsibilities as the board of directors of any nonprofit corporation.

(b) Powers of the Board for Public Organizations. The powers, duties, and responsibilities of the board shall be determined by the governing officials of the public organization. The governing officials may establish:

(1) an advisory board, in which case the authority given to the advisory board depends on the powers delegated to it by the governing officials of the political subdivision; or

(2) a governing board, empowering the board of directors with substantive decision-making authority and delegating the powers, duties, and responsibilities to carry out its CSBG-supported contract and functions.

(c) Compensation. Board members are not entitled to compensation for their service on the board. Reimbursement of reasonable and necessary expenses incurred by a board member in carrying out his/her duties is allowed.

(d) Conflict of Interest. No board member may participate in the selection, award, or administration of a subcontract supported by CSBG funds if:

(1) the board member;

(2) any member of his/her immediate family (as defined in the CSBG contract);

(3) the board member's partner; or

(4) any organization which employs or is about to employ any of the above, has a financial interest in the firm or person selected to perform a subcontract. No employee of the local CSBG subrecipient

or of the Texas Department of Housing and Community Affairs may serve on the board.

§5.215. Board Size.

(a) Board Service Limitations for Private Nonprofit Entities and Public Organizations Subrecipients boards may establish bylaws which allow for term limits and/or procedures for the removal of board members.

(b) Vacancies/Removal of Board Members.

(1) Vacancies. In no event shall the board allow 25% or more of either the public, private, or poverty sector board positions to remain vacant for more than ninety (90) days. CSBG subrecipients shall report the number of board vacancies by sector in their monthly performance reports. Compliance with the CSBG Act requirements for board membership is a condition for eligible entities to receive CSBG funding. There is no provision in the Act for a waiver or exception to these requirements.

(2) Removal of Board Members/Private Nonprofit Entities. Public officials or their representatives, may be removed from the board either by the board or by the entity that appointed them to serve on the board. Other members of the board may be removed by the board or pursuant to any procedure provided in the private nonprofit's by-laws.

(3) Removal of Board Members/Public Organizations. Board members may be removed from the board by the public organization or by the board if the board is so empowered by the public organization. The board may petition the public organization to remove a board member or the public organization may delegate the power of removal to the board.

§5.217. Board Meeting Requirements.

(a) The Board must follow the Texas Open Meetings Act, meet at least once per calendar quarter and at a minimum five (5) times per year and, must give each member a notice of meeting five (5) days in advance of the meeting.

(b) Open Meetings Training.

(1) Effective January 1, 2006, the 79th Texas Legislature established a state law §551.005 of the Texas Government Code requiring elected and appointed officials to receive training in Texas Open Government laws. The state law is in accordance to Texas Government Code, Title 5, §551.005 and §552.012. This mandate applies to the board of directors for CSBG eligible entities and requires that training is received within ninety (90) days of becoming a board member. As part of this requirement, the Office of the Attorney General has established and made available formal training to ensure government officials have a good command of open records and open meeting laws. To fulfill this requirement, the Office of the Attorney General offers free training videos which may be requested by accessing their website at www.oag.state.tx.us/opinopen/og_training.shtml or by calling 1-800-252-8011.

(2) Legislation requires open meetings training for public sector local officials; however, the Department recommends this training for all board members. Boards shall ensure that all members serving on the Board of Directors shall receive this training according to the deadlines described in this subsection.

(3) The organization shall maintain a copy of the board training certificate issued to participants upon completion of the training.

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 February 20, 2009.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER C. EMERGENCY SHELTER GRANTS PROGRAM (ESGP)

10 TAC §§5.301 - 5.311

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 5, Subchapter C, §§5.301 - 5.311 concerning the Emergency Shelter Grants Program (ESGP). Sections 5.302, 5.304, 5.306, and 5.311 are adopted with changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7834). Sections 5.301, 5.303, 5.305, 5.307 - 5.310 are adopted without changes and will not be republished.

The purpose of the new chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8.

Public hearings on the new subchapter were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth, and Austin. Additionally, written comments were accepted by mail, e-mail, and facsimile through October 20, 2008.

No public comments were received concerning the proposed new subchapter.

ADMINISTRATIVE CHANGES:

Section 5.302(a)(3). Purpose and Goals. Staff made a correction by changing the word "homeless" to "homelessness."

Section 5.304(c)(1)(A)(i) - (vi) is re-lettered to (c)(1)(A) - (G) and in subsection (d)(2)(C) changing the reference from "title" to "chapter."

Section 5.306(a). Eligible Entities. Staff added language to clarify eligible applicants for this specific program by inserting "(excluding Councils of Government)" between the words "government" and "and."

Section 5.311(a) and (b) Reports. Staff made clarification changes to the names and acronyms of the reports mentioned in this section.

The Board approved the final order adopting the new subchapter with recommended changes, on November 13, 2008.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§5.302. Purpose and Goals.

(a) The ESGP funds are available for:

(1) the rehabilitation or conversion of buildings for use as emergency shelter for the homeless;

(2) the payment of certain operating expenses and essential services in connection with emergency shelters for the homeless; and

(3) homelessness prevention activities.

(b) The program goal is to be the first step in a continuum of assistance to enable homeless individuals and families to move toward independent living as well as to prevent homelessness.

(c) The objectives of the ESGP shall be to:

(1) Help improve the quality of emergency shelters for the homeless;

(2) Help meet the costs of operating and maintaining emergency shelters;

(3) Provide essential services so that homeless individuals have access to the assistance they need to improve their situation; and

(4) Provide emergency intervention assistance to prevent homelessness.

§5.304. Use of Funds.

(a) Eligible Activities. ESGP funds are designed to address the immediate needs of homeless persons to assist their movement to permanent housing:

(1) ESGP funds may be utilized to assist individuals and families who would actually become or remain homeless without ESGP homelessness prevention assistance;

(2) ESGP funds cannot be utilized to care for or assist children in state custody; and

(3) The Department encourages that applications include an innovative approach to providing emergency shelter and/or transitional housing to homeless individuals and families. Transitional housing projects should be designed to provide housing and appropriate essential services to homeless persons in order to facilitate the movement of individuals or families to permanent housing within no more than 24 months. ESGP grant amounts may be used for one or more of the following activities in subsections (b) - (f) of this section:

(b) Operation administration may not exceed more than 10% of an applicant's ESGP budget (42 U.S.C. §11374(a)(3)) and may be requested for administrative salaries (including fringe benefits).

(1) Appropriate staff which may be charged as administrative staff are the executive director, program director, supervisors, administrative support staff, etc.

(2) Job descriptions for these positions are not required to be included in the ESGP application.

(c) Essential Services. ESGP legislation limits essential services to 30% of the total state allocation (24 CFR §576.3 and 42 U.S.C. §11374(a)(2)(b)).

(1) Essential services activities address the immediate needs of homeless individuals and enable homeless persons to become more independent and/or to secure permanent housing. Essential services may include direct client services concerned with employment, health, drug abuse prevention, and education, including but not limited to:

(A) assistance in obtaining permanent housing; medical and psychological counseling and supervision; employment counseling, job placement, and job training (including tuition and books);

(B) nutritional counseling and the salary of food preparers (cooks);

(C) substance abuse treatment and counseling;

(D) assistance in obtaining other federal, state, and local assistance including mental health benefits, medical assistance, veteran's benefits, and income support assistance such as Supplemental Security Income, Temporary Assistance for Needy Families, and Food Stamps;

(E) other services such as childcare, food vouchers, client clothing, or medical assistance (doctor visits, prescriptions, eye glasses or other prostheses, etc.);

(F) transportation costs directly associated with ESGP service delivery, such as bus tokens, bus fare, cab fare, airfare, salary of van driver, etc.; and

(G) salary for staff whose sole duty is to work directly with clients to provide the above services.

(2) Staff salaries may include wages and fringe benefits; however, no administrative or supervisory salaries may be paid with essential services funds.

(3) ESGP funds may be used to provide essential services, if the agency received local funds (locally generated tax revenue) from a unit of local government in the past 12 months, only if the ESGP application includes a request for funds to provide essential services for a new service (24 CFR §576.21(b)).

(d) Maintenance, operation, and furnishings. ESGP funds may be used for maintenance, operation, furnishings, and equipment costs (24 CFR §576.21(3)).

(1) Maintenance costs include contract services for copier or security system maintenance, pest control, lawn care, contracted janitorial service, etc.

(2) Operation costs include administration, equipment, facility rent, utilities, internet service, and telephone; building maintenance and non-deferred repairs; food for shelter residents; vehicle maintenance, registration, repairs, and fuel; building or equipment insurance; fidelity bond coverage; office and maintenance supplies; single audit expenses (if required), staff mileage reimbursement (for travel relating to ESGP service delivery), and pre-award travel expenses (for successful applicants to attend an orientation workshop).

(A) Non-deferred repairs are items that break during the contract period, such as:

(i) repairing a window that is broken;

(ii) repairs due to water damage;

(iii) repairing a broken furnace; or

(iv) repairing an air conditioning unit.

(B) Deferred repairs, classified as rehabilitation activities, are items which are inoperable or broken and in need of replacement prior to the application period.

(C) Equipment may include computers, printers, software, refrigerator, stove, tools, vehicles, etc. All equipment with a useful life of more than one year and an acquisition cost of $500 or more must be included in a cumulative inventory report submitted to the Department each contract year. (Refer to Subchapter A, General Provisions §5.8 of this chapter (relating to Inventory Report).

(D) Subrecipients who participate in a local continuum of care may use ESGP funds to facilitate the required Homeless Management Information System (HMIS) which may include the purchase of software and/or annual access fees to facilitate data collection and reporting of client-level information.

(3) Furnishings may include beds, mattresses, linens, desks, tables, chairs, etc.

(e) Homelessness Prevention. ESGP legislation limits homelessness prevention to 30% of the total state allocation (42 U.S.C. §11374(a)).

(1) Homelessness prevention funds may be used to provide direct monetary assistance on behalf of individuals whose annual income is at or below the federal poverty guideline when the conditions referenced in 24 CFR §576.3 are met.

(A) The individual or family is unable to make the required payments due to a sudden reduction in income or a sudden increase in expenses, i.e. sudden reduction in income may result from an event that occurs no more than ninety (90) days prior to the date of application for ESGP services. Documentation should support the risk of becoming homeless such as an eviction notice or termination of utility service notice;

(B) The assistance is necessary to avoid the foreclosure, eviction, or termination of utility services (excluding telephone service); utility and rent deposit refunds from vendors must be reimbursed to the subrecipient and not the client. Funds should be treated as program income;

(C) There is reasonable prospect that the individual or family will be able to resume the payments within a reasonable period of time (determined by the applicant organization and used consistently among all clients); and

(D) The assistance does not replace funding for pre-existing homelessness prevention activities from any other sources.

(2) Homelessness prevention funds must be used to assist those individuals and families that would actually become or remain homeless without ESGP homelessness prevention assistance (24 CFR §576.3) and include:

(A) Short-term subsidies to help defray rent and utility arrearages for families that have received a notice of eviction, termination of utility services, or payments to prevent the transfers;

(B) Security deposits or first month's rent to enable a homeless family (or individuals in emergency/transitional housing) to acquire permanent housing;

(C) Programs to provide mediation for landlord/tenant disputes;

(D) Programs to provide legal services for the representation of indigent tenants in eviction proceedings;

(E) Payments to prevent foreclosure on a home; and

(F) Other innovative programs and activities designed to prevent the incidence of homelessness.

(3) Subrecipients are required to use the ESGP homelessness prevention application to determine the eligibility of individuals and families applying for ESGP homelessness prevention assistance. (Refer to the Department's website, www.tdhca.state.tx.us, for the homelessness prevention application.)

(f) Rehabilitation. Rehabilitation is defined as the labor, materials, tools, and other costs of improving buildings.

(1) Examples of allowable rehabilitation projects include, but are not limited to:

(A) accumulated deferred maintenance (replacing flooring);

(B) replacement of principle fixtures and components;

(C) improvements to increase energy efficiency (replacing a furnace or air conditioning unit); and

(D) structural changes necessary to make the facility accessible for persons with physical disabilities.

(2) Rehabilitation projects include deferred repairs for items that are inoperable or broken and in need of replacement prior to the submission of the ESGP application. Rehabilitation does not include non-deferred repairs.

(3) All rehabilitation activity funded through ESGP must occur within the existing structure, must not increase the square footage of the structure involved, and must comply with local government safety and sanitation requirements. (Refer to §504 of the Rehabilitation Act of 1973, as amended, as provided in 24 CFR §8.23(a) or (b)). Types of rehabilitation projects include conversion, major rehabilitation and renovation (24 CFR §576.3).

§5.306. Eligible Entities.

(a) Eligible applicants are units of general local government (excluding Councils of Government) and private nonprofit organizations (24 CFR §576.1 of the ESGP Act).

(b) The Department will accept collaborative applications. To be considered as a collaborative, the application must include two or more organizations that will use ESGP funds to provide services to the target population as part of a local continuum of care.

(c) If a unit of general local government applies for only one organization, this will not be considered a collaborative application.

§5.311. Reports.

(a) The ESGP contract requires subrecipients to submit the Monthly Expenditure Report and Monthly Performance Report no later than the twentieth (20th) day of the month after each month of the contract period.

(b) Even if a fund reimbursement is not being requested, an Expenditure Report must be submitted electronically on or before the twentieth (20th) day of each month of the grant period. A final Expenditure Report must be submitted within sixty (60) days after the ESGP contract ends.

(c) A user name and password are needed to access the reporting system to submit monthly reports. The "Community Affairs Contract User Guide System" may be accessed through the TDHCA website, www.tdhca.state.tx.us, under "Interactive" "Contractor Tools".

(d) Subrecipients shall submit, by the thirtieth (30th) day of the month, a Monthly Service Summary Report of ESGP clients reported during the prior month in the Homeless Management Information Systems (HMIS) database.

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 February 20, 2009.

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Michael Gerber
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Texas Department of Housing and Community Affairs
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SUBCHAPTER D. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM

10 TAC §§5.401 - 5.408, 5.421 - 5.426, 5.430 - 5.432

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC, Chapter 5, Subchapter D, §§5.401 - 5.408, 5.421 - 5.426, and 5.430 - 5.432, concerning Comprehensive Energy Assistance Program, as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7838). Sections 5.402, 5.403, 5.405 - 5.407, and 5.422 - 5.426 are adopted with changes to the proposed text. Sections 5.401, 5.404, 5.408, 5.421 and 5.430 - 5.432 are adopted without changes and will not be republished.

The purpose of the new chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8.

Public hearings on the new chapter were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth, and Austin. Additionally, written comments were accepted by mail, e-mail, and facsimile through October 20, 2008.

Public comments and the Department's responses are presented in the order in which the subchapters and sections appear in the new chapter. Following the section number is the title of the section as it appears in the rule. Following the comment is a parenthetical containing a number or series of numbers. Each number corresponds to a person who commented on the particular rule section. Following the identification of the section and related commenters is a summary of the comment and staff's response, including the reasons why the agency agreed or disagreed with the comment and a statement of the factual basis for the new section.

Public comments on the proposed rule were received by (1) Texas Association of Community Action Agencies, (2) Fort Worth Community Action Partners, (3) City of Lubbock, Community Development Department, (4) Community Services, Inc., and (69) Hidalgo County Community Services Agency.

§5.402. Purpose and Goals.

COMMENT (69). Commenter suggested that a definition of "young child" was needed.

DEPARTMENT RESPONSE: Staff amended for clarification purposes. Additional wording was added to the second sentence to describe young child as "age 5 and younger."

§5.403(b)(5)(C) and (D). Distribution of CEAP Funds.

ADMINISTRATIVE CHANGE: Subsection (c) was revised to subparagraph (C) and subsection (d) was revised to subparagraph (D).

§5.406(a) and (b). Subrecipient Reporting Requirements.

ADMINISTRATIVE CHANGE: Staff corrected the names of the reports mentioned in this section.

§5.422(d)(2)(D). General Assistance and Benefit Levels.

COMMENT (1) and (2): Comments received suggesting raising the Heating and Cooling System Replacement, Repair, and/or Retrofit Component maximum household benefit limit from $4,000 to $5,000.

DEPARTMENT RESPONSE: Staff concurred and increased the limit to $5,000.

§5.422(f). General Assistance and Benefit Levels.

ADMINISTRATIVE CHANGE: The total maximum possible annual household benefit was raised from $7,600 to $8,600 to account for the $1,000 increase made in subsection (d)(2)(D).

§5.422(h)(1). General Assistance and Benefit Levels.

COMMENT (1): Commenter suggested adding additional wording for clarification purposes.

DEPARTMENT RESPONSE: Staff concurred and added: "...such as electrical wiring, butane tanks and lines, etc...."

§5.423(a). Energy Crisis Component.

COMMENT (2): Commenter suggested adding to the causes of a bona fide energy crisis the following: ...shortages "or a terrorist attack have..."

DEPARTMENT RESPONSE: Staff concurred and added the additional language.

§5.423(a). Energy Crisis Component.

COMMENT (69): Commenter suggested definition of "young child" was needed.

DEPARTMENT RESPONSE: Staff concurred. Additional language was added to describe "very young child" as "age 5 and younger."

§5.423(d)(5). Energy Crisis Component.

COMMENT (2): Comment received regarding the difficulty of getting doctor statements during life threatening situations in a reasonable amount of time.

DEPARTMENT RESPONSE: Staff concurred and added language to clarify this section. An additional sentence was added as follows: "A doctor's statement or prior written approval from the Department is required."

§5.425(a). Elderly and Disabled Component.

COMMENT (3): The commenter stated that there should not be an age requirement for the household member living with a disability.

DEPARTMENT RESPONSE: Staff concurred with this comment and added the word "at" as follows: "Disabled households include at least one member living with a disability."

§5.426(a). Heating and Cooling Component.

COMMENT (69): Commenter suggested definition of "young child" was also needed for §5.402 and §5.423 to be consistent with this section.

DEPARTMENT RESPONSE: Staff concurred and made changes for clarification and consistency purposes.

§5.426(g). Heating and Cooling Component.

COMMENT (1) and (4): Comments received regarding increasing the cost for performing proper assessments of heating and cooling system components.

DEPARTMENT RESPONSE: Staff concurred and increased the limit to $5,000 to be consistent with the revision in §5.422(d)(2)(D).

The Board approved the final order adopting the new chapter with recommended changes, on November 13, 2008.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§5.402. Purpose and Goals.

The purpose of CEAP is to assist low-income households, particularly those with the lowest incomes, that pay a high proportion of household income for home energy, primarily in meeting their immediate home energy needs. The program encourages priority be given to those with the highest home energy needs, meaning low income households with a high energy burden and/or the presence of a "vulnerable" individual in the household, such as a young child age 5 and younger, disabled person, or frail older individual. CEAP services include: energy education, needs assessment, budget counseling (as it pertains to energy needs), utility payment assistance and heating and cooling system replacement, repair or retrofit.

§5.403. Distribution of CEAP Funds.

(a) The Department distributes funds to subrecipients by an allocation formula.

(b) The formula allocates funds based on the number of low-income households in a service area and takes into account the special needs of individual service areas. The need for energy assistance in an area is addressed through a weather factor (based on heating and cooling degree days). The extra expense in delivering services in sparsely populated areas is addressed by an inverse population density factor. The lack of additional services available in very poor counties is addressed by a county median income factor. Finally, the elderly are given priority by giving greater weight to this population. The five factors used in the formula are calculated as follows:

(1) County Non-elderly Poverty Household Factor (weight of 40%) is defined by the Department as the number of Non-elderly Poverty Households in the County divided by the number of Non-elderly Poverty Households in the State;

(2) County Elderly Poverty Household Factor (weight of 40%) is defined by the Department as the number of Elderly Poverty Households in the County divided by the number of Elderly Poverty Households in the State; and

(3) County Inverse Poverty Household Density Factor (weight of 5%) is defined by the Department as:

(A) The number of Square Miles of the County divided by the number of Poverty Households of the County (equals the Inverse Poverty Household Density of the County); and

(B) Inverse Poverty Household Density of the County divided by the Sum of Inverse Household Densities.

(4) County Median Income Variance Factor (weight of 5%) is defined by the Department as:

(A) State Median Income minus the County Median Income (equals County Variance); and

(B) County Variance divided by sum of the State County Variances.

(5) County Weather Factor (weight of 10%) is defined by the Department as:

(A) County Heating Degree Days plus the County Cooling Degree Days, multiplied by the Poverty Households, divided by the sum of County Heating & Cooling Degree Days of Counties (equals County Weather); and

(B) County Weather divided by the total sum of the State County Weather.

(C) All demographic factors are based on the decennial U.S. Census.

(D) Total sum of subsection (b)(1) - (5) of this section multiplied by total funds allocation equals the County's allocation of funds. The sum of the county allocations within each subrecipient service area equals the subrecipient's total allocation of funds.

§5.405. Subrecipient Requirements for Appeals Process for Applicants.

(a) Subrecipients shall provide a written denial of assistance notice to applicant within ten (10) days of the adverse determination. This notification shall include written instructions of the appeals process and specific reasons for the denial by component. The applicant wishing to appeal a decision must provide written notice to subrecipient within ten (10) days of receipt of the denial notice.

(b) The subrecipient who receives an appeal shall establish an appeals committee composed of at least three persons. Subrecipient shall maintain documentation of appeals in their client files.

(c) The subrecipient shall hold the appeal hearing within ten business days after the subrecipient received the appeal request from the applicant.

(d) The subrecipient shall record the hearing.

(e) The hearing shall allow time for a statement by subrecipient staff with knowledge of the case.

(f) The hearing shall allow the applicant at least equal time, if requested, to present relevant information contesting the decision.

(g) Subrecipient shall notify applicant of the decision in writing. The subrecipient shall mail the notification by close of business on the business day following the decision (1 day turn-around).

(h) If the applicant is not satisfied, they may further appeal the decision in writing to the Department within ten (10) days of notification of an adverse decision.

(i) If client appeals to the Department, the funds should remain encumbered until the Department completes its decision.

(j) The Department may review the recording of the hearing, the committee's decision, and any other relevant information necessary.

(k) The Department appeals committee shall decide the case and forward their recommendation to the Division Director for final concurrence.

(l) The Department will notify all parties in writing of its decision within thirty (30) days of receipt of the appeal.

§5.406. Subrecipient Reporting Requirements.

(a) The subrecipient shall electronically submit to the Department a Monthly Expenditure Report of all expenditure of funds, request for advance or reimbursement, and a Monthly Performance Report no later than fifteen (15) days after the end of each month.

(b) The subrecipient shall electronically submit to the Department no later than sixty (60) days after the end of the subrecipient contract term a final expenditure or reimbursement and programmatic report utilizing the Expenditure Report and the Performance Report.

(c) The subrecipient shall submit to the Department no later than sixty (60) days after the end of the contract term an inventory of all vehicles, tools, and equipment with a unit acquisition cost of $5,000 or more and a useful life of more than one year, if purchased in whole or in part with CEAP funds.

(d) The subrecipient shall submit other reports, data, and information on the performance of the CEAP program activities as required by the Department.

§5.407. Subrecipient Requirements for Establishing Priority for Eligible Households and Client Eligibility Criteria.

(a) The subrecipients shall set the client income eligibility level at or below 125% of the federal poverty level in effect at the time the client makes an application for services.

(b) Subrecipient shall determine client income. The Department will provide definition of income lists to determine total household income. The lists contain income inclusions and exclusions and are located in §5.19 of this chapter (relating to Client Income Guidelines).

(c) Subrecipients shall base annualized eligibility determinations on household income from the 30 day period prior to the date of application for assistance. Each subrecipient shall document and retain proof of income from all sources for all household members eighteen (18) years and older for the entire thirty (30) day period prior to the date of application and multiply by twelve (12) to annualize income.

(d) In the case of migrant, or seasonal workers, or similarly situated workers, a longer period than thirty (30) days may be used for annualizing income.

(e) If proof of income is unavailable, the applicant must complete and sign a Declaration of Income Statement (DIS). In order to use the DIS form, each subrecipient shall develop and implement a written policy and procedure on the use of the DIS form. In developing the policy and procedure, subrecipients shall give consideration to limiting the use of the DIS form to cases where there are serious extenuating circumstances that justify the use of the form. Such circumstances might include crisis situations such as applicants that are affected by natural disaster which prevents the applicant from obtaining income documentation, applicants that flee a home due to physical abuse, applicants who are unable to locate income documentation of a recently deceased spouse, or whose work is migratory, part-time, temporary, self-employed or seasonal in nature. To ensure limited use, the Department will review the written policy and its use during on-site monitoring visits.

(f) Social security numbers are not required for applicants for CEAP.

(g) Proof of citizenship is not required for CEAP.

(h) The subrecipients shall establish priority criteria to serve persons in households who are particularly vulnerable such as the elderly, persons with disabilities, families with young children, high residential energy users, and households with high energy burden. High residential energy users and households with high energy burden are defined as follows:

(1) Households with Energy Burden which exceeds the median energy burden of income-eligible households characterized by the Department as experiencing high energy burden. The Department calculates energy burden by dividing home energy costs by the household's gross income.

(2) Households with annual energy expenditures which exceed the median home expenditures for income-eligible households are characterized by the Department as high energy consumers.

(i) Homeowners and renters will be treated equitably under all programs funded in whole or in part from LIHEAP funds. For those renters who pay heating and/or cooling bills as part of their rent, the subrecipient shall make special efforts to determine the portion of the rent that constitutes the fuel heating and/or cooling payment. If "sub metering" is not available, the subrecipient shall exercise care when negotiating with the landlords so the cost of utilities quoted is in line with the consumption for similar residents of the community. If the subrecipient pays the landlord, then the landlord shall furnish evidence that he/she has paid the bill and the amount of assistance must be deducted from the rent, if the utility payment is not stated separately from the rent. An agreement stating the terms of the payment negotiations must be signed by the landlord.

(j) A household unit cannot be served, if the meter is utilized by another household.

§5.422. General Assistance and Benefit Levels.

(a) Subrecipients shall not discourage anyone from applying for CEAP assistance. Subrecipients shall provide all potential clients with opportunity to apply for LIHEAP programs.

(b) CEAP provides assistance to targeted beneficiaries being households with low incomes at or below 125% of the Federal Poverty Level, with priority given to the elderly, persons with disabilities, families with young children; households with the highest energy costs or needs in relation to income, and households with high energy consumption.

(c) CEAP includes activities, as defined in Assurances 1-16 in Title XXVI of the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35), as amended; such as education; and financial assistance to help very low- and extremely low-income consumers reduce their utility bills to an affordable level. CEAP services include utility payment assistance; heating and cooling system replacement, repair, and/or retrofit; energy education; and budget counseling.

(d) Sliding scale benefit for all CEAP components:

(1) Benefit determinations are based on the household's income, the household size, the energy cost and/or the need of the household, and the availability of funds.

(2) Energy assistance benefit determinations will use the following sliding scale (Except Heating and Cooling System Replacement, Repair and/or Retrofit Component):

(A) Households with Incomes of 0 to 50% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,200.

(B) Households with Incomes of 51% to 75% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,100.

(C) Households with Incomes of 76% to 125% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,000.

(D) The Heating and Cooling System Replacement, Repair, and/or Retrofit Component maximum household benefit limit is $5,000.

(e) Subrecipient shall not establish lower local limits of assistance for any component.

(f) Total maximum possible annual household benefit (all components combined) equals $8,600.

(g) Subrecipient shall determine client eligibility for utility payments and/or retrofit based on the agency's household priority rating system and household's income as a percent of poverty.

(h) Subrecipients shall provide only the following types of assistance with funds from CEAP:

(1) Payment to vendors and suppliers of fuel/utilities, goods, and other services, such as electrical wiring, butane tanks, and lines, etc. for past due or current bills related to the procurement of energy for heating and cooling needs of the residence, not to include security lights and other items unrelated to energy assistance;

(2) Payment to vendors--only one energy bill payment per month as required by component;

(3) Needs assessment and energy conservation tips, coordination of resources, and referrals to other programs;

(4) Energy assistance to low-income elderly and disabled individuals most vulnerable to high cost of energy for heating and cooling needs of the residence;

(5) Payment of water bills only when such costs include expenses from operating an evaporative water cooler unit or when the water bill is an inseparable part of a utility bill. As a part of the intake process, outreach, and coordination, the subrecipient shall confirm that a client owns an operational evaporative cooler and has used it to cool the dwelling within sixty (60) days prior to application. Payment of other utility charges such as wastewater and waste removal are allowable only if these charges are an inseparable part of a utility bill. Documentation from vendor is required. Whenever possible, subrecipient shall negotiate with the utility providers to pay only the "home energy"--heating and cooling--portion of the bill;

(6) Energy bills already paid by householders may not be reimbursed by the program;

(7) Payment of reconnection fees in line with the registered tariff filed with the Public Utility Commission and/or Texas Railroad Commission. Payment cannot exceed that stated tariff cost. Subrecipient shall negotiate to reduce the costs to cover the actual labor and material and to ensure that the utility does not assess a penalty for delinquency in payments;

(8) Payment of security deposits only when state law requires such a payment, or if the Public Utility Commission or Texas Railroad Commission has listed such a payment as an approved cost, and where required by law, tariff, regulation, or a deferred payment agreement includes such a payment. Subrecipients shall not pay such security deposits that the energy provider will eventually return to the client;

(9) While rates and repair charges may vary from vendor to vendor, Subrecipient shall negotiate for the lowest possible payment. Prior to making any payments to an energy vendor a Subrecipient shall have a signed vendor agreement on file from the energy vendor receiving direct LIHEAP payments from the Subrecipient;

(10) Subrecipient may make payments to landlords on behalf of eligible renters who pay their utility and/or fuel bills indirectly. Subrecipient shall notify each participating household of the amount of assistance paid on its behalf. Subrecipient shall document this notification. Subrecipient shall maintain proof of utility or fuel bill payment. Subrecipient shall ensure that amount of assistance paid on behalf of client is deducted from client's rent; and

(11) In lieu of deposit required by an energy vendor, Subrecipient may make advance payments. The Department does not allow LIHEAP expenditures to pay deposits, except as noted in paragraph (7) of this subsection. Advance payments may not exceed an estimated two months' billings. Funds for the Texas CEAP shall not be used to weatherize dwelling units, for medicine, food, transportation assistance (i.e., vehicle fuel), income assistance, or to pay for penalties or fines assessed to clients.

§5.423. Energy Crisis Component.

(a) A bona fide energy crisis exists when extraordinary events or situations resulting from extreme weather conditions and/or fuel supply shortages or a terrorist attack have depleted or will deplete household financial resources and/or have created problems in meeting basic household expenses, particularly bills for energy so as to constitute a threat to the well-being of the household, particularly the elderly, the disabled, or children age 5 and younger.

(b) A utility disconnection notice may constitute an energy crisis, if client demonstrates a history of good faith in paying prior utility bills.

(c) Energy Crisis assistance for one household cannot exceed the maximum allowable benefit level in one year. Crisis assistance payments cannot exceed the minimum amount needed to resolve the crisis. If the client's crisis requires more than the household limit to resolve, it exceeds the scope of this program. If crisis exceeds the household limit, subrecipient may pay up to the household limit but the rest of the bill will have to be paid from other funds to resolve the crisis. Payments may not exceed client's actual utility bill. The assistance must result in resolution of the crisis.

(d) Where necessary to prevent undue hardships from a qualified energy crisis, subrecipients may directly issue vouchers to provide:

(1) Temporary shelter not to exceed the annual household expenditure limit for the duration of the contract period in the limited instances that inoperable heating/cooling appliances or supply of power to the dwelling is disrupted--causing temporary evacuation;

(2) Emergency deliveries of fuel up to 100 gallons per crisis per household, at the prevailing price. This benefit may include coverage for safety precautions--up to the maximum household benefit;

(3) Purchase of portable heating/cooling units (portable electric heaters are allowable only as a last resort) not to exceed household benefit limit during the contract period. Portable air conditioning and heating units may be purchased only in situations that threaten the life of the client;

(4) Subrecipient shall meet local energy crisis criteria prior to purchasing portable units for clients;

(5) Subrecipient shall maintain in the client file documentation of any special situation affecting client eligibility. For a client to qualify to receive a portable air conditioner or heater to protect life of household occupants, the subrecipient's client file must contain documentation from a medical professional, stating that a health condition of household occupant requires such climate control. A doctor's statement or prior written approval from the Department is required.

(6) Portable heating/cooling units must meet Energy Star® or International Residential Code (IRC) compliant.

(e) Crisis funds, whether for emergency fuel deliveries, purchase of portable heating/cooling units, or temporary shelter, shall be considered part of the total maximum household allowable assistance.

(f) When natural disasters result in energy supply shortages or other energy-related emergencies, LIHEAP will allow home energy related expenditures for the following:

(1) Costs to temporarily shelter or house individuals in hotels, apartments or other living situations in which homes have been destroyed or damaged, i.e., placing people in settings to preserve health and safety and to move them away from the crisis situation;

(2) Costs for transportation (such as cars, shuttles, buses) to move individuals away from the crisis area to shelters, when health and safety is endangered by loss of access to heating or cooling;

(3) Utility reconnection costs;

(4) Repair or replacement costs for furnaces and air conditioners;

(5) Insulation repair;

(6) Coats and blankets, as tangible benefits to keep individuals warm;

(7) Crisis payments for utilities and utility deposits; and

(8) Purchase of fans, air conditioners and generators.

(g) Time Limits for Assistance--Subrecipients ensure that for clients who have already lost service or are in immediate danger of losing service, some form of assistance to resolve the energy crisis shall be provided within a 48 hour time limit (18 hours in life-threatening situations). The time limit commences upon completion of the application process. The application process is considered to be complete when an agency representative accepts an application and completes the eligibility process.

(h) Subrecipients maintain written documentation in client files showing crises resolved within appropriate timeframes. The Department disallows improperly documented expenditures.

§5.424. Co-Payment Component.

(a) Subrecipients use home energy payments, energy conservation tips, participation by utilities, and coordination with other services to assist low-income households to reduce their home energy needs.

(b) Subrecipients make payments directly to vendors on behalf of participating households. Participating households make co-payments while participating in the program.

(c) Subrecipients shall calculate payments based on a sliding scale benefit structure.

(d) First payment of co-payment plan may include 100% of a utility bill--including arrears--or an appropriate percentage determined by the subrecipient as detailed in the Service Delivery Plan.

(e) A household's participation in the program may last from three (3) to twelve (12) months. Early termination may result if client fails to meet the provisions of the client service agreement.

(f) If a co-payment client's assistance period extends beyond the end of a program year, that client must re-apply for eligibility certification to continue receiving assistance.

(g) Subrecipient shall provide energy conservation education and referrals.

§5.425. Elderly and Disabled Component.

(a) Elderly households include at least one member age sixty (60) or above. Disabled households include at least one member living with a disability. Documentation of disability, (i.e. Social Security, Supplemental Security Income statement, doctor's letter) kept in client file will validate eligibility.

(b) Subrecipients make utility payments on behalf of elderly and disabled persons based on the previous twelve (12) month's home energy consumption history, including allowances for cost inflation. In the absence of an available home energy consumption history, subrecipient may base payments on current program year's bill. Subrecipients note such exceptions in client files. Benefit amounts exceeding the actual bill shall be treated as a credit with the utility company for the client.

(c) Elderly and/or disabled clients may receive benefits to cover up to 100% of the four highest remaining bills within the contract year as long as the cost does not exceed the maximum annual benefit.

(d) The Department requires Subrecipients to expend a minimum of 10% of their Direct Service funds in the Elderly/Disabled Component.

§5.426. Heating and Cooling Component.

(a) The priority factors other than income eligibility for heating/cooling assistance include the degree of energy burden and household needs. Equipment replacement or repair under this component must reduce energy consumption and energy burden. "Household energy need" takes into account the unique situation of such household that results from having members of vulnerable populations, including children age 5 and younger, disabled individuals, and older individuals. The Department defines the household's energy need as the requirement for energy used to heat and/or cool the dwelling unit, as well as energy required to heat water and refrigerate food.

(b) Equipment repair and replacement targets households with high energy burden, or equipment unsafe or inadequate to protect occupants from extreme temperatures. This component reduces clients' energy burden by reducing excess demand from inefficient heating and cooling appliances. Questionably high energy bills during the heating or cooling season may indicate the need for an assessment of the condition of all major heating and cooling appliances in the client's home. An energy assessment of the home demonstrates whether or not the expected savings from repair or replacement of equipment will exceed the cost and will reduce energy consumption. Appliances consuming the most energy receive highest priority. Estimated repair cost exceeding 60% of estimated replacement cost justifies replacement.

(c) Subrecipients must conduct whole house assessments on all eligible heating and cooling appliances. Subrecipients must incorporate the appliance replacement protocols and tools available on the Department website, for window units, water heaters, and refrigerators on all applicable appliances in the household. Printed results from the use of these tools must be placed in the client files and be available for review.

(d) Household appliances assessed for condition (health and safety) and efficiency may include any home heating or cooling appliances and propane tanks. The Program allows replacement of evaporative coolers with refrigerated air only for substantiated medical reasons. Subrecipients shall replace appliances with Energy Star® rated equipment or IRC compliant appliances.

(e) Acceptable assessments for appliances under consideration for repair, replacement or retrofit with CEAP funds may be considered valid for one (1) year from the date of assessment. While subrecipients must re-certify income eligibility, the previously obtained assessment would remain valid. Should it appear that appliances previously assessed that did not require repair, replacement, or retrofit at the time of the assessment had deteriorated, a new assessment could be performed on only the applicable appliances.

(f) Households that contain both evaporative coolers and refrigerated air must be assessed in order to make the household most energy efficient. When both units need replacement consideration must be based on what is most energy efficient. Special consideration may be given to climate area and medical need. Without medical documentation a waiver may be granted by the Department.

(g) Heating and cooling assessments may be charged to the Heating and Cooling Component on a per household basis. If the assessment cost is charged to the Heating and Cooling Component, the cost must be counted toward the household benefit of $5,000.

(h) All replacement units must meet Energy Star or IRC compliant and must result in energy savings for the client. Heating and cooling funds may pay for zoning off a room in which the client spends a majority of time at home, incidental to the above improvements, if necessary to conserve conditioned air. In order to use heating and cooling funds for a room zone-off, the household must also be receiving a repair, replacement, or retrofit of a space heating or cooling unit.

(i) This component may be used to purchase, lease, or repair butane or propane tanks as well as the residential lines associated with the tanks or natural gas lines of the dwelling not to exceed the household's maximum allowable assistance and only if such service ensures the flow of energy necessary for heating and or cooling the household.

(j) This component may be used to purchase or repair of residential electric lines, not to exceed household's maximum allowable assistance and only if such service ensures the flow of energy necessary for heating and cooling the household.

(k) The Department requires Subrecipients to expend a minimum of 10% of their Direct Service funds in the Heating and Cooling Component.

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 February 20, 2009.

TRD-200900760
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER E. WEATHERIZATION ASSISTANCE PROGRAM GENERAL

10 TAC §§5.501 - 5.508, 5.521 - 5.532

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 5, Subchapter E, §§5.501 - 5.508 and 5.521 - 5.532 concerning Weatherization Assistance Program General Rules. Sections 5.503, 5.505 - 5.507, 5.524, 5.527, 5.528, and 5.532 are adopted with changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7844). Sections 5.501, 5.502, 5.504, 5.508, 5.521 - 5.523, 5.525, 5.526, and 5.529 - 5.531 are adopted without changes and will not be republished.

The purpose of the new chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8.

Public hearings on the new chapter were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth, and Austin. Additionally, written comments were accepted by mail, e-mail, and facsimile through October 20, 2008.

Public comments and the Department's responses are presented in the order in which the subchapters and sections appear in the new chapter. Following the section number is the title of the section as it appears in the rule. Following the comment is a parenthetical containing a number or series of numbers. Each number corresponds to a person who commented on the particular rule section. Following the identification of the section and related commenters is a summary of the comment and staff's response, including the reasons why the agency agreed or disagreed with the comment and a statement of the factual basis for the new section.

Public comments on the proposed rule were received by (1) Texas Association of Community Action Agencies, Inc. and (4) Community Services, Inc.

§5.503(5)(C). Distribution of WAP Funds.

COMMENT (1): Commenter suggested that the department delete the reference to the "2000" U.S. Census and insert reference to the "most recent decennial" U.S. Census.

DEPARTMENT RESPONSE: Staff concurred and amended the language.

§5.506(a) - (b). Subrecipient Reporting Requirements.

ADMINISTRATIVE CHANGE: Staff corrected the names of the reports mentioned in this section.

§5.524. Lead Safe Work Practices.

COMMENT (1): Comment received regarding the requirement for subrecipients to provide a one-day Lead Safe Weatherization (LSW) training to their subcontractors. Commenter stated that they did not have the credentials or available funds to fulfill this requirement.

DEPARTMENT RESPONSE: Staff does not concur with this comment; however, minor revisions were made for clarification. The training is still required; however, the one-day training requirement has been removed.

§5.528(a). Health and Safety.

COMMENT (1) and (4): Comment received suggesting that the Health and Safety 10% budget limit should be removed because the requirement for use of vented heaters is three times more expensive than unvented space heaters.

DEPARTMENT RESPONSE: Department concurred and in consideration of the International Residential Code and the recent Department of Energy "Space Heater Policy", staff raised the Health and Safety budget to 20% of the Materials, Labor, and Program Support budget.

§5.532. Training Funds for Conferences.

COMMENT (1): Commenter proposed a revision to allow more flexibility to attend other training sessions which address WAP topics.

DEPARTMENT RESPONSE: The Department concurred and revised the language to allow more flexibility to attend other relevant workshops and conferences.

The Board approved the final order adopting the new subchapter with recommended changes, on November 13, 2008.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§5.503. Distribution of WAP Funds.

(a) The Department distributes funds to subrecipients by an allocation formula.

(b) The allocation formula allocates funds based on the number of low-income households in a service area and takes into account the special needs of individual service areas. The need for energy assistance in an area is addressed through a weather factor (based on heating and cooling degree days). The extra expense in delivering services in sparsely populated areas is addressed by an inverse population density factor. The lack of additional services available in very poor counties is addressed by a county median income factor. Finally, the elderly are given priority by giving greater weight to this population. The five factors used in the formula are calculated as follows:

(1) County Non-elderly Poverty Household Factor is defined as the number of Non-elderly Poverty Households in the County divided by the number of Non-elderly Poverty Households in the State;

(2) County Elderly Poverty Household Factor is defined as the number of Elderly Poverty Households in the County divided by the number of Elderly Poverty Households in the State;

(3) County Inverse Poverty Household Density Factor is defined as:

(A) The number of Square Miles of the County divided by the number of Poverty Households of the County (equals the Inverse Poverty Household Density of the County); and

(B) Inverse Poverty Household Density of the County divided by the Sum of Inverse Household Densities.

(4) County Median Income Variance Factor is defined as:

(A) State Median Income minus the County Median Income (equals County Variance); and

(B) County Variance divided by sum of the State County Variances;

(5) County Weather Factor is defined as:

(A) County Heating Degree Days plus the County Cooling Degree Days, multiplied by the Poverty Households, divided by the sum of County Heating & Cooling Degree Days of Counties (equals County Weather); and

(B) County Weather divided by the total sum of the State County Weather.

(C) The five factors carry the following weights in the allocation formula: number of non-elderly poverty households (40%), number of poverty households with at least one member who is sixty-five (65) years of age or older (40%), household density as an inverse ratio (5%), the median income of the county (5%), and a weather factor based on Heating Degree Days and Cooling Degree Days (10%). All demographic factors are based on the most current decennial U.S. Census. The formula is as follows:

(i) County Non-elderly Poverty Household Factor (0.40) plus;

(ii) County Elderly Poverty Household Factor (0.40) plus;

(iii) County Inverse Poverty Household Density Factor (0.05) plus;

(iv) County Median Income Variance Factor (0.05) plus;

(v) County Weather Factor (0.10);

(vi) Total sum of clauses (i) - (v) of this subparagraph multiplied by total funds allocation equals the County's allocation of funds.

(vii) The sum of the county allocation within each subrecipient service area equals the subrecipient's total allocation of funds.

§5.505. Subrecipient Requirements for Appeals Process for Applicants.

(a) Subrecipients shall provide a written denial of assistance notice to applicant within ten (10) days of the adverse determination. If the denial is for any reason other than DOE reweatherization, as specified in 10 CFR Part 440, the subrecipient will notify the applicant of the adverse determination. This notification shall include written instructions of the appeals process and specific reasons for the denial. The applicants wishing to appeal a decision must provide written notice to subrecipient within ten (10) days of receipt of the denial notice.

(b) The subrecipient who receives an appeal shall establish an appeals committee composed of at least three persons. Subrecipient shall maintain documentation of appeals in their client files.

(c) The subrecipient shall hold the appeal hearing within ten (10) business days after the subrecipient received the appeal request from the applicant.

(d) The subrecipient shall record the hearing.

(e) The hearing shall allow time for a statement by subrecipient staff with knowledge of the case.

(f) The hearing shall allow the applicant at least equal time, if requested, to present relevant information contesting the decision.

(g) Subrecipient shall notify applicant of the decision in writing. The subrecipient shall mail the notification by close of business on the business day following the decision (one (1) day turn-around).

(h) If the applicant is not satisfied, they may further appeal the decision in writing to the Department within ten (10) days of notification of an adverse decision.

(i) If client appeals to the Department, the subrecipient must retain the maximum allowable cost per unit until the Department renders a decision.

(j) The Department may review the recording of the hearing, the committee's decision, and any other relevant information necessary.

(k) The Department appeals committee shall decide the case and forward their recommendation to the Division Director for final concurrence.

(l) The Department will notify all parties in writing of its decision within thirty (30) days of receipt of the appeal.

§5.506. Subrecipient Reporting Requirements.

(a) The subrecipient shall electronically submit to the Department a Monthly Expenditure Report of all expenditure of funds, request for advance or reimbursement, and a Monthly Performance Report no later than fifteen (15) days after the end of each month.

(b) The subrecipient shall electronically submit to the Department no later than sixty (60) days after the end of the subrecipient contract term a final expenditure or reimbursement and programmatic report utilizing the Monthly Expenditure Report and the Monthly Performance Report.

(c) The subrecipient shall submit to the Department no later than sixty (60) days after the end of the contract term an inventory of all vehicles, tools, and equipment with a unit acquisition cost of $5,000 or more and a useful life of more than one (1) year, if purchased in whole or in part with DOE and LIHEAP-WAP funds.

(d) The subrecipient shall submit other reports, data, and information on the performance of the DOE and LIHEAP-WAP program activities as required by DOE pursuant to 10 CFR §440.25 or by the Department.

§5.507. Subrecipient Requirements for Establishing Priority for Eligible Households and Client Eligibility Criteria.

(a) Dwelling units that contain household members who receive Social Security Disability Insurance (SSDI) only are not automatically eligible.

(b) The subrecipients shall establish eligibility and priorities criteria to increase the energy efficiency of dwellings owned or occupied by low-income persons who are particularly vulnerable such as the elderly, persons with disabilities, families with young children, high residential energy users, and households with high energy burden. High residential energy users and households with high energy burden are defined as follows:

(1) Households with energy burden which exceeds 11% of gross income are characterized by the Department as high energy burden households. The Department calculates energy burden by dividing home energy costs by the household's gross income.

(2) Households with energy expenditures which exceed $1000 of energy expenditures per year are characterized by the Department as high energy consumers.

(c) The subrecipients shall follow the Department rules and established state and federal guidelines for determining eligibility for multifamily dwelling units as referenced in §5.527 of this subchapter (relating to Energy Audit Procedures).

(d) To determine income eligibility for program services, subrecipients must base annualized eligibility determinations on household income from thirty (30) days prior to the date of application for assistance. Each subrecipient must document income from all sources for all household members for the entire thirty (30) day period prior to the date of application and multiply by twelve (12) to annualize income. Income documentation must be collected from all income sources for all household members eighteen (18) years and older for the entire thirty (30) day period.

(e) In the case of migrant, seasonal, part-time, temporary, or self-employed workers a longer period than thirty (30) days may be used for annualizing income. However, the same method must be used for all similarly situated workers.

(f) If proof of income is unavailable, the applicant must complete and sign a Declaration of Income Statement (DIS). In order to use the DIS form, each subrecipient shall develop and implement a written policy and procedure on the use of the DIS form. In developing the policy and procedure, subrecipients shall give consideration to limiting the use of the DIS form to cases where there are serious extenuating circumstances that justify the use of the form. Such circumstances might include crisis situations such as applicants that are affected by natural disaster which prevents the applicant from obtaining income documentation, applicants that flee a home due to physical abuse, applicants who are unable to locate income documentation of a recently deceased spouse, or whose work is migratory or seasonal in nature. The Department will review the written policy and its use during on-site monitoring visits.

(g) Subrecipient shall determine applicant income. The Department will provide definition of income lists to determine total household income. The lists contain income inclusions and exclusions and are located in §5.19 of this chapter (relating to Client Income Guidelines).

(h) Social Security numbers are not required for applicants.

§5.524. Lead Safe Work Practices.

Subrecipients will require and document that their subcontractors have received Lead Safe Weatherization (LSW) training, an LSW Manual, and an LSW Jobsite Handbook prior to commencement of weatherization work. Subrecipients must obtain a signed Worker Verification of LSW Training form from the subcontractor indicating that the subcontractor received the LSW training, manual, and jobsite handbook. Subcontractors must follow LSW Work Practices as outlined by the U.S. Department of Energy.

§5.527. Energy Audit Procedures.

(a) Savings-to-Investment Ratio (SIR) for the Energy Audit procedures will determine the installation of allowable weatherization measures. The weatherization measures must result in energy cost savings over the lifetime of the measure(s), discounted to present value, that equal or exceed the cost of materials, and installation.

(b) The Energy Audit has not been approved for multi-family buildings containing 25 or more units. Since Texas subrecipients rarely propose to weatherize a building with 25 or more units, the Department will acquire a DOE approved energy audit for use in auditing multi-family buildings containing 25 or more units.

(c) Energy Auditors must use the established R-values for existing measures provided in the International Energy Conservation Code (IECC) when entering data into the Energy Audit. Subrecipients must follow minimum requirements set in the State of Texas adopted International Residential Code (IRC) or jurisdictions authorized by State law to adopt later editions.

(d) All materials and labor measures must be entered into the Energy Audit.

§5.528. Health and Safety.

(a) Health and Safety funds will have a maximum of 20% of the Materials, Labor and Program Support budgets.

(b) Subrecipients shall provide weatherization services with the primary goal of energy efficiency. The Department considers establishing a healthy and safe home environment to be important to ensuring that energy savings result from weatherization work.

(c) If health and safety issues identified on an individual unit (which would be exacerbated by any weatherization work performed) cannot be abated within the allowable WAP limits, the unit exceeds the scope of this program.

(d) Subrecipients must test for high carbon monoxide (CO) levels and bring CO levels to acceptable levels before weatherization work can start. The Department has defined maximum acceptable CO readings as follows:

(1) 25 parts per million for cook stove burners and unvented space heaters;

(2) 100 parts per million for vented combustion appliance; and

(3) 150 parts per million for cook stove ovens.

§5.532. Training Funds for Conferences.

The Department provides financial assistance to subrecipients for training and technical activities for State sponsored, DOE sponsored, and other relevant workshops and conferences. Subrecipients may use WAP training funds to attend conferences provided the conference agenda includes topics directly related to administering WAP. Costs to

attend the conference must be prorated by program for the appropriate portion. Only staff actually working on the WAP program may charge any of their travel costs to the 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.

Filed with the Office of the Secretary of State on February 20, 2009.

TRD-200900761
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: September 19, 2008
For further information, please call: (512) 475-3915

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SUBCHAPTER F. WEATHERIZATION ASSISTANCE PROGRAM DEPARTMENT OF ENERGY

10 TAC §§5.601 - 5.609

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 5, Subchapter F, §§5.601 - 5.609, concerning Weatherization Assistance Program Department of Energy without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7848) and will not be republished.

The purpose of the new chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8.

Public hearings on the new subchapter were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth, and Austin. Additionally, written comments were accepted by mail, e-mail, and facsimile through October 20, 2008.

No public comments were received concerning the proposed new subchapter.

The Board approved the final order adopting the new subchapter on November 13, 2008.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its 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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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER G. WEATHERIZATION ASSISTANCE PROGRAM LOW INCOME HOME ENERGY ASSISTANCE PROGRAM

10 TAC §§5.701 - 5.705

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 5, Subchapter G, §§5.701 - 5.705, concerning Weatherization Assistance Program Low Income Home Energy Assistance Program without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7849) and will not be republished.

The purpose of the new chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8.

Public hearings on the new subchapter were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth, and Austin. Additionally, written comments were accepted by mail, e-mail, and facsimile through October 20, 2008.

No public comments were received concerning the proposed new subchapter.

The Board approved the final order adopting the new subchapter on November 13, 2008.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its 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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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER H. SECTION 8 HOUSING CHOICE VOUCHER PROGRAM

10 TAC §5.801

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 5, Subchapter H, §5.801, concerning Section 8 Housing Choice Voucher Program without changes to proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7850) and will not be republished.

The purpose of the new chapter is to consolidate, clarify and simplify the rules formerly contained in Chapters 5, 6 and 8.

Public hearings on the new subchapter were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth, and Austin. Addi-

tionally, written comments were accepted by mail, e-mail, and facsimile through October 20, 2008.

No public comments were received concerning the proposed new subchapter.

The Board approved the final order adopting the new subchapter on November 13, 2008.

The new section is adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its 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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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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CHAPTER 6. ENERGY ASSISTANCE PROGRAMS

SUBCHAPTER A. DEPARTMENT OF ENERGY WEATHERIZATION ASSISTANCE PROGRAM (DOE-WAP)

10 TAC §§6.1 - 6.21

The Texas Department of Housing and Community Affairs adopts the repeal of 10 TAC Chapter 6, Subchapter A, §§6.1 - 6.21, concerning the Department of Energy Weatherization Assistance Program, without changes to the proposal as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7851) and will not be republished.

The repeal is adopted in order to allow adoption of new rules governing the Community Affairs Division Program, to consolidate the Department of Energy Weatherization Assistance Program rules under the Chapter 5 Community Affairs Programs rules with new rules being adopted as part of the 2009 rule cycle.

Public hearings on the repeal were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth and Austin. No comments were received regarding the adoption of this repeal.

The Board approved the final order adopting this repeal on December 18, 2008.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its 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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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER B. LOW INCOME HOME ENERGY ASSISTANCE PROGRAM WEATHERIZATION ASSISTANCE PROGRAM (LIHEAP-WAP)

10 TAC §§6.101 - 6.121

The Texas Department of Housing and Community Affairs adopts the repeal of 10 TAC Chapter 6, Subchapter B, §§6.101 - 6.121, concerning the Low Income Home Energy Assistance Program Weatherization Assistance Program, without changes to the proposal as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7852) and will not be republished.

The repeal is adopted in order to allow adoption of new rules governing the Community Affairs Division Program, to consolidate the Low Income Home Energy Assistance Program Weatherization Assistance Program rules under the Chapter 5 Community Affairs Programs rules with new rules being adopted as part of the 2009 rule cycle.

Public hearings on the repeal were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth and Austin. No comments were received regarding the adoption of this repeal.

The Board approved the final order adopting this repeal on December 18, 2008.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its 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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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER C. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM (CEAP)

10 TAC §§6.201 - 6.214

The Texas Department of Housing and Community Affairs adopts the repeal of 10 TAC Chapter 6, Subchapter C, §§6.201 - 6.214, concerning the Comprehensive Energy Assistance Program, without changes to the proposal as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7852) and will not be republished.

The repeal is adopted in order to allow adoption of new rules governing the Community Affairs Division Program, to consolidate the Comprehensive Energy Assistance Program rules under the Chapter 5 Community Affairs Programs rules with new rules being adopted as part of the 2009 rule cycle.

Public hearings on the repeal were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth and Austin. No comments were received regarding the adoption of this repeal.

The Board approved the final order adopting this repeal on December 18, 2008.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its 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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Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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CHAPTER 8. PROJECT ACCESS PROGRAM RULES

10 TAC §8.1

The Texas Department of Housing and Community Affairs adopts the repeal of 10 TAC Chapter 8, §8.1, concerning the Project Access Program Rules, without changes to the proposal as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7854) and will not be republished.

The repeal is adopted in order to allow adoption of new rules governing the Community Affairs Division Program, to consolidate the Project Access Program rules under the Chapter 5 Community Affairs Programs rules with new rules being adopted as part of the 2009 rule cycle.

Public hearings on the repeal were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth and Austin. No comments were received regarding the adoption of this repeal.

The Board approved the final order adopting this repeal on December 18, 2008.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its 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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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 11. ADMINISTRATIVE DEPARTMENT

13 TAC §11.7

The Texas Historical Commission (THC) is adopting an amendment to §11.7 of Title 13, Part 2, Chapter 11 of the Texas Administrative Code, concerning the Code of Conduct and Ethics Policy, without changes to the proposed text as published in the December 12, 2008, issue of the *Texas Register* (33 TexReg 10123) and will not be republished. This amendment is needed to comply with §572.051(d) of the Texas Government Code, Standards of Conduct; State Agency Ethics, which requires all state agencies to adopt an ethics policy and requires the Office of the Attorney General to provide a model policy.

The amendment adds language to §11.7(b) - (e) to clarify conduct and ethics expected of THC employees. These clarifications are needed to comply with §572.051(d) of the Texas Government Code, Standards of Conduct; State Agency Ethics.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Chapter 442 of the Texas Government Code, which provides the Texas Historical Commission with authority to promulgate rules and §572.051(d) of the Texas Government Code.

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 February 18, 2009.

TRD-200900686

F. Lawerence Oaks
Executive Director
Texas Historical Commission
Effective date: March 10, 2009
Proposal publication date: December 12, 2008
For further information, please call: (512) 463-8817

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13 TAC §11.10

The Texas Historical Commission (Commission) is adopting the repeal of §11.10 (relating to Charges for Public Records) of Title 13, Part 2, Chapter 11 of the Texas Administrative Code, as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9840) and the section will not be republished. The section has been superseded by legislation and the adoption by the Attorney General of Texas of a uniform rule for all agencies on this subject.

No comments were received regarding the repeal of §11.10. The repeal will take effect 20 days after filing with the Texas Register.

The repeal is adopted under the Texas Government Code §442.005(q), which provides the Commission with authority to promulgate rules that will reasonably effect the purposes of Chapter 442 of the Government Code.

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 February 19, 2009.

TRD-200900715
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Effective date: March 11, 2009
Proposal publication date: December 5, 2008
For further information, please call: (512) 463-8817

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13 TAC §11.12

The Texas Historical Commission (Commission) is adopting new §11.12, relating to Limitations on Responses to Public Information Requests of Title 13, Part 2, Chapter 11 of the Texas Administrative Code without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9841). The purpose of this section is to implement Texas Government Code §552.275, which allows governmental bodies to set limitations on the amount of time a governmental body must spend responding to requests under the Public Information Act without charging the requestor for the personnel time spent responding to the requests. This proposal would set that limit at 36 hours, as allowed by the statute.

No comments were received regarding new §11.12. The section will take effect 20 days after filing with the Texas Register.

The new rule is adopted under the Texas Government Code §442.005(q), which provides the Commission with authority to promulgate rules that will reasonably effect the purposes of that chapter, and Texas Government Code §552.275, which provides that governmental bodies may adopt rules on this subject.

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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F. Lawerence Oaks
Executive Director
Texas Historical Commission
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For further information, please call: (512) 463-8817

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER AA. COMMISSIONER'S RULES ON SCHOOL FINANCE

19 TAC §61.1018

The Texas Education Agency (TEA) adopts an amendment to §61.1018, concerning payment of supplemental compensation. The amendment is adopted without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9846). Section 61.1018 addresses the administration of payments for supplemental compensation to eligible entities. The adopted amendment aligns the rule with statutory changes authorized by House Bill (HB) 1, 79th Texas Legislature, Third Called Session, 2006. The adopted amendment redefines the payment described in the rule, specifying it as a wage increase rather than a supplement, and modifies the method of providing state funding for that payment.

Before the 2005 legislative session, administration of supplemental compensation was the responsibility of the Teacher Retirement System of Texas (TRS). However, eligible entities reported their eligible employees to the TEA, and the TEA made the payments of supplemental compensation on behalf of the TRS. To provide more efficient administration of the program, Senate Bill 1863, 79th Texas Legislature, Regular Session, 2005, added the Texas Education Code (TEC), Chapter 22, School District Employees and Volunteers, Subchapter D, Compensation Supplementation, shifting the responsibility for supplemental compensation to the TEA. The TEA exercised rulemaking authority to adopt, effective January 31, 2006, 19 TAC §61.1018, Payment of Supplemental Compensation, which specifies definitions; establishes reporting requirements; delineates eligibility criteria; and sets forth the funding formula, distribution procedures, and settle-up process.

House Bill 1, 79th Texas Legislature, Third Called Session, 2006, amended the TEC, Chapter 22, Subchapter D, to convert the payment authorized by this chapter from supplemental compensation to a wage increase. The bill also requires that certain employees of eligible entities annually elect in writing whether to designate part of their compensation as health care supplementation.

The adopted amendment to 19 TAC §61.1018 implements these statutory changes. Specific changes to the rule include the following.

Throughout the rule, references to the payment provided for by the TEC, Chapter 22, Subchapter D, were changed to reflect the conversion of that payment from supplemental compensation to a wage increase.

The explanation of the purpose of the rule in subsection (a) was modified to reflect the conversion of the payment authorized by the TEC, Chapter 22, Subchapter D, from supplemental compensation to a wage increase.

In subsection (b), modifications were made to the definitions for entity, full-time employee, and part- time employee. New definitions were added for the terms minimum-salary-schedule employee and staff salary allotment, and the definition for professional staff was removed.

In subsection (c), outdated information about the reporting of staff information was deleted, and language in the subsection was rearranged to reflect the deletion.

In subsection (d), changes to eligibility were made to reflect the amended definitions in subsection (b). Also, based on statutory changes, the eligibility requirement that an individual must have been employed by an eligible entity for at least 91 days was removed and replaced with a requirement that an individual must have provided written election of whether to designate a portion of his or her compensation to be used as health care supplementation.

Subsection (e) was replaced with new language regarding the funding formula for the payment to reflect the conversion of the payment authorized by the TEC, Chapter 22, Subchapter D, from supplemental compensation to a wage increase.

Subsection (f), addressing outdated provisions for distribution of the payment, was deleted.

New subsection (f) was added to modify the settle-up process to reflect the conversion of the payment authorized by the TEC, Chapter 22, Subchapter D, from supplemental compensation to a wage increase. Deadlines for the settle-up process and TEA's adjustment of the allotment were specified.

Subsection (g), regarding outdated settle-up procedures, was deleted.

In addition, the section title was updated from "Payment of Supplemental Compensation" to "Payment of Health Care Supplementation" to correspond with the type of payment described in the rule.

At the beginning of a school year, the TEA estimates the payment due to an eligible entity under the TEC, Chapter 22, Subchapter D. All eligible entities are required to submit monthly, through the online Foundation School Program Payment System's Staff Salary Data module, the number of employees making up several different categories (e.g., full-time classroom teachers, part-time classroom teachers, and administrators). This information allows the TEA to compute, at the end of the school year, the payment under the TEC, Chapter 22, Subchapter D, that the eligible entity was actually entitled to receive so that the TEA can reconcile that amount against the amount that was paid based on estimated data.

The Staff Salary Data module replaces the Health Care Funding Application, which was closed at the conclusion of the 2005-2006 school year and deleted as a data collection in July 2008. The type of data currently collected through the Staff Salary Data module is similar to the type of data that was collected through the Health Care Funding Application.

Eligible entities may need to change existing forms or create new forms related to health care coverage to allow employees to indicate whether they are electing to designate a portion of their compensation to be used as health care supplementation.

The TEA determined that the amendment will have no adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began December 5, 2008, and ended January 5, 2009. No public comments were received.

The amendment is adopted under the TEC, §22.102, which authorizes the TEA to adopt rules to implement health care supplementation.

The amendment implements the TEC, Chapter 22, Subchapter 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.

Filed with the Office of the Secretary of State on February 13, 2009.

TRD-200900642
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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CHAPTER 76. EXTRACURRICULAR ACTIVITIES
SUBCHAPTER AA. COMMISSIONER'S RULES

19 TAC §76.1003

The Texas Education Agency (TEA) adopts new §76.1003, concerning safety training requirements. The new section is adopted without changes to the proposed text as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10406) and will not be republished. The adopted new rule establishes in rule extracurricular athletic activity safety training requirements in accordance with the Texas Education Code (TEC), §33.202, as added by Senate Bill (SB) 82, 80th Texas Legislature, 2007.

Through SB 82, the 80th Texas Legislature added the TEC, §33.202, requiring the commissioner of education to develop and adopt an extracurricular activity safety training program. The program must include training in emergency action planning; cardiopulmonary resuscitation (CPR); communicating with 9-1-1 emergency service operators and other emergency per-

sonnel; and recognizing symptoms of potentially catastrophic injuries.

Adopted new 19 TAC Chapter 76, Extracurricular Activities, Subchapter AA, Commissioner's Rules, §76.1003, Extracurricular Athletic Activity Safety Training Requirements, requires that all coaches, trainers, marching band directors, sponsors, and certain physicians who assist with extracurricular athletic activities meet certain safety requirements or complete a safety training course beginning with the 2008-2009 school year. New subsection (a) adopts the Extracurricular Activity Safety Training Program provided by the University Interscholastic League as an extracurricular athletic activity safety training program. New subsection (b) adopts the educational requirements for licensure as a licensed athletic trainer for the same purpose. New subsection (d) establishes the educational requirements for physicians.

As required by the TEC, §33.206, school districts will maintain documentation that specified staff and volunteers meet the minimal safety training requirements.

The TEA determined that the new section will have no adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began December 26, 2008, and ended January 26, 2009. No public comments were received.

The new section is adopted under the TEC, §33.202, which authorizes the commissioner by rule to develop and adopt an extracurricular activity safety training program.

The adopted new section implements the TEC, §33.202.

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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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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

19 TAC §129.1025

The Texas Education Agency (TEA) adopts an amendment to §129.1025, concerning student attendance accounting. The amendment is adopted without changes to the proposed text as published in the November 14, 2008, issue of the *Texas Register* (33 TexReg 9177). The section adopts by reference the annual student attendance accounting handbook. The handbook provides student attendance accounting rules for school districts and charter schools. The proposed amendment adopts by reference the *2008-2009 Student Attendance Accounting Handbook Version 2.*

Legal counsel with the TEA has recommended that the procedures contained in each annual student attendance accounting handbook be adopted as part of the Texas Administrative Code. This decision was made in 2000 as a result of a court decision challenging state agency decision making via administrative letters and publications. Given the statewide application of the attendance accounting rules and the existence of sufficient statutory authority for the commissioner of education to adopt by reference the student attendance accounting handbook, staff proceeded with formal adoption of rules in this area. The intention is to annually update the rule to refer to the most recently published student attendance accounting handbook.

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

The adopted amendment to 19 TAC §129.1025 adopts by reference the *2008-2009 Student Attendance Accounting Handbook Version 2.* Policy decisions related to dual credit programs and state funding that were made after publication of the first version of the student attendance accounting handbook for the 2008-2009 school year necessitated publication of a second version. Data from previous school years will continue to be subject to the student attendance accounting handbook as the handbook existed in those years.

Significant changes to the *2008-2009 Student Attendance Accounting Handbook Version 2* from the *2007-2008 Student Attendance Accounting Handbook* include revisions relating to the following sections.

Section 3

Information on new average daily attendance (ADA) eligibility codes 7 and 8 was added.

A clarification of how student attendance affects student funding eligibility was added.

Information was added explaining that student records must be requested, sent, and received using the Texas Student Records Electronic Exchange system.

Information was added explaining that the requirement that a student be counted absent if not present at the designated district attendance-taking time or if not with a responsible campus official at that time does not apply to students participating in certain alternative attendance programs, such as the Optional Flexible School Day Program.

A sentence was added stating explicitly that if a student is not actually on campus at the time attendance is taken because the student is enrolled in and attending an off-campus dual credit

course, then the student may be considered in attendance for FSP purposes.

A clarification was made that the policy of allowing a student who had an excused absence to make up missed school work applies to all excused absences, not only absences to sound "Taps" at a military honors funeral held in Texas for a deceased veteran.

Information was added clarifying in which situations a student who participates in early graduation ceremonies is eligible to generate ADA.

A subsection was added explaining that the TEA does not provide state funding for summer school programs and that, in general, if a student is in membership for additional days beyond the 180 days that make up the state funding year, the excess attendance will not generate state funding.

Language was added to state explicitly that a school district has flexibility in setting the ending date of its school calendar.

Sections 3 and 4

The requirement that a homebound student must be expected to be confined at home or hospital bedside for four consecutive weeks was modified. The four weeks no longer need to be consecutive.

Sections 3 and 11

A clarification of the policies related to student participation in dual credit programs as that participation relates to state funding was added. For the 2008-2009 school year, school districts may count the time that students spend in dual credit courses for state funding purposes even if students are required to pay tuition, fees, or textbook costs for these courses.

Section 4

Information on "least restrictive environment" requirements was added.

Section 6

Information was added explaining that, if a student's parent has denied bilingual/English as a second language (ESL) services and the only summer school program available is a bilingual/ESL program, then the student is not eligible to generate funding by participating in the program.

Charts were added showing the criteria for transferring a limited English proficient (LEP) student out of the bilingual/ESL program and for transferring a LEP student who is receiving special education services out of the bilingual/ESL program.

Section 7

An explanation was added that any student who is automatically eligible for the National School Lunch Program (NSLP) is eligible for free prekindergarten and that any student who is eligible for and participating in Head Start is automatically eligible for the NSLP.

An explanation was added of the documentation required to show that a student is eligible for free prekindergarten based on the student's having ever been in the conservatorship of the Texas Department of Family and Protective Services (DFPS) (i.e., in foster care) following an adversary hearing. Also, a clarification was made that students who have been adopted or returned to their parents after having been in DFPS conservatorship are eligible for free prekindergarten.

Section 10

Information was added regarding the criteria under which a student may be placed in a juvenile justice alternative education program (JJAEP) and regarding students who have not been expelled but have been assigned to a JJAEP by a court. Also, a clarification was added that a JJAEP is not eligible to receive FSP funding and does not report student attendance to the TEA. The school district in which a student is enrolled immediately preceding the student's placement in a JJAEP is responsible for determining the student's ADA eligibility code.

A subsection was added on students from outside a district who are being served in detention or other facilities making short-term residential placements.

Section 11

A subsection was added on how to report dual credit attendance in the Public Education Information Management System (PEIMS) when a higher education institution's calendar is shorter than the school district calendar.

The subsections on the Optional Flexible School Day Program and the High School Equivalency Program were expanded. New subsections on the Optional Flexible Year Program, the Electronic Course Pilot, and the Texas Virtual School Network were added.

19 TAC §129.1025 places the specific procedures contained in the *2008-2009 Student Attendance Accounting Handbook Version 2* in the Texas Administrative Code. The TEA distributes FSP funds in accordance with the procedures specified in each annual student attendance accounting handbook. Data reporting requirements are addressed through the PEIMS.

The TEA determined that the amendment will have no adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the rule action began November 14, 2008, and ended December 15, 2008. Following is a summary of public comments received and corresponding agency responses regarding the proposed amendment to 19 TAC Chapter 129, Student Attendance, Subchapter AA, Commissioner's Rules, §129.1025, Adoption By Reference: Student Attendance Accounting Handbook.

Comment. The associate superintendent of Southwest Preparatory School commented that the TEA did not provide timely notice of its policy of not providing funding for more than 180 days per funding year and that, consequently, the charter school spent money on staff and facilities for summer school that it otherwise would not have.

Agency Response. The agency disagrees that it did not provide timely notice of the policy of not providing funding for more than 180 days per funding year. It has been the TEA's policy since at least 1995 to limit funding to 180 days per funding year, as the agency is required to do in accordance with the Texas Education Code (TEC), §25.081 and §42.005(a)(1). Section 3.8.4 of the *2008-2009 Student Attendance Accounting Handbook Version 2,* in addition to the August 19, 2008, To the Administrator Addressed letter regarding summer school and state funding, simply clarify and highlight the TEA's existing policy of limiting funding to 180 days per funding year.

Comment. The associate superintendent of Southwest Preparatory School commented that the TEA's policy of limiting funding to 180 days per funding year has been retroactively implemented

before the rule amendment adopting the handbook has been through the adoption process.

Agency Response. The agency disagrees. The policy of limiting funding to 180 days per funding year was in effect before the amendment to the *2008-2009 Student Attendance Accounting Handbook Version 2* was proposed. It has been the TEA's policy since at least 1995 to limit funding to 180 days per funding year, as the agency is required to do in accordance with the TEC, §25.081 and §42.005(a)(1).

Comment. The associate superintendent of Southwest Preparatory School commented that the TEA's policy of limiting funding to 180 days per funding year will cause severe administrative and financial problems for the school.

Agency Response. The agency disagrees. The TEA's policy of limiting funding to 180 days per funding year has been in place since at least 1995 and is based on statutory requirement in the TEC, §25.081 and §42.005(a)(1).

Comment. The associate superintendent of Southwest Preparatory School requested that the amendment to 19 TAC §129.1025 either not be adopted or be adopted to be effective September 1, 2009, so that charter schools could transition more smoothly to compliance with the requirement limiting funding to 180 days per funding year.

Agency Response. The agency disagrees. Charter schools should not require any time to comply with the TEA's policy of limiting funding to 180 days per funding year, as the policy has been in place since at least 1995.

Comment. Southwest Preparatory Charter School; Winfree Academy Charter Schools; KIPP Houston; Erath Excels! Academy, Inc.; Texans Can!; Responsive Education Solutions; and Trinity Charter School commented that there is no statutory basis for limiting funding to a 180-day year that begins the fourth Monday in August.

Agency Response. The agency disagrees. Per the TEC, §42.005, a student may generate ADA funding for only 180 days of instruction.

Also, the *2008-2009 Student Attendance Accounting Handbook Version 2* does not require that an open-enrollment charter school's calendar begin on the fourth Monday in August. Section 3.8.4 of the handbook states only that the state funding calendar year begins the fourth Monday in August. An open-enrollment charter school is permitted to receive funding for any 180-day calendar that falls any time within the state funding calendar year. If an open-enrollment charter school calendar starts June 1, it is possible for the school to receive funding for the period June 1 through the day before the fourth Monday in August in one funding year and funding for the remainder of the calendar in the new funding year (that starts the fourth Monday in August). In this example, the open-enrollment charter school calendar would have 90 days of funding in one funding year and 90 days in the next funding year. The school would receive funding for a student participating in the instructional calendar as long as the student had not already completed a 180-day calendar in another charter school or school district before starting the charter school calendar beginning June 1.

Comment. Southwest Preparatory Charter School; Winfree Academy Charter Schools; KIPP Houston; Erath Excels! Academy, Inc.; Texans Can!; Responsive Education Solutions; and Trinity Charter School commented that there is no statutory basis for limiting ADA funding to "membership days." They commented that an open-enrollment charter school student who had missed a portion of a 180-day calendar track would not be eligible to generate further funding after that calendar track ended.

Agency Response. The agency disagrees. The *2008-2009 Student Attendance Accounting Handbook Version 2* does not limit funding beyond statutory requirements.

Per the TEC, §42.005, a student may generate ADA funding for 180 days of instruction. Per Section 3.8.4 of the *2008-2009 Student Attendance Accounting Handbook Version 2,* as long as the 180 days fall within a single funding year, a student's attendance for those days would generate funding. If a charter school student were, for example, to attend 90 days of one calendar track and then attend 90 days of another later calendar track within the same state funding calendar year, all 180 days of attendance would be eligible for funding.

Comment. Southwest Preparatory Charter School; Winfree Academy Charter Schools; KIPP Houston; Erath Excels! Academy, Inc.; Texans Can!; Responsive Education Solutions; and Trinity Charter School commented that Section 3.8.4 of the *2008-2009 Student Attendance Accounting Handbook Version 2,* when combined with the compulsory education statute (TEC, §25.085), may require an open-enrollment charter school to educate a student while denying ADA funding for instructional days. The group commented that because an open-enrollment charter school may provide staggered 180-day calendar tracks and because a student may complete part of one track and then switch to another, the charter school may be required to educate the student for more than 180 instructional days within the funding year.

Agency Response. The agency agrees that if a charter school accepts a student for participation in one of its calendar tracks, the school is obligated to provide the student with instruction for the duration of the track.

However, a charter school's allowing a student to participate in a second calendar track within the same funding year does not change the number of instructional days for which the student is eligible to generate ADA funding by law. Per the TEC, §42.005, a student may generate ADA funding for only 180 days of instruction. In accordance with the TEC, §42.005(a)(1), ADA is calculated by dividing the sum of attendance for each day of the minimum number of days of instruction (180 days) by the minimum number of days of instruction (180).

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

The amendment implements the TEC, §42.004.

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 February 13, 2009.

TRD-200900643

Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: March 5, 2009
Proposal publication date: November 14, 2008
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 162. SUPERVISION OF MEDICAL SCHOOL STUDENTS

22 TAC §162.1

The Texas Medical Board (Board) adopts amendments to §162.1, concerning Supervision of Medical School Students, without changes to the proposed text as published in the January 9, 2009, issue of the *Texas Register* (34 TexReg 167) and will not be republished.

The amendments to §162.1 provide for the supervision of a medical student who is not enrolled at a Texas medical school as a full-time student or visiting student.

Elsewhere in this issue of the *Texas Register,* the Board contemporaneously adopts the rule review of Chapter 162.

The Board sought stakeholder input through Stakeholder Groups, which made comments on the suggested changes to the rules at a meeting held on October 29, 2008. The comments were incorporated into the proposed rules.

The Board received no public written comments and no one appeared to testify at the public hearing held on February 6, 2009.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which provide authority for the Board to adopt rules and bylaws as necessary to govern its own proceedings, perform its duties, regulate the practice of medicine in this state, enforce this subtitle, and establish rules related to licensure.

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 February 17, 2009.

TRD-200900646
Mari Robinson, J.D.
Interim Executive Director
Texas Medical Board
Effective date: March 9, 2009
Proposal publication date: January 9, 2009
For further information, please call: (512) 305-7016

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CHAPTER 171. POSTGRADUATE TRAINING PERMITS

22 TAC §171.7

The Texas Medical Board (Board) adopts the repeal of §171.7, concerning Inactive Status, without changes to the proposed text as published in the January 9, 2009, issue of the *Texas Register* (34 TexReg 168) and will not be republished.

The repeal of §171.7 deletes a provision that recognizes an inactive status of a physician in training permit. The provision is unnecessary under the current procedure to issue a physician in training permit for the length of postgraduate training. The board considers a postgraduate training permit to be terminated if the holder of the permit is not engaged in the program of postgraduate training.

The Board sought stakeholder input through Stakeholder Groups, which made comments on the suggested changes to the rules at a meeting held on October 29, 2008. The comments were incorporated into the proposed rules.

The Board received no public written comments and no one appeared to testify at the public hearing held on February 6, 2009.

The repeal is adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which provide authority for the Board to adopt rules and bylaws as necessary to govern its own proceedings, perform its duties, regulate the practice of medicine in this state, enforce this subtitle, and establish rules related to licensure.

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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Mari Robinson, J.D.
Interim Executive Director
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CHAPTER 172. TEMPORARY AND LIMITED LICENSES

SUBCHAPTER B. TEMPORARY LICENSES

22 TAC §172.4

The Texas Medical Board (Board) adopts amendments §172.4, concerning State Health Agency Temporary License, with nonsubstantive changes to the proposed text as published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8869). The text of the rule will be republished.

The amendment updates the reference to the board rule requiring the holder of a temporary license under this section to show that the person has taken an examination within the last ten years.

The Board sought stakeholder input through Stakeholder Groups, which made comments on the suggested changes to the rules at a meeting held on October 29, 2008. The comments were incorporated into the proposed rules.

The Board received no public written comments and no one appeared to testify at the public hearing held on February 6, 2009.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which provide authority for the Board to adopt rules and bylaws as necessary to govern its own proceedings, perform its duties, regulate the practice of medicine in this state, enforce this subtitle, and establish rules related to licensure.

§172.4. State Health Agency Temporary License.

An applicant may elect to apply for a state health agency temporary license in lieu of licensure.

(1) The executive director of the board may issue such a temporary license to an applicant:

(A) who holds a valid license in another state or Canadian province on the basis of an examination, that is accepted by the board for licensure;

(B) who has passed the Texas medical jurisprudence examination;

(C) whose application has been filed, processed, and found to be in order. The application shall be complete in every detail with the exception of compliance with §163.1(a)(9)(K) of this title (relating to Definitions of Examinations accepted by the board for licensure); and

(D) who holds a salaried, administrative, or clinical position with an agency of the State of Texas.

(2) The state health agency temporary license shall be requested by the chief administrative officer of the employing state agency and shall be issued exclusively to that agency. The chief administrative officer shall state whether the temporary license is for a:

(A) clinical position. This temporary license will be valid for a one-year period from the date of issuance and will not be renewable. The temporary license is revocable at any time the board deems necessary. To practice beyond one year, the holder of the temporary license must fully comply with §163.7 of this title (relating to Ten Year Rule). During the period that the state health agency clinical temporary license is in effect, the physician will be supervised by a licensed staff physician who will regularly review the temporary license holder's skill and performance. This temporary license will be marked "clinical"; or

(B) administrative non-clinical position. This temporary license will be valid for a one-year period from the date of issuance; however, it is revocable at any time the board deems necessary. The temporary license shall automatically expire one year after the date of issuance but may be re-issued annually at the request of the chief administrative officer of the employing state agency and at the discretion of the board. The holder of a state health agency temporary license, not designated as clinical, shall not practice medicine as that term is defined in the Medical Practice Act, TEX. OCCUPATIONS CODE ANN. §151.002(a)(13). This temporary license will be marked "administrative."

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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Mari Robinson, J.D.
Interim Executive Director
Texas Medical Board
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For further information, please call: (512) 305-7016

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CHAPTER 175. FEES, PENALTIES AND FORMS

22 TAC §175.1, §175.3

The Texas Medical Board (Board) adopts amendments to §175.1, concerning Application Fees, and §175.3, concerning Penalties, without changes to the proposed text as published in the January 9, 2009, issue of the *Texas Register* (34 TexReg 169) and will not be republished.

The amendment to §175.1 corrects fees charged for application for surgical assistant licenses and penalty fees for surgical assistants and physician assistants.

The amendment to §175.3 corrects penalty fees in accordance with statutory requirements.

The Board sought stakeholder input through Stakeholder Groups, which made comments on the suggested changes to the rules at a meeting held on October 29, 2008. The comments were incorporated into the proposed rules.

The Board received no public written comments and no one appeared to testify at the public hearing held on February 6, 2009.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which provide authority for the Board to adopt rules and bylaws as necessary to govern its own proceedings, perform its duties, regulate the practice of medicine in this state, enforce this subtitle, and establish rules related to licensure.

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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Mari Robinson, J.D.
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For further information, please call: (512) 305-7016

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CHAPTER 185. PHYSICIAN ASSISTANTS

22 TAC §185.2

The Texas Medical Board (Board) adopts amendments to §185.2, concerning Definitions, without changes to the proposed text as published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8871) and will not be republished.

The amendment revises the definition of a supervising physician to define an "unrestricted medical license."

The Board sought stakeholder input through Stakeholder Groups, which made comments on the suggested changes to the rules at a meeting held on October 29, 2008. The comments were incorporated into the proposed rules.

The Board received no public written comments and no one appeared to testify at the public hearing held on February 6, 2009.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which provide authority for the Board to adopt rules and bylaws as necessary to govern its own proceedings, perform its duties, regulate the practice of medicine in this state, enforce this subtitle, and establish rules related to licensure.

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 189. COMPLIANCE PROGRAM

22 TAC §189.1, §189.2

The Texas Medical Board (Board) adopts amendments to §189.1, concerning Purpose and Scope and §189.2, concerning Definitions, without changes to the proposed text as published in the January 9, 2009, issue of the *Texas Register* (34 TexReg 170) and will not be republished.

The amendments to §189.1 add as a citation to statutory authority authorizing the Board to promulgate rules relating to the development of a program to monitor compliance of license holders who are subject to disciplinary action.

The amendments to §189.2 update the names of the Texas Medical Board and the Texas Physician Assistant Board and add chart monitoring to the definition of a monitoring physician.

Elsewhere in this issue of the *Texas Register*, the Board contemporaneously adopts the rule review of Chapter 189.

The Board sought stakeholder input through Stakeholder Groups, which made comments on the suggested changes to the rules at a meeting held on October 29, 2008. The comments were incorporated into the proposed rules.

The Board received no public written comments and no one appeared to testify at the public hearing held on February 6, 2009.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which provide authority for the Board to adopt rules and bylaws as necessary to govern its own proceedings, perform its duties, regulate the practice of medicine in this state, enforce this subtitle, and establish rules related to licensure.

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 14. TEXAS OPTOMETRY BOARD

CHAPTER 273. GENERAL RULES

22 TAC §273.8

The Texas Optometry Board adopts amendments to §273.8, concerning Renewal of License, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9856).

The amendments concern reinstatement of expired licenses and removes a requirement to conform to the statute.

No comments were received regarding the proposed amendments.

The amendments are adopted under the Texas Optometry Act, Texas Occupations Code, §351.151 and §351.304. The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession, and §351.304 to require reexamination upon license expiration.

No other sections are affected by the 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 February 17, 2009.

TRD-200900659
Chris Kloeris
Executive Director
Texas Optometry Board
Effective date: March 9, 2009
Proposal publication date: December 5, 2008
For further information, please call: (512) 305-8502

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CHAPTER 280. THERAPEUTIC OPTOMETRY

22 TAC §280.8, §280.10

The Texas Optometry Board adopts amendments to §280.8, concerning Optometric Glaucoma Specialist: Required Educa-

tion, Examination and Clinical Skills Evaluation, and §280.10, concerning Optometric Glaucoma Specialist: Administration and Prescribing of Oral Medications and Anti-Glaucoma Drugs, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9856).

The amendments clarify the requirements for finding that the course work and examination required to apply for the optometric glaucoma specialist license are part of the current curriculum of certified schools or colleges of optometry. Under the amendments, applicants may have the required skills evaluation performed by an ophthalmologist or optometric glaucoma specialist. The amendments to §280.10 concerns drug orders for Controlled Substances. The amendments add the additional information required by Senate Bill 1879, 80th Legislature, Regular Session, clarifies when a Controlled Substances registration is required, and updates citations in the Optometry Act.

Comments

The agency received comments from the Texas Ophthalmological Association on §280.8. No comments were received on §280.10.

Since August 2000, the agency has licensed 2,000 optometric glaucoma specialists. A majority of the agency's active licensees hold the optometric glaucoma specialist license and are therefore authorized to treat glaucoma under the provisions of §351.358 and §351.3581 of the Texas Optometry Act. The agency has adopted rules, 22 TAC §§280.8 - 280.11, concerning the licensing and practice of optometric glaucoma specialists.

Section 351.358 and §351.3581 were added to the Texas Optometry Act by House Bill 1059, 76th Legislature, Regular Session, with an effective date of September 1, 1999. Section Three of the bill added a new section to the Texas Optometry Act, titled Optometric Health Care Advisory Committee (Committee). Section Three is codified as §351.165 of the Texas Optometry Act. This section set up a committee to make recommendations to the agency and the Texas Medical Board regarding requirements for education and clinical training of applicants for the optometric glaucoma specialist license. The legislature specifically restricted the authority of the Committee in subsection (g), which states: "Unless continued in existence by act of the legislature, the Optometric Health Care Advisory Committee is abolished, and this section expires September 1, 2005." The legislature did not choose to continue this section, which therefore expired on September 1, 2005.

Prior to the abolishment of the Committee on September 1, 2005, the Committee, pursuant to §351.165, made recommendations for the education and training requirements necessary to apply for the optometric glaucoma specialist license. These recommendations were approved by the agency and the Texas Medical Board. These recommendations included a thirty hour course with a detailed description of the topics to be covered. The agency subsequently approved courses presented by optometry schools and a medical school.

The amendments to §280.8 do not change the course requirements recommended by the Committee and approved by both agencies. The amendments do seek to avoid the delay and extra expense in the licensing of optometric glaucoma specialists where it can be shown and certified by the agency that the thirty hour course and examination was provided in the education that the applicant received in optometry school. The amendments still require that an applicant for the optometric glaucoma specialist license comply with §351.3581 by completing an instructional clinical review course and passing an approved examination.

Portions of the thirty hour course may not have been part of the curriculum of all optometrists licensed prior to the enactment of §351.358 and §351.3581. These applicants for an optometric glaucoma specialist license were therefore required to take a course after receiving an optometry license. The agency finds no valid purpose is served by having current graduates from programs that include the thirty hour course and examination to immediately retake the course.

The commenter states that a course taken in school cannot be a review course and that therefore the requirement in §351.3581 for applicants to, ". . . complete an instructional clinical review course; . . ." cannot be met. The amendments to the rule require an instructional clinic review component. If the dean cannot certify that the school course work meets this requirement, the amendments do not allow the agency to find that the thirty hour course has been completed by the graduate. Therefore the agency disagrees with this comment.

The commenter also states that §351.3581 requires that a future applicant must be a therapeutic optometrist before taking the required course. The agency disagrees with this comment and interprets §351.3581 to require a therapeutic optometrist license as a requirement for license as an optometric glaucoma specialist, not as a requirement to take and pass the required course.

The agency agrees with the comments from the Texas Ophthalmological Association that §351.165 of the Texas Optometry Act expired on September 1, 2005. The agency also notes that the Optometric Health Care Advisory Committee was abolished on that same date.

The commenter stated that the expiration of §351.165 is not the repeal of that section, and that the recommendations made by the Optometric Health Care Advisory Committee did not expire with the expiration of the statute. The commenter further stated that the proposed amendments of the rule is inconsistent with statutory law.

The agency disagrees with the commenter that it does not have the legal authority to amend this rule regarding the method the agency may use to determine the competency of applicants for the optometric glaucoma specialist license. Section 351.165 has expired. The agency disagrees with the commenter regarding the status of §351.165. The expiration acted to repeal the section. Thus the agency is required to comply only with the sections still effective, §351.358 and §351.3581, which require applicants to take an instructional clinical course and exam.

The agency has determined that licensees who are authorized to treat glaucoma under the Texas Optometry Act, are also competent to make an evaluation of the skills of an applicant for that license. These are the same skills regularly employed by the licensees now authorized to treat glaucoma. Section 351.358 and §351.3581 do not contain a requirement that applicants for the optometric glaucoma specialist have a list of skills evaluated. However, the rule amendments maintain that requirement, but permit an optometric glaucoma specialist as well as an ophthalmologist to evaluate the skills. The rule amendments require applicants to comply with all the requirements of §351.3581.

The agency agrees with the commenter that §351.3581 refers to the requirements of §351.165, however, §351.165 has expired and the Committee authorized by that section was abolished.

The agency disagrees with the commenter regarding the authority to adopt the amendments and asserts that these amendments comply with the requirements of §351.151 and §351.3581, the effective and applicable statutes for the rule amendments.

Statutory Authority

The amendments are adopted under the Texas Optometry Act, Texas Occupations Code, §§351.151, 351.358, and 351.3581; and under §481.074 of the Texas Health and Safety Code. The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession. Section 351.358 and §351.3581 set the requirements for optometric glaucoma specialist license and allow optometric glaucoma specialist licenses to prescribe Controlled Substances. Section 481.074 of the Texas Health and Safety Code sets out the requirements for a prescription order for Controlled Substances.

No other sections are affected by the 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.

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TRD-200900658
Chris Kloeris
Executive Director
Texas Optometry Board
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For further information, please call: (512) 305-8502

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PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 291. PHARMACIES

SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.33

The Texas State Board of Pharmacy adopts amendments to §291.33, concerning Operational Standards, with changes to the proposed text as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10408). The amendments are adopted with changes based on comments received as described below.

The amendments clarify that specified information on the prescription labels and written information provided to consumers must be printed in a type-size no smaller than 10-point Times Roman; and clarify that the prescription label is not required to include the identification code or initials of the dispensing pharmacist if the information is stored in the pharmacy's data processing system.

Comments were received as follows:

Davita Rx commented in support of the proposed amendments. The Board agrees with this comment.

Medco Health Solutions, Inc. commented that the proposed amendments with regard to the prescription label and written prescription information should allow for a font-size comparable to ten-point Times Roman. Medco commented that only specific items on the label including the patient name, drug and strength, directions for use, and use by date should be required to be in the specified font-size. The Board agrees with these comments and the adopted rule reflects the changes.

The National Association of Chain Drug Stores (NACDS) commented that it would be impossible to include all of the required elements of a prescription label in ten-point Times Roman font. Pharmacies would have no other option but to provide duplicative, accompanying written information with every prescription dispensed. NACDS recommended that rules be amended to require the important information printed on the prescription labels be printed in ten-point Times Roman font thus making it easier for patients to check that they have received the proper drug and can read the drug directions for use. NACDS commented that only the prescription number, patient name, directions for use, and drug name and strength be required to be in a specific font size. NACDS opposed the amendments to supplement the label information with written information if the label did not conform to the specific font. NACDS commented that the amendments requiring the written information be printed in a font-size no smaller than ten-point Times Roman would require pharmacies to use more paper and increase printing costs. The Board agrees with the comments to only require certain information on the label conform to the font-size requirements. The Board disagrees with the comments regarding the font-size on written information and supplemental information. Requiring a specific font-size will improve the readability of prescription labels and written information.

The amendments are adopted under §§551.002, 554.051, 562.006 and 562.0061 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.006 and §562.0061 as authorizing the agency to adopt rules regarding the prescription label and written information provided to consumers.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Occupations Code.

§291.33. Operational Standards.

(a) Licensing requirements.

(1) A Class A pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(2) A Class A pharmacy which changes ownership shall notify the board within ten days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(3) A Class A pharmacy which changes location and/or name shall notify the board within ten days of the change and file for an amended license as specified in §291.3 of this title.

(4) A Class A pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writ-

ing of the names of the new managing officers within ten days of the change, following the procedures in §291.3 of this title.

(5) A Class A pharmacy shall notify the board in writing within ten days of closing, following the procedures in §291.5 of this title (relating to Closed Pharmacies).

(6) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(7) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(8) A Class A pharmacy, licensed under the provisions of the Act, §560.051(a)(1), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(2) concerning Nuclear Pharmacy (Class B), is not required to secure a license for such other type of pharmacy; provided, however, such licensee is required to comply with the provisions of §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title (relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(9) A Class A (community) pharmacy engaged in the compounding of non-sterile pharmaceuticals shall comply with the provisions of §291.131 of this title (relating to Pharmacies Compounding Non-Sterile Preparations).

(10) A Class A (community) pharmacy engaged in the compounding of sterile pharmaceuticals shall comply with the provisions of §291.133 of this title (relating to Pharmacies Compounding Sterile Preparations).

(11) A Class A (Community) pharmacy engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.121 of this title (relating to Remote Pharmacy Services).

(12) Class A (Community) pharmacy engaged in centralized prescription dispensing and/or prescription drug or medication order processing shall comply with the provisions of §291.123 of this title (relating to Centralized Prescription Drug or Medication Order Processing) and/or §291.125 of this title (relating to Centralized Prescription Dispensing).

(b) Environment.

(1) General requirements.

(A) The pharmacy shall be arranged in an orderly fashion and kept clean. All required equipment shall be clean and in good operating condition.

(B) A Class A pharmacy shall have a sink with hot and cold running water within the pharmacy, exclusive of restroom facilities, available to all pharmacy personnel and maintained in a sanitary condition.

(C) A Class A pharmacy which serves the general public shall contain an area which is suitable for confidential patient counseling.

(i) Such counseling area shall:

(I) be easily accessible to both patient and pharmacists and not allow patient access to prescription drugs;

(II) be designed to maintain the confidentiality and privacy of the pharmacist/patient communication.

(ii) In determining whether the area is suitable for confidential patient counseling and designed to maintain the confidentiality and privacy of the pharmacist/patient communication, the board may consider factors such as the following:

(I) the proximity of the counseling area to the check-out or cash register area;

(II) the volume of pedestrian traffic in and around the counseling area;

(III) the presence of walls or other barriers between the counseling area and other areas of the pharmacy; and

(IV) any evidence of confidential information being overheard by persons other than the patient or patient's agent or the pharmacist or agents of the pharmacist.

(D) The pharmacy shall be properly lighted and ventilated.

(E) The temperature of the pharmacy shall be maintained within a range compatible with the proper storage of drugs; the temperature of the refrigerator shall be maintained within a range compatible with the proper storage of drugs requiring refrigeration.

(F) Animals, including birds and reptiles, shall not be kept within the pharmacy and in immediately adjacent areas under the control of the pharmacy. This provision does not apply to fish in aquariums, guide dogs accompanying disabled persons, or animals for sale to the general public in a separate area that is inspected by local health jurisdictions.

(2) Security.

(A) Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of prescription drugs, and records for such drugs.

(B) The prescription department shall be locked by key, combination or other mechanical or electronic means to prohibit unauthorized access when a pharmacist is not on-site except as provided in subparagraphs (C) and (D) of this paragraph and paragraph (3) of this subsection. The following is applicable:

(i) If the prescription department is closed at any time when the rest of the facility is open, the prescription department must be physically or electronically secured. The security may be accomplished by means such as floor to ceiling walls; walls, partitions, or barriers at least 9 feet 6 inches high; electronically monitored motion detectors; pull down sliders; or other systems or technologies that will secure the pharmacy from unauthorized entrance when the pharmacy is closed. Pharmacies licensed prior to June 1, 2009, shall be exempt from this provision unless the pharmacy changes location. Change of location shall include the relocation of the pharmacy within the licensed address. A pharmacy licensed prior to June 1, 2009 that files a change of ownership but does not change location shall be exempt from the provisions.

(ii) Effective, June 1, 2009, the pharmacy's key, combination, or other mechanical or electronic means of locking the pharmacy may not be duplicated without the authorization of the pharmacist-in-charge or owner.

(iii) Effective, June 1, 2009, at a minimum, the pharmacy must have a basic alarm system with off-site monitoring and

perimeter and motion sensors. The pharmacy may have additional security by video surveillance camera systems.

(C) Prior to authorizing individuals to enter the prescription department, the pharmacist-in-charge or owner may designate persons who may enter the prescription department to perform functions, other than dispensing functions or prescription processing, documented by the pharmacist-in-charge including access to the prescription department by other pharmacists, pharmacy personnel and other individuals. The pharmacy must maintain written documentation of authorized individuals other than individuals employed by the pharmacy who accessed the prescription department when a pharmacist is not on-site.

(D) Only persons designated either by name or by title including such titles as "relief" or "floater" pharmacist, in writing by the pharmacist-in-charge may unlock the prescription department except in emergency situations. An additional key to or instructions on accessing the prescription department may be maintained in a secure location outside the prescription department for use during an emergency or as designated by the pharmacist-in-charge for entry by another pharmacist.

(E) Written policies and procedures for the pharmacy's security shall be developed and implemented by the pharmacist-in-charge and/or the owner of the pharmacy. Such polices and procedures may include quarterly audits of controlled substances commonly abused or diverted; perpetual inventories for the comparison of the receipt, dispensing, and distribution of controlled substances; monthly reports from the pharmacy's wholesaler(s) of controlled substances purchased by the pharmacy; opening and closing procedures; product storage and placement; and central management oversight.

(3) Temporary absence of pharmacist.

(A) On-site supervision by pharmacist.

(i) If a pharmacy is staffed by only one pharmacist, the pharmacist may leave the prescription department for short periods of time without closing the prescription department and removing pharmacy technicians, pharmacy technician trainees, and other pharmacy personnel from the prescription department provided the following conditions are met:

(I) at least one pharmacy technician remains in the prescription department;

(II) the pharmacist remains on-site at the licensed location of the pharmacy and is immediately available;

(III) the pharmacist reasonably believes that the security of the prescription department will be maintained in his or her absence. If in the professional judgment of the pharmacist, the pharmacist determines that the prescription department should close during his or her absence, then the pharmacist shall close the prescription department and remove the pharmacy technicians, pharmacy technician trainees, and other pharmacy personnel from the prescription department during his or her absence; and

(IV) a notice is posted which includes the following information:

(-a-) the pharmacist is on a break and the time the pharmacist will return; and

(-b-) pharmacy technicians may begin the processing of prescription drug orders or refills brought in during the pharmacist's absence, but the prescription or refill may not be delivered to the patient or the patient's agent until the pharmacist verifies the accuracy of the prescription.

(ii) During the time a pharmacist is absent from the prescription department, only pharmacy technicians who have completed the pharmacy's training program may perform the following duties, provided a pharmacist verifies the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent:

(I) initiating and receiving refill authorization requests;

(II) entering prescription data into a data processing system;

(III) taking a stock bottle from the shelf for a prescription;

(IV) preparing and packaging prescription drug orders (i.e., counting tablets/capsules, measuring liquids and placing them in the prescription container);

(V) affixing prescription labels and auxiliary labels to the prescription container; and

(VI) prepackaging and labeling prepackaged drugs.

(iii) Upon return to the prescription department, the pharmacist shall:

(I) conduct a drug regimen review as specified in subsection (c)(2) of this section; and

(II) verify the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent.

(iv) An agent of the pharmacist may deliver a previously verified prescription to the patient or his or her agent provided a record of the delivery is maintained containing the following information:

(I) date of the delivery;

(II) unique identification number of the prescription drug order;

(III) patient's name;

(IV) patient's phone number or the phone number of the person picking up the prescription; and

(V) signature of the person picking up the prescription.

(v) Any prescription delivered to a patient when a pharmacist is not in the prescription department must meet the requirements for a prescription delivered to a patient as described in subsection (c)(1)(F) of this section.

(vi) During the times a pharmacist is absent from the prescription department a pharmacist intern shall be considered a registered pharmacy technician and may perform only the duties of a registered pharmacy technician.

(vii) In pharmacies with two or more pharmacists on duty, the pharmacists shall stagger their breaks and meal periods so that the prescription department is not left without a pharmacist on duty.

(B) Pharmacist is off-site.

(i) The prescription department must be secured with procedures for entry during the time that a pharmacy is not under the continuous on-site supervision of a pharmacist and the pharmacy is not open for pharmacy services.

(ii) Pharmacy technicians and pharmacy technician trainees may not perform any duties of a pharmacy technician or pharmacy technician trainee during the time that the a pharmacist is off-site.

(iii) An agent of the pharmacist may deliver a previously verified prescription to a patient or patient's agent during short periods of time when a pharmacist is off-site, provided the following conditions are met:

(I) short periods of time may not exceed two consecutive hours in a 24 hour period;

(II) a notice is posted which includes the following information:

(-a-) the pharmacist is off-site and not present in the pharmacy;

(-b-) no new prescriptions may be prepared at the pharmacy but previously verified prescriptions may be delivered to the patient or the patient's agent; and

(-c-) the date/time when the pharmacist will return.

(III) the pharmacy must maintain documentation of the absences of the pharmacist(s); and

(IV) the prescription department is locked and secured to prohibit unauthorized entry.

(iv) During the time a pharmacist is absent from the prescription department and is off-site, a record of prescriptions delivered must be maintained and contain the following information:

(I) date and time of the delivery;

(II) unique identification number of the prescription drug order;

(III) patient's name;

(IV) patient's phone number or the phone number of the person picking up the prescription; and

(V) signature of the person picking up the prescription.

(v) Any prescription delivered to a patient when a pharmacist is not on-site at the pharmacy must meet the requirements for a prescription delivered to a patient as described in subsection (c)(1)(F) of this section.

(c) Prescription dispensing and delivery.

(1) Patient counseling and provision of drug information.

(A) To optimize drug therapy, a pharmacist shall communicate to the patient or the patient's agent, information about the prescription drug or device which in the exercise of the pharmacist's professional judgment the pharmacist deems significant, such as the following:

(i) the name and description of the drug or device;

(ii) dosage form, dosage, route of administration, and duration of drug therapy;

(iii) special directions and precautions for preparation, administration, and use by the patient;

(iv) common severe side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur;

(v) techniques for self monitoring of drug therapy;

(vi) proper storage;

(vii) refill information; and

(viii) action to be taken in the event of a missed dose.

(B) Such communication:

(i) shall be provided with each new prescription drug order;

(ii) shall be provided for any prescription drug order dispensed by the pharmacy on the request of the patient or patient's agent;

(iii) shall be communicated orally in person unless the patient or patient's agent is not at the pharmacy or a specific communication barrier prohibits such oral communication;

(iv) effective, June 1, 2010, shall be documented by recording the initials or identification code of the pharmacist providing the counseling in the prescription dispensing record on either the original hard-copy prescription. in the pharmacy's data processing system or in an electronic logbook; and

(v) shall be reinforced with written information relevant to the prescription and provided to the patient or patient's agent. The following is applicable concerning this written information.

(I) Written information must be in plain language designed for the consumer and printed in an easily readable font size comparable to but no smaller than ten-point Times Roman.

(II) When a compounded product is dispensed, information shall be provided for the major active ingredient(s), if available.

(III) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(-a-) the pharmacist informs the patient or the patient's agent that the product is a new drug entity and written information is not available;

(-b-) the pharmacist documents the fact that no written information was provided; and

(-c-) if the prescription is refilled after written information is available, such information is provided to the patient or patient's agent.

(C) Only a pharmacist may verbally provide drug information to a patient or patient's agent and answer questions concerning prescription drugs. Non-pharmacist personnel may not ask questions of a patient or patient's agent which are intended to screen and/or limit interaction with the pharmacist.

(D) Nothing in this subparagraph shall be construed as requiring a pharmacist to provide consultation when a patient or patient's agent refuses such consultation. The pharmacist shall document such refusal for consultation.

(E) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient at the pharmacy, the following is applicable.

(i) So that a patient will have access to information concerning his or her prescription, a prescription may not be delivered to a patient unless a pharmacist is in the pharmacy, except as provided in subsection (b)(3) of this section.

(ii) Any prescription delivered to a patient when a pharmacist is not in the pharmacy must meet the requirements described in subparagraph (F) of this paragraph.

(iii) A Class A pharmacy shall make available for use by the public a current or updated edition of the United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient), or another source of such information designed for the consumer.

(F) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient or his or her agent at the patient's residence or other designated location, the following is applicable.

(i) The information specified in subparagraph (A) of this paragraph shall be delivered with the dispensed prescription in writing.

(ii) If prescriptions are routinely delivered outside the area covered by the pharmacy's local telephone service, the pharmacy shall provide a toll-free telephone line which is answered during normal business hours to enable communication between the patient and a pharmacist.

(iii) The pharmacist shall place on the prescription container or on a separate sheet delivered with the prescription container in both English and Spanish the local and if applicable, toll-free telephone number of the pharmacy and the statement: "Written information about this prescription has been provided for you. Please read this information before you take the medication. If you have questions concerning this prescription, a pharmacist is available during normal business hours to answer these questions at (insert the pharmacy's local and toll-free telephone numbers)."

(iv) The pharmacy shall maintain and use adequate storage or shipment containers and use shipping processes to ensure drug stability and potency. Such shipping processes shall include the use of appropriate packaging material and/or devices to ensure that the drug is maintained at an appropriate temperature range to maintain the integrity of the medication throughout the delivery process.

(v) The pharmacy shall use a delivery system which is designed to assure that the drugs are delivered to the appropriate patient.

(G) Except as specified in subparagraph (B) of this paragraph, in the best interest of the public health and to optimize drug therapy, upon delivery of a refill prescription, a pharmacist shall ensure that the patient or patient's agent is offered information about the refilled prescription. Either a pharmacist or other pharmacy personnel shall inform the patient or patient's agent that a pharmacist is available to discuss the patient's prescription and provide information.

(H) A pharmacy shall post a sign no smaller than 8.5 inches by 11 inches in clear public view at all locations in the pharmacy where a patient may pick up prescriptions. The sign shall contain the following statement in a font that is easily readable: "Do you have questions about your prescription? Ask the pharmacist." Such notification shall be in both English and Spanish.

(I) The provisions of this paragraph do not apply to patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

(2) Pharmaceutical care services.

(A) Drug regimen review.

(i) For the purpose of promoting therapeutic appropriateness, a pharmacist shall, prior to or at the time of dispensing a prescription drug order, review the patient's medication record. Such review shall at a minimum identify clinically significant:

(I) known allergies;

(II) rational therapy-contraindications;

(III) reasonable dose and route of administration;

(IV) reasonable directions for use;

(V) duplication of therapy;

(VI) drug-drug interactions;

(VII) drug-food interactions;

(VIII) drug-disease interactions;

(IX) adverse drug reactions; and

(X) proper utilization, including overutilization or underutilization.

(ii) Upon identifying any clinically significant conditions, situations, or items listed in clause (i) of this subparagraph, the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner. The pharmacist shall document such occurrences.

(iii) The drug regimen review may be conducted by remotely accessing the pharmacy's electronic data base from outside the pharmacy by an individual Texas licensed pharmacist employee of the pharmacy, provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records.

(B) Other pharmaceutical care services which may be provided by pharmacists include, but are not limited to, the following:

(i) managing drug therapy as delegated by a practitioner as allowed under the provisions of the Medical Practices;

(ii) administering immunizations and vaccinations under written protocol of a physician;

(iii) managing patient compliance programs;

(iv) providing preventative health care services; and

(v) providing case management of patients who are being treated with high-risk or high-cost drugs, or who are considered "high risk" due to their age, medical condition, family history, or related concern.

(3) Generic Substitution.

(A) General requirements.

(i) In accordance with Chapter 562 of the Act, a pharmacist may dispense a generically equivalent drug product if:

(I) the generic product costs the patient less than the prescribed drug product;

(II) the patient does not refuse the substitution; and

(III) the practitioner does not certify on the prescription form that a specific prescribed brand is medically necessary as specified in a dispensing directive described in subparagraph (C) of this paragraph.

(ii) If the practitioner has prohibited substitution through a dispensing directive in compliance with subparagraph (C) of this paragraph, a pharmacist shall not substitute a generically equivalent drug product unless the pharmacist obtains verbal or written authorization from the practitioner and notes such authorization on the original prescription drug order.

(B) Prescription format for written prescription drug orders.

(i) A written prescription drug order issued in Texas may:

(I) be on a form containing a single signature line for the practitioner; and

(II) contain the following reminder statement on the face of the prescription: "A generically equivalent drug product may be dispensed unless the practitioner hand writes the words 'Brand Necessary' or 'Brand Medically Necessary' on the face of the prescription."

(ii) A pharmacist may dispense a prescription that is not issued on the form specified in clause (i) of this subparagraph, however, the pharmacist may dispense a generically equivalent drug product unless the practitioner has prohibited substitution through a dispensing directive in compliance with subparagraph (C)(i) of this paragraph.

(iii) The prescription format specified in clause (i) of this subparagraph does not apply to the following types of prescription drug orders:

(I) prescription drug orders issued by a practitioner in a state other than Texas;

(II) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or

(III) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.

(iv) In the event of multiple prescription orders appearing on one prescription form, the practitioner shall clearly identify to which prescription(s) the dispensing directive(s) apply. If the practitioner does not clearly indicate to which prescription(s) the dispensing directive(s) apply, the pharmacist may substitute on all prescriptions on the form.

(C) Dispensing directive.

(i) Written prescriptions.

(I) A practitioner may prohibit the substitution of a generically equivalent drug product for a brand name drug product by writing across the face of the written prescription, in the practitioner's own handwriting, the phrase "brand necessary" or "brand medically necessary."

(II) The dispensing directive shall:

(-a-) be in a format that protects confidentiality as required by the Health Insurance Portability and Accountability Act of 1996 (29 U.S.C. Section 1181 et seq.) and its subsequent amendments; and

(-b-) comply with federal and state law, including rules, with regard to formatting and security requirements.

(III) The dispensing directive specified in this paragraph may not be preprinted, rubber stamped, or otherwise reproduced on the prescription form.

(IV) After, June 1, 2002, a practitioner may prohibit substitution on a written prescription only by following the dispensing directive specified in this paragraph. Two-line prescription forms, check boxes, or other notations on an original prescription drug order which indicate "substitution instructions" are not valid methods to prohibit substitution, and a pharmacist may substitute on these types of written prescriptions.

(V) A written prescription drug order issued prior to June 1, 2002, but presented for dispensing on or after June 1, 2002, shall follow the substitution instructions on the prescription.

(ii) Verbal Prescriptions.

(I) If a prescription drug order is transmitted to a pharmacist orally, the practitioner or practitioner's agent shall prohibit substitution by specifying "brand necessary" or "brand medically necessary." The pharmacists shall note any substitution instructions by the practitioner or practitioner's agent, on the file copy of the prescription drug order. Such file copy may follow the one-line format indicated in subparagraph (B)(i) of this paragraph, or any other format that clearly indicates the substitution instructions.

(II) If the practitioner's or practitioner's agent does not clearly indicate that the brand name is medically necessary, the pharmacist may substitute a generically equivalent drug product.

(III) To prohibit substitution on a verbal prescription reimbursed through the medical assistance program specified in 42 C.F.R., §447.331:

(-a-) the practitioner or the practitioner's agent shall verbally indicate that the brand is medically necessary; and

(-b-) the practitioner shall mail or fax a written prescription to the pharmacy which complies with the dispensing directive for written prescriptions specified in clause (i) of this subparagraph within 30 days.

(iii) Electronic prescription drug orders.

(I) To prohibit substitution, the practitioner or practitioner's agent shall note "brand necessary" or "brand medically necessary" on the electronic prescription drug order.

(II) If the practitioner or practitioner's agent does not clearly indicate on the electronic prescription drug order that the brand is medically necessary, the pharmacist may substitute a generically equivalent drug product.

(III) To prohibit substitution on an electronic prescription drug order reimbursed through the medical assistance program specified in 42 C.F.R., §447.331, the practitioner shall fax a copy of the original prescription drug order which complies with the requirements of a written prescription drug order specified in clause (i) of this subparagraph within 30 days.

(iv) Prescriptions issued by out-of-state, Mexican, Canadian, or federal facility practitioners.

(I) The dispensing directive specified in this subsection does not apply to the following types of prescription drug orders:

(-a-) prescription drug orders issued by a practitioner in a state other than Texas;

(-b-) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or

(-c-) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.

(II) A pharmacist may not substitute on prescription drug orders identified in subclause (I) of this clause unless the practitioner has authorized substitution on the prescription drug order. If the practitioner has not authorized substitution on the written prescription drug order, a pharmacist shall not substitute a generically equivalent drug product unless:

(-a-) the pharmacist obtains verbal or written authorization from the practitioner (such authorization shall be noted on the original prescription drug order); or

(-b-) the pharmacist obtains written documentation regarding substitution requirements from the State Board of Pharmacy in the state, other than Texas, in which the prescription drug order was issued. The following is applicable concerning this documentation.

(-1-) The documentation shall state that a pharmacist may substitute on a prescription drug order issued in such other state unless the practitioner prohibits substitution on the original prescription drug order.

(-2-) The pharmacist shall note on the original prescription drug order the fact that documentation from such other state board of pharmacy is on file.

(-3-) Such documentation shall be updated yearly.

(D) Refills.

(i) Original substitution instructions. All refills, including prescriptions issued prior to June 1, 2001, shall follow the original substitution instructions or dispensing directive, unless otherwise indicated by the practitioner or practitioner's agent.

(ii) Narrow therapeutic index drugs.

(I) The board, in consultation with the Texas State Board of Medical Examiners, has determined that no drugs shall be included on a list of narrow therapeutic index drugs as defined in §562.013, Occupations Code.

(-a-) The board has specified in §309.7 of this title (relating to Dispensing Responsibilities) that for drugs listed in the publication, pharmacists shall use as a basis for determining generic equivalency, Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication. Pharmacists may only substitute products that are rated therapeutically equivalent in the Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements.

(-b-) Practitioners may prohibit substitution through a dispensing directive in compliance with subparagraph (C) of this paragraph.

(II) The board shall reconsider the contents of the list if the Federal Food and Drug Administration determines a new equivalence classification which indicates that certain drug products are equivalent but special notification to the patient and practitioner is required when substituting these products.

(4) Substitution of dosage form.

(A) As specified in §562.002 of the Act, a pharmacist may dispense a dosage form of a drug product different from that prescribed, such as a tablet instead of a capsule or liquid instead of tablets, provided:

(i) the patient consents to the dosage form substitution;

(ii) the pharmacist notifies the practitioner of the dosage form substitution; and

(iii) the dosage form so dispensed:

(I) contains the identical amount of the active ingredients as the dosage prescribed for the patient;

(II) is not an enteric-coated or time release product;

(III) does not alter desired clinical outcomes;

(B) Substitution of dosage form may not include the substitution of a product that has been compounded by the pharmacist unless the pharmacist contacts the practitioner prior to dispensing and obtains permission to dispense the compounded product.

(5) Therapeutic Drug Interchange. A switch to a drug providing a similar therapeutic response to the one prescribed shall not be made without prior approval of the prescribing practitioner. This paragraph does not apply to generic substitution. For generic substitution, see the requirements of paragraph (3) of this subsection.

(A) The patient shall be notified of the therapeutic drug interchange prior to, or upon delivery, of the dispensed prescription to the patient. Such notification shall include:

(i) a description of the change;

(ii) the reason for the change;

(iii) whom to notify with questions concerning the change; and

(iv) instructions for return of the drug if not wanted by the patient.

(B) The pharmacy shall maintain documentation of patient notification of therapeutic drug interchange which shall include:

(i) the date of the notification;

(ii) the method of notification;

(iii) a description of the change; and

(iv) the reason for the change.

(6) Prescription containers.

(A) A drug dispensed pursuant to a prescription drug order shall be dispensed in a child-resistant container unless:

(i) the patient or the practitioner requests the prescription not be dispensed in a child-resistant container; or

(ii) the product is exempted from requirements of the Poison Prevention Packaging Act of 1970.

(B) A drug dispensed pursuant to a prescription drug order shall be dispensed in an appropriate container as specified on the manufacturer's container.

(C) Prescription containers or closures shall not be reused. However, if a patient or patient's agent has difficulty reading or understanding a prescription label, a prescription container may be reused provided:

(i) the container is designed to provide audio-recorded information about the proper use of the prescription medication;

(ii) the container is reused for the same patient;

(iii) the container is cleaned; and

(iv) a new safety closure is used each time the prescription container is reused.

(7) Labeling.

(A) At the time of delivery of the drug, the dispensing container shall bear a label in plain language and printed in an easily

readable font size, unless otherwise specified, with at least the following information:

(i) name, address and phone number of the pharmacy;

(ii) unique identification number of the prescription that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(iii) date the prescription is dispensed;

(iv) initials or an identification code of the dispensing pharmacist;

(v) name of the prescribing practitioner;

(vi) name of the patient or if such drug was prescribed for an animal, the species of the animal and the name of the owner that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(vii) instructions for use that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(viii) quantity dispensed;

(ix) appropriate ancillary instructions such as storage instructions or cautionary statements such as warnings of potential harmful effects of combining the drug product with any product containing alcohol;

(x) if the prescription is for a Schedules II - IV controlled substance, the statement "Caution: Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed";

(xi) if the pharmacist has selected a generically equivalent drug pursuant to the provisions of the Act, Chapters 562 and 563, the statement "Substituted for Brand Prescribed" or "Substituted for 'Brand Name'" where "Brand Name" is the actual name of the brand name product prescribed;

(xii) the name of the advanced practice nurse or physician assistant, if the prescription is carried out or signed by an advanced practice nurse or physician assistant in compliance with Subtitle B, Chapter 157, Occupations Code; and

(xiii) the name and strength of the actual drug product dispensed that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman, unless otherwise directed by the prescribing practitioner.

(I) The name shall be either:

(-a-) the brand name; or

(-b-) if no brand name, then the generic name and name of the manufacturer or distributor of such generic drug. (The name of the manufacturer or distributor may be reduced to an abbreviation or initials, provided the abbreviation or initials are sufficient to identify the manufacturer or distributor. For combination drug products or non-sterile compounded drug products having no brand name, the principal active ingredients shall be indicated on the label.)

(II) Except as provided in clause (xi) of this subparagraph, the brand name of the prescribed drug shall not appear on the prescription container label unless it is the drug product actually dispensed.

(B) If the prescription label required in subparagraph (A) of this paragraph is printed in a type size smaller than ten-point Times Roman, the pharmacy shall provide the patient written information containing the information specified in subparagraph (A) of this paragraph in an easily readable font size comparable to but no smaller than ten-point Times Roman.

(C) The label is not required to include the initials or identification code of the dispensing pharmacist specified in subparagraph (A) of this paragraph if the identity of the dispensing pharmacist is recorded in the pharmacy's data processing system. The record of the identity of the dispensing pharmacist shall not be altered in the pharmacy's data processing system.

(D) The dispensing container is not required to bear the label specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 34-day supply or 100 dosage units, whichever is less, is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the dispensing container bears a label that adequately:

(I) identifies the:

(-a-) pharmacy by name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength of the drug dispensed;

(-d-) name of the patient;

(-e-) name of the prescribing practitioner and, if applicable, the name of the advanced practice nurse or physician assistant who signed the prescription drug order; and

(II) sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(d) Equipment and supplies. Class A pharmacies dispensing prescription drug orders shall have the following equipment and supplies:

(1) typewriter or comparable equipment;

(2) refrigerator;

(3) adequate supply of child-resistant, light-resistant, tight, and if applicable, glass containers;

(4) adequate supply of prescription, poison, and other applicable labels;

(5) appropriate equipment necessary for the proper preparation of prescription drug orders; and

(6) metric-apothecary weight and measure conversion charts.

(e) Library. A reference library shall be maintained which includes the following in hard-copy or electronic format:

(1) current copies of the following:

(A) Texas Pharmacy Act and rules;

(B) Texas Dangerous Drug Act and rules;

(C) Texas Controlled Substances Act and rules; and

(D) Federal Controlled Substances Act and rules (or official publication describing the requirements of the Federal Controlled Substances Act and rules);

(2) at least one current or updated reference from each of the following categories:

(A) patient information:

(i) United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient); or

(ii) a reference text or information leaflets which provide patient information;

(B) drug interactions: a reference text on drug interactions, such as Drug Interaction Facts. A separate reference is not required if other references maintained by the pharmacy contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken;

(C) a general information reference text, such as:

(i) Facts and Comparisons with current supplements;

(ii) United States Pharmacopeia Dispensing Information Volume I (Drug Information for the Healthcare Provider);

(iii) Clinical Pharmacology;

(iv) American Hospital Formulary Service with current supplements; or

(v) Remington's Pharmaceutical Sciences; and

(3) basic antidote information and the telephone number of the nearest Regional Poison Control Center.

(f) Drugs.

(1) Procurement and storage.

(A) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff relative to such responsibility.

(B) Prescription drugs and devices and nonprescription Schedule V controlled substances shall be stored within the prescription department or a locked storage area.

(C) All drugs shall be stored at the proper temperature, as defined in the USP/NF and §291.15 of this title (relating to Storage of Drugs).

(2) Out-of-date drugs or devices.

(A) Any drug or device bearing an expiration date shall not be dispensed beyond the expiration date of the drug or device.

(B) Outdated drugs or devices shall be removed from dispensing stock and shall be quarantined together until such drugs or devices are disposed of properly.

(3) Nonprescription Schedule V controlled substances.

(A) Schedule V controlled substances containing codeine, dihydrocodeine, or any of the salts of codeine or dihydrocodeine may not be distributed without a prescription drug order from a practitioner.

(B) A pharmacist may distribute nonprescription Schedule V controlled substances which contain no more than 15 milligrams of opium per 29.5729 ml or per 28.35 Gm provided:

(i) such distribution is made only by a pharmacist; a nonpharmacist employee may not distribute a nonprescription Schedule V controlled substance even if under the supervision of a pharmacist; however, after the pharmacist has fulfilled professional and legal responsibilities, the actual cash, credit transaction, or delivery may be completed by a nonpharmacist:

(ii) not more than 240 ml (eight fluid ounces), or not more than 48 solid dosage units of any substance containing opium, may be distributed to the same purchaser in any given 48-hour period without a prescription drug order;

(iii) the purchaser is at least 18 years of age; and

(iv) the pharmacist requires every purchaser not known to the pharmacist to furnish suitable identification (including proof of age where appropriate).

(C) A record of such distribution shall be maintained by the pharmacy in a bound record book. The record shall contain the following information:

(i) true name of the purchaser;

(ii) current address of the purchaser;

(iii) name and quantity of controlled substance purchased;

(iv) date of each purchase; and

(v) signature or written initials of the distributing pharmacist.

(4) Class A Pharmacies may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets all of the following conditions:

(A) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;

(B) the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;

(C) the samples are for dispensing or provision at no charge to patients of such health care entity; and

(D) the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1986.

(g) Prepackaging of drugs.

(1) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by supportive personnel under the direction and direct supervision of a pharmacist.

(2) The label of a prepackaged unit shall indicate:

(A) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(B) facility's lot number;

(C) expiration date; and

(D) quantity of the drug, if the quantity is greater than one.

(3) Records of prepackaging shall be maintained to show:

(A) name of the drug, strength, and dosage form;

(B) facility's lot number;

(C) manufacturer or distributor;

(D) manufacturer's lot number;

(E) expiration date;

(F) quantity per prepackaged unit;

(G) number of prepackaged units;

(H) date packaged;

(I) name, initials, or electronic signature of the prepacker; and

(J) signature, or electronic signature of the responsible pharmacist.

(4) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(h) Customized patient medication packages.

(1) Purpose. In lieu of dispensing two or more prescribed drug products in separate containers, a pharmacist may, with the consent of the patient, the patient's caregiver, or the prescriber, provide a customized patient medication package (patient med-pak).

(2) Definition. A patient med-pak is a package prepared by a pharmacist for a specific patient comprising a series of containers and containing two or more prescribed solid oral dosage forms. The patient med-pak is so designed or each container is so labeled as to indicate the day and time, or period of time, that the contents within each container are to be taken.

(3) Label.

(A) The patient med-pak shall bear a label stating:

(i) the name of the patient;

(ii) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(iii) the name, strength, physical description or identification, and total quantity of each drug product contained therein;

(iv) the directions for use and cautionary statements, if any, contained in the prescription drug order for each drug product contained therein;

(v) if applicable, a warning of the potential harmful effect of combining any form of alcoholic beverage with any drug product contained therein;

(vi) any storage instructions or cautionary statements required by the official compendia;

(vii) the name of the prescriber of each drug product;

(viii) the date of preparation of the patient med-pak and the beyond-use date assigned to the patient med-pak (which such beyond-use date shall not be later than 60 days from the date of preparation);

(ix) the name, address, and telephone number of the pharmacy;

(x) the initials or an identification code of the dispensing pharmacist; and

(xi) any other information, statements, or warnings required for any of the drug products contained therein.

(B) If the patient med-pak allows for the removal or separation of the intact containers therefrom, each individual container shall bear a label identifying each of the drug product contained therein.

(C) The dispensing container is not required to bear the label specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 34-day supply or 100 dosage units, whichever is less, is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the dispensing container bears a label that adequately:

(I) identifies the:

(-a-) pharmacy by name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength of each drug product dispensed;

(-d-) name of the patient;

(-e-) name of the prescribing practitioner of each drug product and if applicable, the name of the advanced practice nurse or physician assistant who signed the prescription drug order; and

(II) for each drug product sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(4) Labeling. The patient med-pak shall be accompanied by a patient package insert, in the event that any drug contained therein is required to be dispensed with such insert as accompanying labeling. Alternatively, such required information may be incorporated into a single, overall educational insert provided by the pharmacist for the total patient med-pak.

(5) Packaging. In the absence of more stringent packaging requirements for any of the drug products contained therein, each container of the patient med-pak shall comply with official packaging standards. Each container shall be either not reclosable or so designed as to show evidence of having been opened.

(6) Guidelines. It is the responsibility of the dispensing pharmacist when preparing a patient med-pak, to take into account any applicable compendial requirements or guidelines and the physical and chemical compatibility of the dosage forms placed within each con-

tainer, as well as any therapeutic incompatibilities that may attend the simultaneous administration of the drugs.

(7) Recordkeeping. In addition to any individual prescription filing requirements, a record of each patient med-pak shall be made and filed. Each record shall contain, as a minimum:

(A) the name and address of the patient;

(B) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(C) the name of the manufacturer or distributor and lot number for each drug product contained therein;

(D) information identifying or describing the design, characteristics, or specifications of the patient med-pak sufficient to allow subsequent preparation of an identical patient med-pak for the patient;

(E) the date of preparation of the patient med-pak and the beyond-use date that was assigned;

(F) any special labeling instructions; and

(G) the initials or an identification code of the dispensing pharmacist.

(i) Automated devices and systems.

(1) Automated compounding or counting devices. If a pharmacy uses automated compounding or counting devices:

(A) the pharmacy shall have a method to calibrate and verify the accuracy of the automated compounding or counting device and document the calibration and verification on a routine basis;

(B) the devices may be loaded with bulk or unlabeled drugs only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist;

(C) the label of an automated compounding or counting device container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(D) records of loading bulk or unlabeled drugs into an automated compounding or counting device shall be maintained to show:

(i) name of the drug, strength, and dosage form;

(ii) manufacturer or distributor;

(iii) manufacturer's lot number;

(iv) expiration date;

(v) date of loading;

(vi) name, initials, or electronic signature of the person loading the automated compounding or counting device; and

(vii) signature or electronic signature of the responsible pharmacist; and

(E) the automated compounding or counting device shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her signature to the record specified in subparagraph (D) of this paragraph.

(2) Automated pharmacy dispensing systems. This paragraph becomes effective September 1, 2000.

(A) Authority to use automated pharmacy dispensing systems. A pharmacy may use an automated pharmacy dispensing system to fill prescription drug orders provided that:

(i) the pharmacist-in-charge is responsible for the supervision of the operation of the system;

(ii) the automated pharmacy dispensing system has been tested by the pharmacy and found to dispense accurately. The pharmacy shall make the results of such testing available to the Board upon request; and

(iii) the pharmacy will make the automated pharmacy dispensing system available for inspection by the board for the purpose of validating the accuracy of the system.

(B) Quality assurance program. A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall operate according to a written program for quality assurance of the automated pharmacy dispensing system which:

(i) requires continuous monitoring of the automated pharmacy dispensing system; and

(ii) establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least every six months and whenever any upgrade or change is made to the system and documents each such activity.

(C) Policies and procedures of operation.

(i) When an automated pharmacy dispensing system is used to fill prescription drug orders, it shall be operated according to written policies and procedures of operation. The policies and procedures of operation shall establish requirements for operation of the automated pharmacy dispensing system and shall describe policies and procedures that:

(I) include a description of the policies and procedures of operation;

(II) provide for a pharmacist's review, approval, and accountability for the transmission of each original or new prescription drug order to the automated pharmacy dispensing system before the transmission is made;

(III) provide for access to the automated pharmacy dispensing system for stocking and retrieval of medications which is limited to licensed healthcare professionals or pharmacy technicians acting under the supervision of a pharmacist;

(IV) require prior to use, that a pharmacist checks, verifies, and documents that the automated pharmacy dispensing system has been accurately filled each time the system is stocked;

(V) provide for an accountability record to be maintained which documents all transactions relative to stocking and removing medications from the automated pharmacy dispensing system;

(VI) require a prospective drug regimen review is conducted as specified in subsection (c)(2) of this section; and

(VII) establish and make provisions for documentation of a preventative maintenance program for the automated pharmacy dispensing system.

(ii) A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(D) Recovery Plan. A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall maintain a written plan for recovery from a disaster or any other situation which interrupts the ability of the automated pharmacy dispensing system to provide services necessary for the operation of the pharmacy. The written plan for recovery shall include:

(i) planning and preparation for maintaining pharmacy services when an automated pharmacy dispensing system is experiencing downtime;

(ii) procedures for response when an automated pharmacy dispensing system is experiencing downtime;

(iii) procedures for the maintenance and testing of the written plan for recovery; and

(iv) procedures for notification of the Board, each patient of the pharmacy, and other appropriate agencies whenever an automated pharmacy dispensing system experiences downtime for more than two days of operation or a period of time which significantly limits the pharmacy's ability to provide pharmacy services.

(3) Final check of prescriptions dispensed using an automated pharmacy dispensing system. For the purpose of §291.32(b)(2) of this title (relating to Personnel), a pharmacist must perform the final check of all prescriptions prior to delivery to the patient to ensure that the prescription is dispensed accurately as prescribed.

(A) This final check shall be considered accomplished if:

(i) a check of the final product is conducted by a pharmacist after the automated system has completed the prescription and prior to delivery to the patient; or

(ii) the following checks are conducted by a pharmacist:

(I) if the automated pharmacy dispensing system contains bulk stock drugs, a pharmacist verifies that those drugs have been accurately stocked as specified in paragraph (2)(C)(i)(IV) of this subsection; and

(II) a pharmacist checks the accuracy of the data entry of each original or new prescription drug order entered into the automated pharmacy dispensing system.

(B) If the final check is accomplished as specified in subparagraph (A)(ii) of this paragraph, the following additional requirements must be met.

(i) The dispensing process must be fully automated from the time the pharmacist releases the prescription to the automated system until a completed, labeled prescription ready for delivery to the patient is produced.

(ii) The pharmacy has conducted initial testing and has a continuous quality assurance program which documents that the automated pharmacy dispensing system dispenses accurately as specified in paragraph (2)(A) and (B) of this subsection.

(iii) The automated pharmacy dispensing system documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (A)(ii) of this paragraph; and

(II) the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who performs any other portion of the dispensing process.

(iv) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least every month rather than every six months as specified in paragraph (2)(B) of this subsection.

(4) Automated checking device.

(A) For the purpose of this subsection, an automated checking device is a fully automated device which confirms, after dispensing but prior to delivery to the patient, that the correct drug and strength has been labeled with the correct label for the correct patient.

(B) For the purpose of §291.32(b)(2) of this title, the final check of a dispensed prescription shall be considered accomplished using an automated checking device provided:

(i) a check of the final product is conducted by a pharmacist prior to delivery to the patient or the following checks are performed by a pharmacist:

(I) the prepackaged drug used to fill the order is checked by a pharmacist who verifies that the drug is labeled and packaged accurately; and

(II) a pharmacist checks the accuracy of each original or new prescription drug order.

(ii) the prescription is dispensed, labeled, and made ready for delivery to the patient in compliance with Class A (Community) Pharmacy rules; and

(iii) prior to delivery to the patient:

(I) the automated checking device confirms that the correct drug and strength has been labeled with the correct label for the correct patient; and

(II) a pharmacist performs all other duties required to ensure that the prescription has been dispensed safely and accurately as prescribed.

(C) If the final check is accomplished as specified in subparagraph (B) of this paragraph, the following additional requirements must be met.

(i) The pharmacy has conducted initial testing of the automated checking device and has a continuous quality assurance program which documents that the automated checking device accurately confirms that the correct drug and strength has been labeled with the correct label for the correct patient.

(ii) The pharmacy documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (B)(i) of this paragraph; and

(II) the name(s) initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who perform any other portion of the dispensing process.

(iii) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated checking device at least monthly.

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 February 20, 2009.

TRD-200900720

Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: March 12, 2009
Proposal publication date: December 26, 2008
For further information, please call: (512) 305-8028

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PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 329. LICENSING PROCEDURE

22 TAC §329.6

The Texas Board of Physical Therapy Examiners adopts amendments to §329.6, concerning Licensure by Endorsement, without changes to the proposed text as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10409). The amendments will assure that the board has reviewed all of the physical therapy licensure history of applicants to determine whether they are qualified to practice in Texas.

The amendments will require verification of licensure from all states in which an applicant holds or has held a physical therapy license.

Two comments from individuals were received regarding the changes currently proposed for this section. One person questioned whether the Board had any evidence that licensees who had entered the state by endorsement were a problem, and suggested that if there was no evidence that "bad actors" were being licensed, the change was not necessary and punitive to applicants. Both of the comments suggested that it would be an additional burden on those coming in by endorsement; one was most concerned with the additional cost, while the other one was more concerned that it would be too much of an administrative burden on the applicant, who would have to keep track of licenses previously held. The second comment also suggested that the board could require applicants to only verify licensure history for the past 10 years.

The Board believes that verification of all licenses has become more critical since an increasing number of PTs and PTAs are seeking concurrent licensure in multiple states. At this time there is no national source (accessible to a state board) for verifying all state disciplinary action against a licensee; therefore verification must be done individually with each state. The Board believes that, regardless of the number of states in which a professional may have worked, that professional may be expected to keep track of the states in which they have held a license. Also, although the cost to applicants holding multiple licenses will increase, the Board points out that requiring verification from all states for licensure by endorsement is a national standard, Texas being one of the few states which does not currently require it.

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

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 February 17, 2009.

TRD-200900660
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Effective date: March 9, 2009
Proposal publication date: December 26, 2008
For further information, please call: (512) 305-6900

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CHAPTER 341. LICENSE RENEWAL

22 TAC §341.6

The Texas Board of Physical Therapy Examiners adopts amendments to §341.6, concerning License Restoration, without changes to the proposed text as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10410). The amendments will assure that the board has reviewed all of the physical therapy licensure history of applicants to determine whether they are qualified to practice in Texas, and will eliminate confusion about the expiration date of the restored license and the continuing education required to renew it.

The amendments will give people who restore their Texas licenses a full two year period of licensure before their licenses would expire. Currently, they are given no more than two years and no less than one year of licensure, based on their original license expiration date. The amendments also will require verification of licensure from all states in which an applicant holds or has held a license, and include editorial changes to language intended to clarify existing statements and requirements.

A comment was received from one individual regarding the changes currently proposed for this section. She suggested that requiring verification from all states would not only increase the cost of licensure by endorsement, but that it might put too large an administrative burden on those applicants, who would have to keep track of all licenses previously held. She also suggested that the board could require applicants to only verify licensure history for the past 10 years.

The Board believes that verification of all licenses has become more critical since an increasing number of PTs and PTAs are seeking concurrent licensure in multiple states. At this time there is no national source (accessible to a state board) for verifying all state disciplinary action against a licensee; therefore verification must be done individually with each state. The Board believes that, regardless of the number of states in which a professional may have worked, that professional may be expected to keep track of the states in which they have held a license. Also, the Board would point out that verification from all states for licensure by endorsement is a national standard, Texas being one of the few states which does not currently require it.

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

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 February 17, 2009.

TRD-200900661
John P. Maline
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PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 571. LICENSING

SUBCHAPTER A. EXAMINATION

22 TAC §571.3

The Texas Board of Veterinary Medical Examiners adopts an amendment to §571.3, regarding the eligibility for examination and licensure, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9042) and will not be republished.

The amendment corrects a misspelled word in subsection (d)(2)(C)(ii), changing "mush" to "must."

No comments were received regarding adoption of the amendment.

The amendment is adopted under the authority of the Veterinary Licensing Act, Occupations Code §801.151(a) which states that the Board may adopt rules necessary to administer the chapter as well as §801.151(b) which states that the Board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medicine profession. Texas Occupations Code, Chapter 801, is affected by this amendment.

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 February 18, 2009.

TRD-200900698
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Effective date: March 10, 2009
Proposal publication date: November 7, 2008
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CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER F. RECORDS KEEPING

22 TAC §573.52

The Texas Board of Veterinary Medical Examiners (Board) adopts amendments to §573.52, which discusses patient record keeping, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9043) and will not be republished.

Section 573.52(a) sets forth requirements of patient record keeping by clarifying pre-existing requirements, and adding the following requirements to patients' records: client phone number, patient identification including name, species, breed, age, sex and description, diagnostic images or written summary of same if unable to save said image, applicable differential diagnosis or treatment, and notation of amendment, supplementation, change or correction in a patient record not made contemporaneously with the act or observation. The amendment also provides an exception to the requirement of taking the temperature of an individual animal when difficult to obtain.

The amendment to §573.52(b) requires veterinarians to maintain patient records for a minimum of five years, as opposed to three under the previous rule, and that said records be "readily available", as opposed to "maintained on the business premises" under the previous rule. It allows a veterinarian to destroy medical records relating to any civil, criminal or administrative proceeding if he or she knows the proceeding is finally resolved. The amendment allows a veterinarian, who is discontinuing his or her practice, to transfer ownership of records to another licensed veterinarian or group of veterinarians if the veterinarian provides notice consistent with §573.54, and the veterinarian assuming ownership of the records maintains them consistent with Chapter 573.

Section 573.52(c), requiring a veterinarian to provide patient records to a client within 15 days of request and collect associated fees, has been deleted in its entirety, and will be replaced by §573.52(d). The language of §573.52(c) was substantially incorporated into §573.53, adopted at the October 17, 2008 Board Meeting.

The amendments to §573.52 are intended to create a more comprehensive, uniform and convenient system of maintaining client records, and to alleviate the need for a veterinarian to review client records every three years to pull the rabies vaccination certificates.

Nine comments were received regarding the adoption of the amendments to §573.52. Three comments were in favor of the amendment, two were neither in favor or opposition, and four were opposed to the amendment to §573.52(b) increasing the time veterinarians are required to maintain patient records from 3 to 5 years, on grounds that it would impose unnecessary hardship upon veterinarians caused by increased storage requirements. The Board respectfully disagrees, as the amendment requires the records only be "readily available," which includes a computer database server, off-site facility, or any other location where the records are readily accessible to the veterinarian. Because rabies vaccination certificates are required by §573.51 to be kept for a minimum of 5 years, the Board feels that increasing the maintenance of all patient records from 3 to 5 years creates a more comprehensive, uniform and convenient system of record maintenance, and costs will be offset as licensees will no longer need to review client files at three years to remove rabies vaccination certificates.

The amendment is adopted under the authority of the Veterinary Licensing Act, Texas Occupations Code §801.151(a) which states that the Board may adopt rules necessary to administer

the chapter as well as §801.151(b) which states that the Board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medicine profession. Texas Occupations Code, Chapter 801, is affected by this amendment.

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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Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
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For further information, please call: (512) 305-7563

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22 TAC §573.54

The Texas Board of Veterinary Medical Examiners (Board) adopts new §573.54, regarding the transfer and disposal of patient records, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9045) and will not be republished.

Section 573.54 addresses the notification requirements of a veterinarian who discontinues the provision of veterinary services without the continuation of his or her practice, whose license is voluntarily surrendered in lieu of disciplinary action, or whose license is revoked by the Board. This rule also provides the required method of notification to the veterinarian's clients following discontinuation of his or her practice, voluntarily surrender or Board revocation of license. This rule is intended to better facilitate the transfer of records to clients following the discontinuation of a veterinarian's practice for any of the above reasons.

Three comments were received regarding the adoption of this rule. One comment was in favor of the rule and two opposed the rule. The first was opposed to the requirement that written notice be given to clients seen in the last three years, on grounds that it places an "undue work load" on the veterinarian. The Board respectfully disagrees as the term "written notification" includes mail, e-mail, notation at the bottom of client's receipt and/or publication in a local newspaper. The same individual was opposed to the requirement that notice of discontinuation requires a veterinarian to post written notice in the veterinarian's office, on grounds that it will "harm the income of the veterinarian." The Board respectfully disagrees, as the veterinarian will have already made a decision to retire or move and said notice is simply part of the process of winding down the practice. The second comment states that the rule is ineffectual, as a client is not likely to see the posting in the veterinarian's clinic or the local newspaper. The Board respectfully disagrees, as the term "written notification" also includes mail, e-mail and/or notation at the bottom of client's receipt.

The new rule is adopted under the authority of the Veterinary Licensing Act, Texas Occupations Code §801.151(a) which states that the Board may adopt rules necessary to administer the chapter as well as §801.151(b) which states that the Board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medicine profession. Texas Occupations Code, Chapter 801, is affected by this amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. OTHER PROVISIONS

22 TAC §573.65

The Texas Board of Veterinary Medical Examiners (Board) adopts an amendment to §573.65, defining various terms used in the Veterinary Licensing Act or the Rules of the Board, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9046) and will not be republished.

The amendment defines "invasive dentistry or invasive dental procedures" as "exposing of the dental pulp, or performing extractions" and is reflective of the current Board's interpretation of the term "invasive dental procedures" as used in §573.10(f), Supervision of Non-Licensed Employees.

Two comments were received regarding the adoption of the amendment. The first was in support of the amendment, and the second comment stated neither support nor objection.

The amendment is adopted under the authority of the Veterinary Licensing Act, Texas Occupations Code §801.151(a) which states that the Board may adopt rules necessary to administer the chapter as well as §801.151(b) which states that the Board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medicine profession. Texas Occupations Code, Chapter 801, is affected by this amendment.

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 575. PRACTICE AND PROCEDURE

22 TAC §575.5

The Texas Board of Veterinary Medical Examiners (Board) adopts an amendment to §575.5(e), regarding the amount of fees and reimbursement that are allowed for a subpoenaed witness or an expert witness called at the request of the Board, with a minor punctuation change to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9046). The rule will be republished.

The amendment entitles a witness subpoenaed for deposition or hearing to $25 per diem, and reimbursement for travel expenses in the same manner as Board employees. It also entitles an expert witness called at the request of the Board to $200 per diem and reimbursement for travel expenses in the same manner as Board employees. This increases the amount previously allowed under §575.5(e), which was limited to "expenses incurred." The amendment reflects efforts by the Board to better compensate witnesses for inconveniences caused by compliance with a subpoena and, in the case of expert witnesses, to ensure that the Board makes every effort to secure the best testimony available to prosecute enforcement actions within the budget of a state agency.

Two comments were received regarding the adoption of the amendment. Both stated that the $25 per diem for witnesses was insufficient. One of the two comments stated that the $200 per diem for expert witnesses was also insufficient. The Board respectfully agrees, but is limited by budgetary concerns to the amendment.

The amendment is adopted under the authority of the Veterinary Licensing Act, Texas Occupations Code §801.151(a) which states that the Board may adopt rules necessary to administer the chapter. Texas Occupations Code, Chapter 801, is affected by this amendment.

§575.5. Subpoenas/Witness Expenses.

(a) In any proceeding involving an alleged violation of the Veterinary Licensing Act, Chapter 801, Occupations Code, including a contested case under the Administrative Procedure Act, Chapter 2001, Government Code, the Board may compel by subpoena:

(1) the attendance of witnesses for examination under oath; and

(2) the production for inspection or copying of books, accounts, records, papers, correspondence, documents, and other evidence relevant to the alleged violation.

(b) A party to a contested case hearing may request that the Board issue a subpoena or subpoena duces tecum, in accordance with Section 2001.089 of the APA, as may be hereafter amended. The requesting party must show good cause, relevancy, necessity of the testimony or documents, lack of undue inconvenience, imposition or harassment of the party required to produce the testimony or documents, and must deposit sums necessary to insure payment of expenses incident to the subpoenas. The written request shall be addressed to a sheriff or constable for service in accordance with Section 2001.089 of the APA.

(1) The party requesting the subpoena shall be responsible for the payment of any expense incurred in serving the subpoena, as well as reasonable and necessary expenses incurred by the witness who appears in response to the subpoena.

(2) The party requesting a subpoena duces tecum shall describe and recite with great clarity, particularity and specificity the books, records, and documents to be produced. The written request shall contain a description of the item sought, the name, address and title, if any, of the person or entity who has custody or control over the items, and the date and location at which the items are sought to be produced.

(3) If the subpoena is for the attendance of a witness, the written request shall contain the name, address, and title, if any, of the witness and the date and location at which the attendance of the witness is sought.

(c) A subpoena issued at the request of the Board's staff may be served personally by a Board employee, by certified mail, or by any other means authorized by law.

(d) The Board may delegate authority to issue subpoenas to the executive director.

(e) A witness, called at the request of the Board, who is not a party to the proceeding and who is subpoenaed to appear at a deposition or hearing or to produce books, papers, or other objects, shall be entitled to receive a fee of $25 per day and reimbursed for travel expenses in the same manner as Board employees. An expert witness called at the request of the Board shall be paid a fee of $200 per day and reimbursed for travel expenses in the same manner as Board employees.

(f) The pendancy of a SOAH proceeding does not preclude the board from issuing an investigative subpoena at any time.

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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Loris Jones
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 33. CONTINUING CARE RETIREMENT FACILITIES

The Commissioner of Insurance (Commissioner) adopts amendments to §§33.2, 33.204, 33.403 and 33.404, relating to continuing care retirement facilities generally, application for a certificate of authority, and escrow accounts. The sections are adopted without changes to the proposed text published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6722).

REASONED JUSTIFICATION. A continuing care retirement facility, also referred to as a "continuing care retirement center" (CCRC), is an establishment, complex, campus, or group of living units at which a provider engages in the business of providing continuing care. CCRCs are regulated pursuant to the Texas Continuing Care Facility Disclosure and Rehabili-

tation Act, Health and Safety Code, Chapter 246. A CCRC that is constructed on an as-needed basis and for which a certificate of authority is obtained from the Texas Department of Insurance (Department) prior to facility construction is considered a "phase-in facility." 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. Section 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. Section 246.0736 requires the Commissioner to adopt rules to implement the escrow release process.

Traditionally, CCRC operators (the term "operator" and "provider" are used interchangeably in this adoption order) and have first built their facilities, next obtained their certificate of authority from the Department, and then began accepting residents. As a result, the rules regulating CCRC operators prior to this adoption addressed only this kind of business model. However, certain CCRC operators 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 because the regulations prior to this adoption were not designed to address this phase-in process.

Under the rules prior to this adoption, a continuing care provider operating a phase-in facility had to complete and submit multiple filings with an escrow agent, and subsequently with the Department, each and every time the provider wanted to access funds in an entrance fee escrow account. However, under the adopted amendments, these providers may make an initial filing with the escrow agent, and subsequently with the Department, and then further supplement the filing with quarterly reports to demonstrate 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 adopted 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.

The adopted amendment to §33.2 is necessary to revise the definition of "facility" in order to implement newly enacted Health and Safety Code §246.0735. Section 246.0735 authorizes the Commissioner to create different requirements for escrow release for phase-in facilities. Not amending §33.2 would frustrate a phase-in facility's ability to comply with the requirements of Title 33.

The adopted amendment to §33.204, relating to the contents of the application for the certificate of authority, is necessary to specify requirements relating to the number of items that must be provided by an applicant for a certificate of authority to operate as a CCRC. There is no change in the substance of the requirements specified in the rule prior to this adoption. Specifically, applicants are required to provide an original and two copies of all 19 items listed in §33.204, as applicable, instead of only 9 of the items.

The adopted amendments to §33.403, relating to the release of funds from the entrance fee escrow account to the provider, are necessary to implement newly added Health and Safety Code §246.0736. Section 246.0736 provides for the continuing release of escrow if certain conditions are met. These adopted amendments specify the requirements for the release of entrance fee escrow funds for phase-in facilities in order to satisfy the conditions of Health and Safety Code §246.0736. The amendments address phase-in facilities and their method of operations, and provide instructions on how phase-in facility operators achieve release of entrance fee escrow funds.

The adopted amendments to §33.404, relating to loan reserve fund escrow account(s), are necessary to ensure that CCRC operators who lease their facilities maintain one year's worth of anticipated lease payments for the facility in escrow, similar to requirements for CCRC-owned facilities.

HOW THE SECTIONS WILL FUNCTION.

Section 33.2, Definitions. The adopted amendment to §33.2(13) revises the definition of "facility" in order to accommodate newly enacted Health and Safety Code §246.0735. Under §246.0735, the Commissioner is authorized to create different requirements for escrow release for phase-in facilities. Under the amended definition of "facility," the other requirements of Title 33 will apply to phase-in facilities built on an as-needed basis.

Section 33.204, Contents of Application for Certificate of Authority. Under the adopted amendment to §33.204, an applicant for a certificate of authority to operate as a CCRC is required to provide an original and two copies of all 19 items listed in §33.204, as applicable.

Section 33.403, Release of Funds from the Entrance Fee Escrow Account to Provider. Under the adopted amendments to §33.403, phase-in CCRC operators must provide evidence of occupancy and 10 percent of the entrance fees for a phase-in facility instead of evidence that a facility is at least 50 percent reserved for CCRC residents and 10 percent of the entrance fees as a condition to be met before entrance fee escrow funds can be released. Other adopted amendments to §33.403 incorporate "leasing" or "lease payments" into the conditions to be met before entrance fee escrow release for phase-in CCRC operators. The inclusion of these terms results in the application of the conditions in §33.403 to CCRC operators who lease their facilities.

Section 33.404, Loan Reserve Fund Escrow Account. Under the adopted amendments to §33.404, CCRC operators who lease their facilities must maintain a loan reserve fund escrow account equal to 12 months of lease payments for the facilities.

SUMMARY OF COMMENTS. The Department did not receive any comments on the published proposal.

SUBCHAPTER A. GENERAL PROVISIONS

28 TAC §33.2

STATUTORY AUTHORITY. The amendments are adopted pursuant to the Health and Safety Code §§246.003, 246.022, 246.0735, and 246.0736 and Insurance Code §36.001. The Health and Safety Code §246.003 authorizes the Commissioner to adopt rules to administer and enforce Chapter 246 of the Health and Safety Code. The 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. The 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. The Health and Safety Code §246.0736 requires the Commissioner to adopt rules to implement the escrow release process. The 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.

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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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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SUBCHAPTER C. APPLICATION BY CONTINUING CARE PROVIDER FOR CERTIFICATE OF AUTHORITY

28 TAC §33.204

STATUTORY AUTHORITY. The amendments are adopted pursuant to the Health and Safety Code §§246.003, 246.022, 246.0735, and 246.0736 and Insurance Code §36.001. The Health and Safety Code §246.003 authorizes the Commissioner to adopt rules to administer and enforce Chapter 246 of the Health and Safety Code. The 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. The 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. The Health and Safety Code §246.0736 requires the Commissioner to adopt rules to implement the escrow release process. The 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.

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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Gene C. Jarmon
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SUBCHAPTER E. ESCROW ACCOUNTS

28 TAC §33.403, §33.404

STATUTORY AUTHORITY. The amendments are adopted pursuant to the Health and Safety Code §§246.003, 246.022, 246.0735, and 246.0736 and Insurance Code §36.001. The Health and Safety Code §246.003 authorizes the Commissioner to adopt rules to administer and enforce Chapter 246 of the Health and Safety Code. The 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. The 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. The Health and Safety Code §246.0736 requires the Commissioner to adopt rules to implement the escrow release process. The 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.

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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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 37. FINANCIAL ASSURANCE

The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts amended §§37.9001, 37.9030, 37.9035, 37.9040, 37.9045, and 37.9050.

Sections 37.9040, 37.9045, and 37.9050 are adopted *with changes* to the proposed text and will be republished. Sections 37.9001, 37.9030, and 37.9035 are adopted *without changes* to the proposed text as published in the September 5, 2008, issue of the *Texas Register* (33 TexReg 7422) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The changes adopted to this chapter are part of a larger adoption to revise the commission's radiation control and underground injection control (UIC) rules. The purpose of this rulemaking is to implement the remaining portions of Senate Bill (SB) 1604, 80th Legislature, 2007, its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)), and House Bill (HB) 3838, 80th Legislature, 2007. This rulemaking incorporates new provisions for notice and contested case hearing opportunities related to Production Area Authorizations and UIC Area Permits, financial assurance requirements, and new state fees on gross receipts associated with the radioactive waste disposal. HB 3838 specifically addresses the period between uranium exploration, which is regulated by the Railroad Commission of Texas (RRC), and permitting of injection wells for in situ uranium mining, which is regulated by TCEQ. HB 3838 requires TCEQ to establish a registration program for exploration wells permitted by the RRC that are used for development of the UIC area permit application. In response to a previous petition for rulemaking, the commission has also directed staff to review, seek stakeholder input on, and recommend revision of commission rules related to in situ uranium recovery. The adopted amendments to Chapter 37 establish the financial assurance requirements for licenses for source material recovery, by-product material disposal, and radioactive substances storage and processing. The commission adopts the existing financial assurance requirements of Chapter 37, Subchapter T to be used for the licensing programs subject to the transfer of jurisdiction in SB 1604. SB 1604 also establishes a new state fee for disposal of radioactive substances and amends UIC requirements for uranium mining.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapters 39, 55, 305, 331, and 336.

SECTION BY SECTION DISCUSSION

The commission adopts the amendment to the title of Subchapter S by changing the name from "Financial Assurance for Radioactive Material" to "Financial Assurance for On Site Disposal of Radioactive Substances and Commercial NORM Disposal" to be more accurate. Prior to SB 1604, the commission had responsibilities under the TRCA only for certain disposal activities. SB 1604 provides the TCEQ with additional regulatory and licensing responsibilities for source material recovery and commercial radioactive substances storage and processing.

The commission adopts the amendment to §37.9001 to clarify that the financial assurance requirements of Subchapter S only apply to radioactive material licenses for alternative methods of disposal of radioactive material under 30 TAC Chapter 336, (Radioactive Substance Rules), Subchapter F and licenses for the commercial disposal of naturally-occurring radioactive material (NORM) waste from public water systems under Chapter 336, Subchapter K. The financial assurance requirements of Chapter 37, Subchapter T will apply to decommissioning of facilities under Chapter 336, Subchapter G, licenses for the disposal of low-level radioactive waste under Chapter 336, Subchapter H, licenses for the recovery of source material and by-product material disposal under Chapter 336, Subchapter L, and licenses for the processing and storage of radioactive substances under Chapter 336, Subchapter M, Licensing of Radioactive Substances Processing and Storage Facilities.

The commission adopts the amendment to §37.9030 to establish financial assurance requirements under Chapter 37, Subchapter T for decommissioning activities under Chapter 336, Subchapter G, licenses for the disposal of low-level radioactive waste under Chapter 336, Subchapter H, licenses for the recovery of source material or by-product disposal under Chapter 336, Subchapter L, and licenses for the storage and processing of radioactive substances under Chapter 336, Subchapter M. The primary difference between Subchapter S and Subchapter T of Chapter 37 is that there are additional requirements for the use of insurance as a financial assurance mechanism under Subchapter T. The commission intends to use the more stringent Subchapter T financial assurance requirements for the licensing programs that are subject to the transfer of SB 1604 so that there is enhanced assurance that the state has adequate funds to perform closure or post closure activities should a licensee fail to perform the required activities.

The commission adopts the amendment to §37.9035 to change the definition of "Facility" to be synonymous with the term "Site" as defined in §336.702 and include the recovery of source material under Chapter 336, Subchapter L or the processing and storage of radioactive substances under Chapter 336, Subchapter M.

The commission adopts the amendment to §37.9040 to require that effective financial assurance mechanisms must be provided to the executive director 60 days prior to the initial receipt, production, or possession of radioactive substances. In response to comments, §37.9040 was revised to include the term "injection operations" in lieu of "injection of mining fluid" to promote consistency among other rule provisions and to use defined terms. Similarly, Chapter 336 will also be changed to reflect "injection operations." Financial assurance for aquifer restoration shall be required 60 days prior to injection operations.

The commission adopts the amendment to §37.9045(a)(4) to reference appropriate subchapters of Chapter 336. An amendment to §37.9045(a)(6) is adopted to include citations to §336.1125 and §336.619 should the executive director be required to convert a financial assurance mechanism into cash for deposit to the credit of the perpetual care account. Additionally, §37.9045(a)(5) and (6) are revised in response to comments under Chapter 336 requesting that funds be payable to the State of Texas but consistent with THSC, §401.305(b) that states, in part, that money received by the commission shall be deposited to the credit of the perpetual care account.

The commission adopts amendments to add a new subsection (b) requiring that financial assurance for aquifer restoration be provided in at least the amount established in the cost estimate under each production area authorization. The commission is adopting corresponding amendments to Chapter 331 to require that an applicant for a production area authorization include, as part of the application, a cost estimate for restoring groundwater within the entire production area. Although the cost estimates for aquifer restoration are included as part of the UIC program's production area authorizations, the requirement to have financial assurance for aquifer restoration is part of the radioactive materials license under Subchapter L of Chapter 336. The commission determined that the evaluation of cost estimates for the amount of financial assurance required for aquifer restoration of an entire production area should be included as part of the production area authorization application and subject to opportunities for public participation in the application process rather than the provision of financial assurance on a piecemeal basis and

outside of an application process. Adopted subsection (b) also provides the executive director with the flexibility to use financial assurance for aquifer restoration of any production area under the same area permit. Existing subsection (b) is adopted to be relettered as subsection (c).

The commission adopts the amendment to §37.9050 to provide for the financial test and the parent company guarantee financial assurance mechanisms for licenses under Chapter 336, Subchapter M. The financial test was an option available under the Department of State Health Services (DSHS or Department) rules for licensees for storage and processing. The parent company guarantee was also an option available under the Department rules. Therefore, the commission is adding a provision in Subchapter T, §37.9050 to provide for wording similar to the Department rule in 25 TAC §289.252(ii)(3). THSC, §401.109(a) states that the commission may require a holder of a license issued by the agency to provide security acceptable to the agency to assure performance of the license holder's obligations under this chapter. THSC, §401.109(c) states that the amount and type of security required shall be determined under agency rules and lists criteria. The financial test is considered other security acceptable to the agency as stated in THSC, §401.109(d)(7). This financial assurance mechanism already existed in the Department rule in 25 TAC §289.252(ii)(3) and the commission now adds a similar rule. Additionally, §37.9050(f)(4) and (11) are revised in response to comments under Chapter 336 requesting that funds be payable to the State of Texas but consistent with THSC, §401.305(b) that states, in part, that money received by the commission shall be deposited to the credit of the perpetual care account.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission adopts the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of "a major environmental rule" as defined in the statute. "A major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking action implements legislative requirements in SB 1604, transferring responsibilities for the regulation of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the Department to the commission. The adopted amendments to Chapter 37 establish the financial assurance requirements for radioactive material licenses for source material recovery, by-product disposal and commercial radioactive substances storage and processing. Financial assurance was already required by the DSHS prior to the transfer of these programs to the commission. The adopted rules implement financial assurance requirements that utilize financial instruments approved by the TCEQ, determine the timing for establishing financial assurance, and the triggers for the commission to call upon posted financial assurance. The adopted amendments to Chapter 37 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because financial assurance was already required for these licensing programs. The amendments only change requirements for how financial assurance is administered by the commission including the type and wording of allowable financial instruments, the timing for establishing financial assurance, and the triggering events for calling financial assurance. While there could be new costs associated with obtaining a financial assurance mechanism that meets the requirements of the adopted rules, the commission does not expect that the costs to adversely affect the economy, productivity, or competition in a material way. The rulemaking action also amends technical requirements for these licensing programs and establishes fees for applications and waste disposal in Chapter 336, amends technical requirements for injection wells and other wells for in situ uranium recovery in Chapter 331, amends public notice requirements in Chapter 39, amends public participation requirements in Chapter 55, and amends application requirements and injection well permit term limits in Chapter 305.

Furthermore, the adopted rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

THSC, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, the State of Texas is an "Agreement State" authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The adopted rules are compatible with federal law.

The adopted rules do not exceed an express requirement of state law. THSC, Chapter 401, establishes general requirements, including requirements for public notices, for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. The purpose of the rulemaking is to implement statutory requirements consistent with recent amendments to THSC, Chapter 401, as provided in SB 1604.

The adopted rules are compatible with a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, NRC requirements must be implemented

to maintain a compatible state program for protection against hazards of radiation. The adopted rules are compatible with the NRC requirements and the requirements for retaining status as an "Agreement State."

These rules are adopted under specific authority of THSC, Chapter 401. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances.

The commission invited public comments regarding the draft regulatory impact analysis during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

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

Nevertheless, the commission further evaluated these adopted rules and performed a preliminary assessment of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these rules is to implement changes to the TRCA required by SB 1604, 80th Legislature, 2007, for the establishment of financial assurance for licenses authorizing disposal of by-product material, recovery of source material, and commercial radioactive substances processing and storage. The adopted rules to Chapter 37 would substantially advance this purpose by establishing the financial assurance requirements for the licenses that are subject to the transfer of jurisdiction under SB 1604.

Promulgation and enforcement of these rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The adopted rules establish financial assurance requirements and do not affect real property. Financial assurance was already required by DSHS prior to the transfer of these programs to the commission. Therefore, the adopted rules do not affect real property in a manner that is different than may have been affected under the department's requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on September 16, 2008. The public comment period closed on October 6, 2008. The commission received comments from Mesteña Uranium, LLC (Mesteña), NRC, Lone Star Chapter of the Sierra Club (Sierra Club), Texas Mining and Reclamation Association (TMRA), URI, Inc. (URI), and Hance Scarborough L.L.P. on behalf of Waste Control Specialists, LLC (WCS).

RESPONSE TO COMMENTS

Definitions

The NRC commented that the definition of "closure" in §37.9035 is inconsistent with its definition of "closure" in §336.1105. The latter definition is compatible with the NRC's definition of "closure." The former definition is more closely associated with closure activities. NRC requested the TCEQ to have a consistent definition of "closure" throughout its regulations or more explicitly refine the definition of "closure" in §37.9035 to specify how it relates to the financial assurance requirements to avoid duplication and to meet the Compatibility Category A assigned to the definitions of 10 Code of Federal Regulations (CFR) Part 40 Appendix A.

The definition of "closure" in §336.1105 is the correct comparison for meeting the Compatibility Category A assigned to the definitions of 10 CFR Part 40 Appendix A. The §336.1105 definition of closure is specifically related to source material recovery and is comparable to the terms given in 10 CFR Part 40. The definition of closure in Chapter 37, Subchapter T is broader than the definition of closure in Chapter 336, Subchapter L because the Chapter 37 definition applies to a variety of closure activities and licenses under various Chapter 336 subchapters. The definition of closure in Chapter 336, Subchapter L is compatible with the NRC definition and is also encompassed by the broader Chapter 37 definition. No changes were made in response to this comment.

Submission of Documents

Mesteña and TMRA commented that the proposed language in §37.9040 appears to imply that aquifer restoration is not considered a component of site closure since the language "(other than aquifer restoration)" follows the term "closure." Mesteña requested that "(other than aquifer restoration)" be removed to ensure that the language in §37.9040 remains consistent with other regulatory requirements.

The commission agrees with these comments in part, and disagrees, in part. The term "closure" in §37.9040 does include aquifer restoration. However, changes are not required since the proposed rule did not contain the phrase "(other than aquifer restoration)." The commenters may have reviewed an earlier version of the proposed rules in Chapter 37 prior to *Texas Register* publication as the proposed rule in §37.9040, as published, did not exclude aquifer restoration. No changes were made in response to this comment.

TMRA commented that the term "injection operations" be used as opposed to "injection of mining fluid" to more fully describe the subsurface emplacement of fluids and therefore harmonize with §331.2(51).

The commission agrees with this comment and has changed the reference from "injection of mining fluid" to "injection operations" for consistency with other rule provisions. Therefore, §37.9040 as well as §336.1125(a) have been revised to reflect this change.

TMRA also expressed concern during the public meeting that the proposed financial assurance language was very confusing and convoluted.

The commission acknowledges that financial assurance is a complex topic and must be viewed within the overall framework of financial assurance regulations. The agency's proposed financial assurance rules list which programs are applicable to Chapter 37, Subchapters S and T. Each subchapter is designed to include the type of available financial assurance mechanisms and relevant criteria regarding their use. Changes have been made to the rules in response to comments to add clarification. No additional changes were made in response to this comment.

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

URI commented that aquifer restoration cost estimates be provided in an amount no less than the cost estimate as specified in the most recent annual report instead of being approved for each production area authorization. TMRA additionally commented that the proposed §37.9045(b) does not establish a due date for providing financial assurance for aquifer restoration and that such financial assurance is specifically excluded by proposed rule §37.9040.

The commission does not agree with URI's comment because allowing aquifer restoration cost estimates to be based on the most recent annual report would forfeit the commission's regulatory responsibility to ensure that a formal review and approval process is conducted. The commission agrees with TMRA's comment in part, and disagrees, in part. It is true that §37.9045(b) does not establish a due date for providing financial assurance for aquifer restoration. However, such deadline already exists in §37.9040 which requires financial assurance for closure to be submitted to the executive director 60 days prior to injection operations. By definition, closure includes aquifer restoration in §37.9035. The commenters may have reviewed an earlier version of the proposed rules in Chapter 37 prior to *Texas Register* publication as the proposed rule in §37.9040, as published, did not exclude aquifer restoration. No changes were made in response to this comment.

Financial Assurance Mechanisms

WCS commented that proposed §37.9050(i) restricts the use of the financial test by the licensee in any situation whereby the licensee has a parent company holding majority control of the voting stock of the licensee. WCS argues that most of the commission's other regulatory programs allow licensees the option of a financial self test regardless of parent affiliation due to the protectiveness of the stringent terms of the financial test alone. WCS stated that if the licensee itself satisfies the financial test, it should be allowed to do so even if it has a parent company that holds majority control of its voting stock.

The commission agrees with this comment in part, and disagrees, in part. The commission agrees that a more restrictive criteria exists, however, this requirement was already included in rules promulgated under DSHS, 25 TAC §289.252(gg)(6)(B) pursuant to 10 CFR §30.35(f)(2) and §40.36(e)(2) as well as guidance documents issued by the NRC, NUREG-1757, Vol. 3. DSHS and NRC had determined that such appropriate restriction was warranted and the commission concurs with their assessment. No changes were made in response to this comment.

Sierra Club commented that they would prefer to have aquifer recovery and source-recovery related to in-situ mining captured under Chapter 37, Subchapter T and therefore, Chapter 37, Subchapter Q should be captured under Chapter 37, Subchapter T. Additionally, Sierra Club expressed their support of having all uranium licensees as governed under Chapter 336, Subchapters L and M meet the same strict financial assurance standards as other facilities captured under Chapter 37, Subchapter T thereby disallowing the use of the financial test and parent corporate guarantee completely.

The commission agrees that financial assurance for aquifer restoration should be captured under Chapter 37, Subchapter T and are adopting rules accordingly. However, the commission disagrees that financial assurance for plugging and abandonment of in-situ mining should be moved from Subchapter Q to Chapter 37, Subchapter T. The commission did not propose rules for Subchapter Q since the existing financial assurance mechanisms for plugging and abandonment have performed as required. The commission proposed amendments to §37.9050 to provide for the financial test and the parent company guarantee financial assurance mechanisms for Chapter 336, Subchapter M only for licenses authorizing commercial storage and processing of radioactive waste. The financial test was an option available under the DSHS rules for storage and processing licensees. The parent company guarantee was also an option available under the DSHS rules. Therefore, the commission proposes a provision in Subchapter T, §37.9050 to provide for such mechanisms similar to the DSHS rules under 25 TAC, §289.252, Subchapter F. THSC, §401.109(a) states that the commission may require a holder of a license issued by the agency to provide security acceptable to the agency to assure performance of the license holder's obligations under this chapter. THSC, §401.109(c) states that the amount and type of security required shall be determined under agency rules and lists criteria. The financial test is considered other security acceptable to the agency as stated in THSC, §401.109(d)(7). No changes were made in response to this comment.

The Sierra Club commented that all facilities should be required to meet the stricter standards under Subchapter T by June of 2009 and that there appears to be a loophole in the proposed rules to preempt facilities under existing DSHS rules, such as WCS's by-product material license, from meeting the stricter Subchapter T requirements.

The commission agrees that all facilities should be required to meet the stricter standards under Subchapter T; however, those licensees with performance bond(s) issued under DSHS rules will have until March 31, 2010 to fully convert their financial assurance. All other licensees will have until June 1, 2009. These revisions are explained in further detail in the corresponding rulemaking under §336.1125 and §336.1235. The commission disagrees with Sierra Club's comment regarding a "loophole" since §336.1125(f), (g) and (i) sufficiently address this issue. The license issued to WCS for by-product material disposal was under Chapter 336, Subchapter L, not Subchapter M which is for licensing of storage and processing of radioactive waste, and financial assurance for by-product material disposal is addressed in §336.1125(f), (g) and (i). The commission has not issued any new licenses under Subchapter M. No changes were made to this chapter in response to this comment.

Contested Case Hearing

TMRA and URI commented that if an application for a production area authorization is required to include cost estimates for aquifer restoration and plugging and abandonment of injection wells, then every application will have the effect of seeking to amend the form or amount of financial assurance for that production area. Then, according to TMRA and URI, all applications for a production area authorization would be subject to an oppor-

tunity for a contested case hearing in contradiction of the intent of SB 1604 and Texas Water Code, §27.0513(d). TMRA and URI commented that production area authorization applications should be required by rule to include cost estimates for aquifer restoration or plugging and abandonment.

The commission does not agree that the requirement to include cost estimates for aquifer restoration and plugging and abandonment of wells as part of an application for a production area authorization conflicts with the intent of SB 1604 and Texas Water Code, §27.0513(d). The commission agrees that cost estimates for aquifer restoration and plugging and abandonment of wells should be included as part of an application for a production area authorization. As an application requirement, cost estimates will be subject to administrative and technical review by the executive director will be available as part of the application provided in a public location for public review, and will be subject to public comment. A new production area authorization would establish the *initial* cost estimates for aquifer restoration of the production area and plugging and abandonment of wells within the production area. The commission does not agree that providing an initial cost estimate for aquifer restoration of a production area constitutes an amendment to the type of bond required for aquifer restoration that is contemplated under Texas Water Code, §27.0513(d)(1). The applicant is providing the *initial* cost estimate for aquifer restoration of the production area, not an *amendment* to the type or amount of a bond required for aquifer restoration of the production area. Furthermore, the applicant is providing a *cost estimate* for aquifer restoration as part of the application, not the *financial assurance*. Texas Water Code, §27.0513(d) distinguishes the initial establishment of production area authorization requirements from subsequent amendment of production area authorization requirements. An application for a new production area authorization that provides cost estimates for aquifer restoration of the production area and cost estimates for plugging and abandonment of wells will not be subject to an opportunity for a contested case hearing under the applicability of Texas Water Code, §27.0513(d)(3) or §55.201(i)(11)(C) because the application is not seeking an *amendment* to the type or amount of financial assurance. In order to maintain compatibility with the NRC's requirements, the financial assurance for aquifer restoration is held under the requirements of the radioactive materials license. While the cost estimate for aquifer restoration will be established in a production area authorization, the financial assurance, based on that cost estimate, will be required under the license. The licensee's financial assurance requirements are addressed in Chapter 336, Subchapter L and Chapter 37. Because the financial assurance for aquifer restoration is held under the licensing requirements of Chapter 336, and the financial assurance for well plugging and abandonment is held under the area permit requirements of Chapter 331, an amendment application for the production area authorization is not required and the exception in TWC, §27.0513(d)(3) or §55.201(i)(11)(C) would not be triggered for subsequent updates to financial assurance for aquifer restoration or well plugging and abandonment for inflation adjustments or cost increases. No changes were made in response to this comment.

SUBCHAPTER S. FINANCIAL ASSURANCE FOR ON SITE DISPOSAL OF RADIOACTIVE SUBSTANCES AND COMMERCIAL NORM DISPOSAL

30 TAC §37.9001

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendment implements Senate Bill 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

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 T. FINANCIAL ASSURANCE FOR RADIOACTIVE SUBSTANCES AND AQUIFER RESTORATION

30 TAC §§37.9030, 37.9035, 37.9040, 37.9045, 37.9050

STATUTORY AUTHORITY

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

of the state. The amendments are also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendments implement THSC, as amended by Senate Bill 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

§37.9040. Submission of Documents.

An owner or operator required by this subchapter to provide financial assurance for closure, post closure, corrective action, and liability coverage must submit originally signed and effective financial assurance mechanisms to the executive director 60 days prior to the initial receipt, production or possession of radioactive substances or injection operations in a production area.

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

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

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

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

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

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

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

(6) All financial assurance required to be converted to cash by direction of the executive director under §§336.619, 336.736 - 336.738, 336.1125, 336.1235, and 37.101 of this title (relating to Financial Assurance for Decommissioning; Funding for Disposal Site Closure and Stabilization; Funding for Institutional Control; Funding for Corrective Action; Financial Security Requirements; Financial Assurance for Storage and Processing; and Drawing on the Financial Assurance Mechanisms) and paragraph (5) of this subsection shall be payable to the State of Texas for deposit to the credit of the perpetual care account.

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

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

§37.9050. Financial Assurance Mechanisms.

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

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

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

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

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

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

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

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

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

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

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

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

(4) corresponding current cost estimates.

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

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

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

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

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

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

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

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

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

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

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

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

(9) An owner or operator or any other person authorized to perform closure, post closure, or corrective action may request reimbursement for closure, post closure, or corrective action expenditures by submitting itemized bills to the executive director. The request shall include an explanation of the expenses and all applicable itemized bills. The owner or operator may request reimbursement for partial closure only if the remaining value of the policy is sufficient to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for closure, post closure, or corrective action activities, the executive director shall determine whether the closure, post closure, or corrective action expenditures are in accordance with the approved closure, post closure, or corrective action activities or are otherwise justified and, if so, shall instruct the insurer to make reimbursement in such amounts as the executive director specifies in writing. If the executive director has reason to believe that the maximum cost of closure, post closure, or corrective action over the remaining life of the facility will be greater than the face amount of the policy, the executive director may withhold reimbursement of such amounts as deemed prudent until the executive director determines, in

accordance with Subchapters A and B of this chapter, that the owner or operator is no longer required to maintain financial assurance requirements for closure, post closure, or corrective action of the facility. If the executive director does not instruct the insurer to make such reimbursements, the executive director shall provide the owner or operator with a detailed written statement of reasons.

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

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

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

(1) The owner or operator must have:

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

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

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

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

(2) The owner or operator must have:

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

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

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

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

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

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

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

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

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

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

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

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

(B) the corporate seals.

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

(A) majority control of the owner or operator;

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

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

(D) authorization of each signatory.

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

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 39. PUBLIC NOTICE

The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts amended §§39.403, 39.651, 39.653, 39.702, 39.703, and 39.707; and adopts new §39.655.

Sections 39.403, 39.651, 39.653, 39.655 39.702, 39.703, and 39.707 are adopted *without changes* to the proposed text as published in the September 5, 2008, issue of the *Texas Register* (33 TexReg 7429) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The changes adopted to this chapter are part of a larger adoption to revise the commission's radiation control and underground injection control (UIC) rules. The purpose of this rulemaking is to implement the remaining portions of Senate Bill (SB) 1604, 80th Legislature, 2007, its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)), Texas Water Code (TWC), Chapter 27 (also known as the Injection Well Act), and House Bill (HB) 3838, 80th Legislature, 2007. This rulemaking incorporates new provisions for notice and contested case hearing opportunities related to Production Area Authorizations and UIC Area Permits, financial assurance requirements, and new state fees on gross receipts associated with the radioactive waste disposal. HB 3838 specifically addresses the period between uranium exploration, which is regulated by the Railroad Commission of Texas (RRC), and permitting of injection wells for in situ uranium mining, which is regulated by TCEQ. HB 3838 requires TCEQ to establish a registration program for exploration wells permitted by the RRC that are used for development of the UIC area permit application. In response to a previous petition for rulemaking, the commission has also directed staff to review, seek stakeholder input on, and recommend revision of commission rules related to in situ uranium recovery. The adopted amendments to Chapter 39 amend public notice requirements for applications for radioactive materials licenses, injection well permits and production area authorizations, and aquifer exemptions. The rules clarify requirements for public notice of radioactive materials licenses, add requirements for the provision of public notice for injection well permits and production area authorizations to mineral interest owners and groundwater conservation districts, and establish specific requirements for public notice of aquifer exemptions.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapters 37, 55, 305, 331, and 336.

SECTION BY SECTION DISCUSSION

The commission adopts amendments to §39.403 to establish public notice requirements for aquifer exemptions. Under §331.13, the commission may identify exempted aquifers after notice and opportunity for a public hearing. However, there are no specific rules in Chapter 39 that specify the public notice requirements applicable to the designation of exempted aquifers. Section 39.403 is amended to apply the public notice requirements of Chapter 39 to the designation of aquifer exemptions.

The commission adopts the amendment to §39.403(a) to include "of this Section" to conform to *Texas Register* requirements. The commission adopts the amendment to §39.403(b)(9) to correct the reference of Chapter 116, Subchapter C to Chapter 116, Subchapter E.

The commission adopts the amendment to §39.651 to address public notice requirements for Class III injection well permits. The adopted section would require that mailed notice of Class III injection well permits be mailed to persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant; landowners adjacent to the property on which the existing or proposed injection well facility is or will be located; persons who own mineral rights underlying the existing or proposed injection well facility; and persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located. Currently, the requirement to provide mailed notice to mineral interest owners applies only to Class I injection well (waste disposal well) permits, and the commission intends to apply these same requirements to Class III injection well (wells used for the extraction of minerals) permit applications. In addition, under the adopted amendments, mailed notice of both Class I and Class III injection well permit applications would be provided to any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located. These adopted mailed notice requirements would apply to the Notice of Receipt of Application and Intent to Obtain a Permit under §39.651(c), the Notice of Application and Preliminary Decision under §39.651(d), and Notice of Contested Case Hearing under §39.651(f).

The commission adopts the amendment to §39.653 to provide similar mailed notice requirements for applications for production area authorizations. The adopted amendment would require that mailed notice be provided to persons who own the property on which the existing or proposed production area is or will be located, if different from the applicant; landowners adjacent to the property on which the existing or proposed production area is or will be located; persons who own mineral rights underlying the existing or proposed production area and persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed production area is or will be located. In addition, under the adopted amendment, the public notices under §39.653 would be provided to any groundwater conservation district established in the county in which the existing or proposed production area is or will be located. The commission adopts the amendment to §39.653(d)(1) to replace the acronym "SOAH" with "the State Office of Administrative Hearings."

The commission adopts new §39.655 to establish public notice requirements for an aquifer exemption. Under adopted new §39.655, specific notice requirements would apply to a Notice of Aquifer Exemption, any Notice of Public Meeting on Aquifer Exemption, and any Notice of Contested Case on Aquifer Exemption. The commission intends that the manner for

newspaper publication of the notice of aquifer exemption be the same as required for the Notice of Application and Preliminary Decision of the injection well permit application associated with the aquifer exemption. And similarly, the recipients of the Notice of Aquifer Exemption should be the same as required for the Notice of Application and Preliminary Decision of the injection well permit application associated with the aquifer exemption.

The commission adopts the amendment to §39.702 to establish that applications for initial issuance, major amendment, or renewal of a license under Chapter 336 are subject to Notice of Declaration of Administrative Completeness. Applications for minor amendments are not subject to this requirement.

The commission adopts the amendment to §39.703 to clarify that the deadline to file public comment for minor amendments is either ten days from mailing of the public notice by the Office of the Chief Clerk, or ten days from the date of publication in the *Texas Register* for those applications for minor amendments of licenses for Chapter 336, Subchapters H and M.

The commission adopts the amendment to §39.707 to correct the title of Subchapter L in subsection (a).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission adopts the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of "a major environmental rule" as defined in the statute. "A major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking action implements legislative requirements in SB 1604, transferring responsibilities for the regulation of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the Department of State Health Services to the commission and amends the UIC program requirements for in situ recovery of uranium. The adopted rules to Chapter 39 amend public notice requirements for applications for radioactive materials licenses, injection well permits and production area authorizations, and aquifer exemptions. The adopted rules clarify requirements for public notice of radioactive materials licenses, add requirements for the provision of public notice for injection well permits and production area authorizations to mineral interest owners and groundwater conservation districts, and establish specific requirements for public notice of aquifer exemptions. The adopted rules to Chapter 39 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 rules apply only to procedural requirements for providing public notice. The adopted rulemaking action also amends technical requirements for the radioactive material licensing programs and establishes fees for applications and waste disposal in Chapter 336, amends technical requirements for injection wells and other wells for in situ uranium recovery in Chapter 331, amends financial assurance requirements in Chapter 37, amends public participation requirements in Chapter 55, and amends application requirements in Chapter 305.

Furthermore, the adopted rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

THSC, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, the State of Texas is an "Agreement State" authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The commission's UIC program is authorized by the United States Environmental Protection Agency and the adopted changes to public notice for injection well permits, production area authorizations, and exempt aquifers do not exceed a standard of federal law or requirement of a delegation agreement. The adopted rules do not exceed a federal standard and are compatible with federal law.

The adopted rules do not exceed an express requirement of state law. THSC, Chapter 401, establishes general requirements, including requirements for public notices, for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. TWC, Chapter 27, establishes requirements for the commission's UIC program and TWC, §5.553, requires the commission to establish requirements for public notice by rule. The purpose of the rulemaking is to implement public notice requirements consistent with THSC, Chapter 401 and TWC, Chapters 5 and 27.

The adopted rules are compatible with the requirements of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The adopted rules are compatible with the NRC requirements and the requirements for retaining status as an "Agreement State." The commission's UIC program is authorized by the United States Environmental Protection Agency, and the public notice requirements are compatible with the state's delegation of the UIC program.

The rules are adopted under specific laws. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. TWC, §27.019 requires the commission to adopt rules reasonably required to implement the Injection Well Act, and TWC, §5.553 requires the commission to establish requirements for the form, content and manner of publication of public notice.

The commission invited public comments regarding the draft regulatory impact analysis during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment is that implementation of these adopted rules would not constitute a taking of real property.

The purpose of these adopted rules is to provide clarifying changes to the public notice requirements for radioactive material licenses, to require public notice of injection well activities to mineral interest owners and groundwater conservation districts, and to establish public notice requirements for aquifer exemptions. The adopted rules to Chapter 39 would substantially advance this purpose by amending the commission public notice requirements.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The adopted rules amend public notice requirements for permit and license applications and do not affect real property. The adopted rules only amend specific requirements for how public notice is provided and do not establish new permitting or licensing programs. Therefore, the adopted rules do not affect real property in a manner that is different than would have been affected without these revisions.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on September 16, 2008. The public comment period closed on October 6, 2008. The commission received comments from Blackburn Carter (BC), Kelly Hart & Hallman (KHH), Mesteña Uranium L.L.C. (Mesteña), the Lone Star Chapter of the Sierra Club (Sierra Club), Texas Mining and Reclamation Association (TMRA), and URI, Inc. (URI).

RESPONSE TO COMMENTS

General Notice Requirements

BC commented that this is the time to extend notice requirements to the exploration phase of in situ uranium mining. BC stated that the public should have information appropriate to answer questions at each step of the process and the information should be made available to groundwater conservation districts.

Because the TCEQ does not regulate the exploration process and does not issue an exploration permit, the TCEQ cannot establish public notice requirements for an exploration permit. The RRC regulates exploration. No changes were made in response to this comment.

BC commented that an application to amend restoration table values or timetables should be subject to notice and reviewed by the public.

Any application for a production area authorization is subject to public notice requirements of Chapter 39. Two notices will be issued for a production area authorization: a notice of receipt of the application and intent to obtain a permit will be issued when an application is determined to be administratively complete; and if the executive director recommends approval of the application, a Notice of Application and Preliminary Decision. An application for a production area authorization must be made available to the public in a public location in the county in which the proposed production area is located. An application is also a public record and is available under the Public Information Act at the TCEQ offices in Austin. No changes were made in response to this comment.

BC commented that the concept of a third-party expert provided in §331.108 is troublesome and should be subject to notice requirements and an opportunity to comment.

All applications for production area authorizations are subject to public notice and an opportunity to comment even if the executive director uses the recommendation of a third-party expert under the provisions of §331.108. No changes were made in response to this comment.

BC commented that notice alone is not enough, public access to information is equally important and that the adequacy and completeness of the information provided to the public at each step of the process is critical.

The commission agrees with the comment. An application for a Class III permit, an application for a production authorization, and a request to designate an exempt aquifer must be made available to the public in a public location within the county in which the proposed facility is located. An application is a public record and is available to the public under the Public Information Act at the TCEQ offices in Austin. Maintaining an application that is available to the public and an opportunity for the public to comment on the application can provide the executive director and the commission with additional information from the public that may not be reflected in the application in making a decision on whether to approve an application.

Notice to Mineral Interest Owners

KHH and TMRA commented that the rules should not require that public notice be sent to adjacent mineral rights owners for Class III injection well permit applications because the wells are not used to inject waste. TMRA and URI commented that adjacent mineral owners cannot be affected by Class III uranium recovery activities. TMRA and URI commented that proposed §39.653(b)(4) and (c)(4) should be deleted. TMRA also commented that §39.651(c)(4) should be changed to eliminate the applicability of the provision for Class III injection wells.

The commission does not agree with the comment and intends to require that public notice be mailed to mineral rights owners underlying and adjacent to a proposed Class III permitted area and to a proposed production area. Because Class III injection operations inject fluids into a formation that is mineral bearing, adjacent mineral owners may be interested or affected by the injection operations. For example, mineral rights owners may be interested that the designation of the boundaries of a permit area or production area are appropriate to assure their rights are not affected, that the protections to assure confinement of mining fluids are adequate, and that monitor wells are appropriately established. No changes were made in response to these comments.

TMRA commented that mineral rights owners are not reflected in county tax rolls and that an applicant will not be able to comply with the "safe haven" requirements of TWC, §27.018(c).

The commission does not agree with the comment. Some taxing authorities may impose a tax on producing mineral interests, and the mineral owner could be reflected in county tax rolls. The public notice required under TWC, §27.018(c) only applies to the notice of a contested case hearing. The commission is adopting requirements to provide mailed notice for the notice of receipt of application and intent to obtain permit and for the notice of application and preliminary decision. These are notice requirements in the earlier stages of the application process. In the event of a contested case hearing on an application, the commission or other party must place evidence in the record that the notice of the hearing was mailed to the address of the affected person included in the appropriate county tax rolls at the time of mailing. The commission has required that public notice be provided to adjacent mineral interest owners for Class I injection well permit applications for over seven years, and there has not been a problem in complying with TWC, §27.018(c) in contested case hearings on Class I injection well permit applications. TWC, §27.018(c) reflects the possibility that the owners of property can change from the time that initial notices associated with an application are provided to the time a contested case hearing is held on an application to ensure that the notice of the hearing is provided to the current property owners as reflected in the county tax rolls at the time of the mailing. To comply with TWC, §27.018(c), the applicant should check with the most current tax rolls to assure that the mailing list for the notice of the contested case hearing includes the names of the affected persons on the appropriate county tax rolls at the time of mailing. If notice is provided to additional persons that are not reflected on the appropriate tax rolls, the applicant would still be in compliance with TWC, §27.018(c). No changes were made in response to this comment.

KHH and URI commented that it is burdensome to develop a mailing list of mineral rights owners because of the large areas involved and the fragmented nature of mineral rights ownership.

The commission does not agree that providing notice to adjacent mineral rights owners is overly burdensome. Mineral interests may get fragmented, but identifying mineral rights and locating mineral rights owners is common in Texas for the oil, gas, and mineral extraction industry. Experienced land men can locate mineral deeds in county records office to identify the appropriate recipients of the notice. In fact, much of this information should already be available to a uranium mining operator as the operator may be required to enter a lease with the mineral rights owners for the exploration and development of the uranium. In addition, all in situ uranium mining operations have a Class I injection well for waste disposal purposes, and existing notice requirements already require the identification of mineral rights owners for applications for the Class I injection well permit application. It should not be too difficult to expand the list of notice recipients for a Class I injection well permit application, if necessary, to include the mineral rights owners adjacent to a proposed Class III injection well permitted area or production area. No changes were made in response to this comment.

Sierra Club commented that the notice of applications for radioactive material licenses for uranium recovery also be sent to groundwater conservation districts and mineral rights owners.

The commission does not agree with the comment. Because the Class III injection well permit and production area authorization applications involve subsurface injection, it is appropriate to include mineral rights owners and groundwater districts on the notices associated with those applications. A radioactive material license involves the activities on the surface. Mineral interest owners and groundwater conservation districts would already be included in the injection well permit applications, and any individual or district can make a request to be included on the mailing list for a particular radioactive material license application or a county-wide mailing list for all applications within a county. No changes were made in response to this comment.

Mailed Notice Requirements

TMRA commented that the proposed language in §39.651(c)(4) is problematic because it requires notice be provided to "persons who own the property" which is overly broad and should be limited to the owners of present possessory surface interests.

The commission does not agree with the comment that the language is problematic. The existing notice rule has used the phrase "persons who own the property" for over seven years without any problems of coverage. By providing notice of the application to "persons who own the property" on which an existing or proposed facility is or will be located, the commission is attempting to give notice to any person who may be affected by the granting of the permit under TWC, §5.115(b). Because providing notice to "persons who own the property" is attempting to provide the notice to those who may be affected by the application, the commission does agree that *ownership* connotes a present possessory interest in the property and an ability to control the property in question. Therefore, an applicant would not have to identify owners of future interests in property for purposes of developing an adjacent landowner mailing list as part of the application. No changes were made to this comment.

TMRA commented that proposed §39.653(b)(1) should be deleted because there is no reason to provide notice to surface owners of a production area authorization when these same owners already were provided notice of the Class III injection well area permit application.

The commission does not agree that §39.653(b)(1) should be deleted. Although someone may have received notice of a Class III injection well area permit application, the person who owns the property on which an existing or proposed production area is located may change from the time a permittee applies for and obtains a Class III injection well area permit to the time the permittee applies for a particular production area authorization. In addition, a Class III injection well area permit does not address all of the same issues or requirements that are addressed in a production area authorization. The owner of the property may be interested in the specific requirements of the production area authorization, such as monitor well requirements and restoration

table values. No changes were made in response to this comment.

TMRA commented that proposed §39.653(b)(2) should use the term "persons who own land" instead of the term "landowners" for consistency purposes.

The commission does not agree with the comment. Although the commission does equate the phrase "person who owns the property" with the term "landowner," the rule language does not need revision for consistency sake. Existing language in §39.651(c)(4)(A) has used "persons who own the property" on which a facility is located, if different than the applicant, for Class I injection well permit applications. And, §39.651(c)(4)(B) has used "landowners" adjacent to the facility for Class I injection well permit applications. These notice requirements have been used successfully without problems in identifying the appropriate notice recipient. The commission's adopted rules carry out the same mailed notice requirements that are currently applied to Class I injection well permit applications to Class III injection well permit and production area authorization applications. No change has been made in response to this comment.

Notice to Groundwater Conservation Districts

Mesteña, Sierra Club, and TMRA expressed agreement with the inclusion of a local groundwater district as a recipient of mailed notice for Class III injection well permit applications and production area authorization applications.

The commission acknowledges the support for this requirement.

Comment period for minor amendments

Sierra Club commented that applications for minor amendments of radioactive materials licenses should be subject to a 30-day comment period after the date of *Texas Register* publication instead of a ten-day period.

The commission does not agree with the comment. A ten-day comment period is appropriate for an application for a minor amendment. The commission is adopting new requirements for establishing the types of license changes that would be considered minor amendments. Generally, minor amendments are changes that do not have any potential impact on public health and safety, worker safety, or environmental health; that enhance protection of health, safety, and the environment; or that have been previously subject to review and environmental analysis. Because of the types of license changes that can be made by a minor amendment, a ten-day comment period is appropriate. No changes have been made in response to this comment.

SUBCHAPTER H. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §39.403

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations. The amendment is also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendment implements Senate Bill 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625; and TWC, §27.0513.

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. PUBLIC NOTICE OF INJECTION WELL AND OTHER SPECIFIC APPLICATIONS

30 TAC §§39.651, 39.653, 39.655

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments and new section are adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements

for production area authorizations. The amendments and new section are also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendments and new section implement Senate Bill 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625; and TWC, §27.0513.

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. PUBLIC NOTICE FOR RADIOACTIVE MATERIAL LICENSES

30 TAC §§39.702, 39.703, 39.707

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments are adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations. The amendments are also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendments implement Senate Bill 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625; and TWC, §27.0513.

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 February 20, 2009.

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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) 239-6090

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CHAPTER 55. REQUESTS FOR RECONSIDERATION AND CONTESTED CASE HEARINGS; PUBLIC COMMENT
SUBCHAPTER F. REQUESTS FOR RECONSIDERATION OR CONTESTED CASE HEARING

30 TAC §55.201

The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts an amendment to §55.201 *with changes* to the proposed text as published in the September 5, 2008, issue of the *Texas Register* (33 TexReg 7423) and will be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The changes adopted to this chapter are part of a larger adoption to revise the commission's radiation control and underground injection control (UIC) rules. The purpose of this rulemaking is to implement the remaining portions of Senate Bill (SB) 1604, 80th Legislature, 2007, its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)), and House Bill (HB) 3838, 80th Legislature, 2007. This rulemaking incorporates new provisions for notice and contested case hearing opportunities related to Production Area Authorizations and UIC Area Permits, financial assurance requirements, and new state fees on gross receipts associated with the radioactive waste disposal. HB 3838 specifically addresses the period between uranium exploration, which is regulated by the Railroad Commission of Texas (RRC), and permitting of injection wells for in situ uranium mining, which is regulated by TCEQ. HB 3838 requires TCEQ to establish a registration program for exploration wells permitted by the RRC that are used for development of the UIC area permit application. In response to a previous petition for rulemaking, the commission has also directed staff to review, seek stakeholder input on, and recommend revision of commission rules related to in situ uranium recovery.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapters 37, 39, 305, 331, and 336.

SECTION DISCUSSION

The commission adopts the amendment to §55.201 to implement Texas Water Code (TWC), §27.0513(d), which was added to the TWC through passage of SB 1604. Under adopted §55.201(i)(11), there is no opportunity for a contested case hearing on an application for a production area authorization, unless the authorization seeks to amend a restoration table value as provided in §331.107(g), addresses the initial establishment of monitor wells unless the executive director uses the recommendations of an independent third-party expert, or amends the type or amount of financial assurance required for groundwater restoration or plugging and abandonment. Qualifications and requirements for the use of an independent third-party expert are addressed elsewhere in this rulemaking. The commission does point out that the requirements of TWC, §27.0513(d)(3) do not apply to the initial establishment of the cost estimates for aquifer restoration or plugging and abandonment of wells. And, under existing permit and radioactive material licensing program requirements, the amount of required financial assurance for closure activities including aquifer restoration and well plugging abandonment can be increased without the submission of a license, permit, or production area authorization application. That is, the permits, licenses and rules require automatic increases based on current cost estimates for the various activities requiring financial assurance. Furthermore, the commission does not consider the intent of this rule to apply to pure economic adjustments in the amount of financial assurance based solely on the annual inflation rate adjustment required under §37.131 or reductions in the amount of financial assurance required when the permittee plugs and abandons wells for which financial assurance is required. In response to comments, the commission has made two changes to §55.201 to clarify that it is the application for the production area authorization that seeks amendment under §55.201(i)(11) and to add the word "table" before "value" in §55.201(i)(11)(A).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission adopts the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of "a major environmental rule" as defined in the statute. "A major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking action implements SB 1604, establishing requirements for production area authorizations for in situ recovery of uranium. The adopted amendment to Chapter 55 is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the amendment affects only procedural requirements for participating in a contested case hearing on a production area authorization application. The rulemaking action also amends requirements for in situ recovery of uranium in Chapter 331, amends technical requirements and for radioactive materials licenses and establishes fees for applications and waste disposal in Chapter 336, amends license application requirements and permit term limits in Chapter 305, amends financial assurance requirements in Chapter 37, and amends public notice requirements in Chapter 39.

Furthermore, the rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The commission's UIC program is authorized by the United States Environmental Protection Agency and the adopted changes for injection well permits, production area authorizations, and exempt aquifers do not exceed a standard of federal law or requirement of a delegation agreement. There are no federal standards for production area authorizations. The adopted rulemaking is compatible with federal law.

The adopted rule does not exceed a requirement of state law. TWC, Chapter 27, the Injection Well Act, establishes requirements for the commission's UIC program. SB 1604 amended the Injection Well Act to establish requirements for production area authorizations and for determining when production area authorization applications are subject to an opportunity for participation in a contested case hearing. The purpose of the rulemaking is to implement requirements consistent with TWC, Chapter 27, as amended by SB 1604.

The adopted rule is compatible with the requirements of a delegation agreement or contract between the state and an agency of the federal government. The commission's UIC program is au-

thorized by the United States Environmental Protection Agency, and the adopted rule is compatible with the state's delegation of the UIC program.

The adopted rule is adopted under specific laws. TWC, Chapter 27, establishes requirements for the commission's UIC program and TWC, §27.019, requires the commission to adopt rules reasonably required to implement the Injection Well Act, and TWC, §27.0513 authorizes the commission to adopt rules to establish requirements for production area authorizations.

The commission invited public comments regarding the draft regulatory impact analysis during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rule and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment is that implementation of the adopted rule would not constitute a taking of real property.

The purpose of the adopted rule is to implement legislative requirements in SB 1604, establishing requirements for production area authorizations for in situ recovery of uranium. The adopted rule would substantially advance this purpose by amending the requirements applicable to participation in contested case hearings on applications for production area authorizations.

Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of private real property. The adopted rule does not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The adopted amendment is procedural, affecting the participation in contested case on applications for production area authorizations, and does not affect real property. The adopted rule implements provisions already effective in statute. Therefore, the adopted rule does not affect real property in a manner that is different than would have been affected without these revisions.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on September 16, 2008. The public comment period closed on October 6, 2008. The commission received comments from Kleberg County Citizen Review Board (KCCRB); Mesteña Uranium, LLC (Mesteña); the Lone Star Chapter of the Sierra Club (Sierra Club); Texas Mining and Reclamation Association (TMRC); and URI, Inc. (URI).

RESPONSE TO COMMENTS

KCCRB commented that there should be a right to a contested case hearing on a production area authorization application if there is a proposed change in production area boundaries or there is a proposed change in the aquifer restoration timetable. The requirements for determining whether an application for a production area authorization is subject to the opportunity for a contested case hearing are established in state statute. Under TWC, §27.0513(d), an application for a production area authorization is an uncontested matter and not subject to contested case hearing requirements unless specific exceptions established in statute apply. The commission cannot expand the exceptions through rulemaking that are created in statute. As a practical matter, though, production area authorizations are not typically subject to an amendment application for expanding the production area. Expansion would require additional monitor wells and would require changes to restoration values. Permittees expand mining operations by applying for a new production area authorization. No change has been made in response to this comment.

TMRA and URI commented that if an application for a production area authorization is required to include cost estimates for aquifer restoration and plugging and abandonment of injection wells, then every application will have the effect of seeking to amend the form or amount of financial assurance for that production area. Then, according to TMRA and URI, all applications for a production area authorization would be subject to an opportunity for a contested case hearing in contradiction of the intent of SB 1604 and TWC, §27.0513(d). TMRA and URI commented that production area authorization applications should be required by rule to include cost estimates for aquifer restoration or plugging and abandonment.

The commission does not agree that the requirement to include cost estimates for aquifer restoration and plugging and abandonment of wells as part of an application for a production area authorization conflicts with the intent of SB 1604 and TWC, §27.0513(d). The commission agrees that cost estimates for aquifer restoration and plugging and abandonment of wells should be included as part of an application for a production area authorization. As an application requirement, cost estimates will be subject to administrative and technical review by the executive director, will be available as part of the application provided in a public location for public review, and will be subject to public comment. A new production area authorization would establish the *initial* cost estimates for aquifer restoration of the production area and plugging and abandonment of wells within the production area. TWC, §27.0513(d) distinguishes the initial establishment of production area authorization requirements from subsequent amendment of production area authorization requirements. TWC, §27.0513(d)(2) addresses the "initial establishment" of monitoring wells, while TWC, §27.0513(d)(1) and (3) address an "amendment" of a restoration table value or "amendment" to the type or amount of bond required for groundwater restoration or plugging and abandonment of wells. If TWC, §27.0513(d)(3) were intended to apply to the initial establishment of the cost estimates for financial assurance for the production area authorization, it would have the same "initial establishment" language used in TWC, §27.0513(d)(2). An application for a new production area authorization that provides cost estimates for aquifer restoration of the production area and cost estimates for plugging and abandonment of wells will not be subject to an opportunity for a contested case hearing under the applicability of TWC, §27.0513(d)(3) or §55.201(i)(11)(C) because the application is not seeking an *amendment* to the type or amount of financial assurance. In order to maintain compatibility with the United States Nuclear Regulatory Commission's requirements, the financial assurance for aquifer restoration is held under the requirements of the radioactive materials license.

While the cost estimate for aquifer restoration will be established in a production area authorization, the financial assurance, based on that cost estimate, will be required under the license. The licensee's financial assurance requirements are addressed in Chapter 336, Subchapter L and Chapter 37. Because the financial assurance for aquifer restoration is held under the licensing requirements of Chapter 336, and the financial assurance for well plugging and abandonment is held under the area permit requirements of Chapter 331, an amendment application for the production area authorization is not required and the exception in TWC, §27.0513(d)(3) or §55.201(i)(11)(C) would not be triggered for subsequent updates to financial assurance for aquifer restoration or well plugging and abandonment for inflation adjustments or cost increases. No change has been made in response to this comment.

TMRA commented that §55.201(i)(11) should be revised to add a comma after the date and replace the phrase "unless the authorization seeks" with "unless the application for the production area authorization seeks." TMRA explained that the authorization is granted by the commission and does not seek anything while the application seeks authorization from the commission.

The commission agrees with the comment and has revised §55.201(i)(11) accordingly.

Mesteña commented that §55.201(i)(11)(A) should be changed to add the word "table" to match the language in statute in TWC, §27.0513(d)(1).

The commission agrees with the comment and has revised §55.201(i)(11)(A) accordingly.

TMRA commented that §55.201(i)(11)(B) is confusing because the word "unless" is used twice to determine whether a particular application for a production area authorization is subject to a contested case hearing. TMRA commented that language in §55.201(i)(11)(B) should be changed from "unless the executive director uses the recommendations the recommendations of an independent third-party expert . . ." to "and the executive director does not use the recommendations . . .".

The commission does not agree with the comment. The language in §55.201(i)(11)(B) is derived from TWC, §27.0513(d)(2). The exclusion from the applicability of contested case hearing opportunity requires the executive director's affirmative use of the recommendation of an independent third-party expert chosen by the commission. No changes were made in response to this comment.

TMRA commented that §55.201(i)(11)(C) should be amended to add a citation to the Radiation Control Act for financial assurance for groundwater restoration.

The commission does not agree with the comment. The language in §55.201(i)(11)(C) is derived from TWC, §27.0513(d)(3) and the statute does not specify that the financial assurance for groundwater restoration is under THSC, §401.109. No changes were made in response to this comment.

Sierra Club commented that they believe the proposed changes to §55.201(i)(11) conforms to the legislative changes required by SB 1604.

The commission appreciates the comment.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendment implements Senate Bill 1604, 80th Legislature, 2007; and TWC, §27.023 and §27.0513.

§55.201. Requests for Reconsideration or Contested Case Hearing.

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's decision and response to comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

(b) The following may request a contested case hearing under this chapter:

(1) the commission;

(2) the executive director;

(3) the applicant; and

(4) affected persons, when authorized by law.

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, and may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(d) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(5) provide any other information specified in the public notice of application.

(e) Any person may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk

within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

(f) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request reconsideration or a contested case hearing shall be treated as public comment.

(g) Procedures for late filed public comments, requests for reconsideration, or contested case hearing are as follows.

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk shall accept a request for reconsideration or contested case hearing, or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file.

(2) The commission may extend the time allowed to file a request for reconsideration, or a request for a contested case hearing.

(h) Any person, except the applicant, the executive director, and the public interest counsel, who was provided notice as required under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

(i) Applications for which there is no right to a contested case hearing include:

(1) a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title;

(3) any air permit application for the following:

(A) initial issuance of a voluntary emission reduction permit or an electric generating facility permit;

(B) permits issued under Chapter 122 of this title (relating to Federal Operating Permits Program); or

(C) amendment, modification, or renewal of an air application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

(4) hazardous waste permit renewals under §305.65(a)(8) of this title (relating to Renewal);

(5) an application, under Texas Water Code, Chapter 26, to renew or amend a permit if:

(A) the applicant is not applying to:

(i) increase significantly the quantity of waste authorized to be discharged; or

(ii) change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant public comment has been given; and

(E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit;

(6) an application for a Class I injection well permit used only for the disposal of nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals under Texas Water Code, §27.021, concerning Permit for Disposal of Brine From Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(7) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under Texas Water Code, §27.023, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

(8) an application for a pre-injection unit registration under §331.17 of this title (relating to Pre-Injection Units Registration);

(9) an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018;

(10) other types of applications where a contested case hearing request has been filed, but no opportunity for hearing is provided by law; and

(11) an application for a production area authorization that is submitted after September 1, 2007, unless the application for the production area authorization seeks:

(A) an amendment to a restoration table value in accordance with the requirements of §331.107(g) of this title (relating to Amendment of Restoration Table Values);

(B) the initial establishment of monitoring wells for any area covered by the authorization, including the location, number, depth, spacing, and design of the monitoring wells, unless the executive director uses the recommendations of an independent third-party expert as provided in §331.108 of this title (relating to Independent Third-Party Experts); or

(C) an amendment to the type or amount of financial assurance required for aquifer restoration, or by Texas Water Code, §27.073, to assure that there are sufficient funds available to the state to utilize a third-party contractor for aquifer restoration or plugging of abandoned wells in the area. Adjustments solely associated with the annual inflation rate adjustment required under §37.131 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates), or for adjustments due to decrease in the cost estimate for plugging and abandonment of wells when plugging and abandonment has been approved by the executive director in accordance with §331.144 of this title (relating to Approval of Plugging and Abandonment) are not considered an amendment to the type or amount of financial assurance required for aquifer restoration or well plugging and abandonment.

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 February 20, 2009.

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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) 239-6090

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CHAPTER 305. CONSOLIDATED PERMITS

The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts amended §§305.49, 305.62, and 305.127. Section 305.62 is adopted *with changes* to the proposed text and will be republished. Sections 305.49 and 305.127 are adopted *without changes* to the proposed text as published in the September 5, 2008, issue of the *Texas Register* (33 TexReg 7460) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The changes adopted to this chapter are part of a larger adoption to revise the commission's radiation control and underground injection control (UIC) rules. The purpose of this rulemaking is to implement the remaining portions of Senate Bill (SB) 1604, 80th Legislature, 2007, its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)), and House Bill (HB) 3838, 80th Legislature, 2007. This rulemaking incorporates new provisions for notice and contested case hearing opportunities related to Production Area Authorizations and UIC Area Permits, financial assurance requirements, and new state fees on gross receipts associated with the radioactive waste disposal. HB 3838 specifically addresses the period between uranium exploration, which is regulated by the Railroad Commission of Texas (RRC), and permitting of injection wells for in situ uranium mining, which is regulated by TCEQ. HB 3838 requires TCEQ to establish a registration program for exploration wells permitted by the RRC that are used for development of the UIC area permit application. In response to a previous petition for rulemaking, the commission has also directed staff to review, seek stakeholder input on, and recommend revision of commission rules related to in situ uranium recovery. The adopted amendments to Chapter 305 address amendment application requirements for radioactive materials licenses, establish term limits for injection well area permits authorizing in situ recovery of uranium, and address production area authorization application requirements.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapters 37, 39, 55, 331, and 336.

SECTION BY SECTION DISCUSSION

The commission adopts the amendment to §305.49(a)(7) to specify that for Class I injection wells only, a letter is required from the RRC stating that the drilling of a disposal well and the injection of waste into the subsurface stratum selected for disposal will not endanger or injure any oil or gas formation. This letter is required under Texas Water Code (TWC) §27.015(a) for disposal wells. Class III injection wells, however, are for the recovery of minerals, and are not disposal wells. The adopted rule change is necessary to avoid application of this requirement to Class III wells. Additionally, Class III wells typically are completed at depths of less than 1,000 feet, whereas most oil and gas production in Texas currently are at greater depths.

The commission adopts the amendment to §305.49(b) to include a new paragraph (6), under which an application for a production area authorization must include a cost estimate for aquifer restoration and well plugging and abandonment. Although financial assurance for aquifer restoration currently is addressed in the Radioactive Materials License for source material recovery, cost estimates for aquifer restoration are reviewed by staff of the TCEQ UIC program. By requiring submission of aquifer restoration cost estimates in an application for a production area, TCEQ UIC staff will be able to complete this review in a timely manner as part of the production area authorization application. Existing paragraph (6) has been renumbered to paragraph (7).

The commission adopts the amendment to §305.62(c) to remove the list of major amendments for licenses issued under Chapter 336, Subchapter H, Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste. Major amendments for licenses issued under Chapter 336 will be in new §305.62(i). Additionally, the commission adopts the amendment to §305.62(c)(3)(G) to define the acronym CFR.

The commission adopts §305.62(i) to establish the types of changes to an existing license that constitute a major amendment, minor amendment, or administrative amendment. New §305.62(i)(1) lists the types of license changes that would be a major amendment. In response to comments, proposed §305.62(i)(1)(B) was revised to categorize as a major amendment a license change that would authorize the receipt of waste that the executive director determines is not authorized in the existing license. Rather than a major amendment designation based on the state of origin of the waste, a major amendment would be required to authorize the receipt of waste that the executive director determines is not authorized in the existing license. In response to comments, §305.62(i)(1)(I) was revised to include that a new technology or new process will only be a major amendment if it does not meet the criteria for a minor amendment in §305.62(i)(2). For evaluating other license changes that are not specified, §305.62(i)(1)(K) provides that a major amendment is one in which a change will have a potentially significant effect on the human environment and which the executive director has prepared a written environmental analysis or has determined that an environmental analysis is required. Major amendment applications are subject to public

notice requirements of Chapter 39 and are subject to an opportunity to request a contested case hearing.

New §305.62(i)(2) lists the type of license changes that would be a minor amendment. In response to comments, §305.62(i)(2) was revised to specify that minor modifications made to the facility that are not currently authorized by an existing license condition which do not pose a potential significant impact on public health and safety, worker safety, or environmental health must be a minor amendment. In addition, minor facility modifications that enhance public health and safety or protection of the environment and minor modifications to enhance environmental monitoring programs at facilities with demonstrated performance were removed from the minor amendment criteria and added as administrative amendments in §305.62(i)(3) in cases that the modification is consistent with individual license conditions for a specified facility. If a license change classification is not specified, the executive director may determine that the proposed change is a minor amendment under §305.62(i)(2)(C). A minor amendment is one in which a change will not have a potentially significant effect on the human environment, but does require a technical review by the executive director. A minor amendment is subject to public notice requirements of Chapter 39, but is not subject to an opportunity to request a contested case hearing. An administrative amendment is one in which is clerical in nature, or after completion of a review, the executive director determines is not a major or minor amendment.

New §305.62(i)(3) lists examples of types of license changes that would be an administrative amendment. An administrative amendment is not subject to public notice requirements or opportunity to request a contested case hearing. In response to comments, additional criteria for administrative amendments were added in §305.62(i)(3)(H) and (I). Existing subsections (i) and (j) will be re-designated as subsections (j) and (k), respectively.

The commission adopts the amendment to §305.127(1)(A)(ii) to place a 10-year term on permits for Class III wells. This change is necessary to implement TWC, §27.0513(b), which was added to the TWC through SB 1604.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission adopts the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of "a major environmental rule" as defined in the statute. "A major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking action implements legislative requirements in SB 1604, transferring responsibilities for the regulation of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the Department of State Health Services to the commission and amends the UIC program requirements for in situ recovery of uranium. The adopted rules to Chapter 305 address amendment application requirements for radioactive materials licenses, establish term limits for injection well area permits authorizing in situ recovery of uranium, and address production area authorization application requirements. The adopted amendments to Chapter 305 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 amendments apply only to procedural requirements for submitting amendment applications for radioactive material licenses, application requirements for production area authorizations, and establish term limits to area permits required by statute. The rulemaking action also amends technical requirements for the radioactive material licensing programs and establishes fees for applications and waste disposal in Chapter 336, amends technical requirements for injection wells and other wells for in situ uranium recovery in Chapter 331, amends financial assurance requirements in Chapter 37, amends public notice requirements in Chapter 39, and amends public participation requirements in Chapter 55.

Furthermore, the rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

THSC, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, the State of Texas is an "Agreement State" authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The commission's UIC program is authorized by the United States Environmental Protection Agency and the adopted changes to term limits for injection well permits and application requirements production area authorizations do not exceed a standard of federal law or requirement of a delegation agreement. The adopted rules are compatible with federal law.

The adopted rules do not exceed an express requirement of state law. THSC, Chapter 401, establishes general requirements for the licensing and disposal of radioactive substances, source material recovery, commercial radioactive substances storage and processing, and low-level radioactive waste disposal. TWC, Chapter 27, establishes requirements for the commission's UIC program. The purpose of the rulemaking is to implement application requirements consistent with THSC, Chapter 401 and TWC, Chapter 27, as amended by SB 1604.

The adopted rules are compatible with the requirements of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory*

Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The adopted rules are compatible with the NRC requirements and the requirements for retaining status as an "Agreement State." The commission's UIC program is authorized by the United States Environmental Protection Agency, and the permit term limits and production area authorization requirements are compatible with the state's delegation of the UIC program.

The adopted rules are adopted under specific laws. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. TWC, §27.019 requires the commission to adopt rules reasonably required to implement the Injection Well Act.

The commission invited public comments regarding the draft regulatory impact analysis during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment is that implementation of these adopted rules would not constitute a taking of real property.

The purpose of these rules is to provide clarifying changes to the amendment application requirements for radioactive material licenses, to provide term limits for injection well permits authorizing in situ recovery of uranium, and to amend application requirements for production area authorizations. The adopted rules to Chapter 305 would substantially advance this purpose by amending the application requirements and establish injection well permit term limits required by statute.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The adopted rules amend application requirements for radioactive materials licenses and production area authorizations, and establish term limits for injection well permits, and do not affect real property. The adopted rules apply only to those who submit a subject application or have an existing injection well permit subject to the term limits established in SB 1604. The technical requirements for the applications subject to Chapter 305 are found in other chapters. Therefore, the adopted rules do not affect real property in a manner that is different than would have been affected without these revisions.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on September 16, 2008. The public comment period closed on October 6, 2008. The commission received comments from the Kleberg County Citizen Review Board (KCCRB), Mesteña Uranium, LLC (Mesteña), Lone Star Chapter of the Sierra Club (Sierra Club), Texas Mining and Reclamation Association (TMRA), Kelly Hart & Hallman LLP on behalf of Uranium Energy Corp and AREVA NC Inc. (KHH), URI, Inc. (URI), and Hance Scarborough, LLP on behalf of Waste Control Specialists LLC (WCS).

RESPONSE TO COMMENTS

Additional Contents of Application for an Injection Well Permit

URI commented that §305.49(b)(6), which specifies that an application for production area authorization be submitted with a cost estimate for aquifer restoration and well plugging and abandonment, creates a regulatory dilemma and a practical geologic engineering problem. If there is a reason for an applicant to seek a change in the amount of financial security in a production area authorization application, then the applicant should make that choice and choose exposure to a contested case hearing. But requiring an estimate, and then making that estimate a driver for surety adjustment pursuant to §37.9045(b) makes the estimate the same as an adjustment. The reason why groundwater restoration cost estimates have not, and cannot, be tied to production area authorizations in the past, is that there is insufficient data available at the time of the production area authorization application to provide for an accurate calculation of groundwater restoration costs. URI recommended the deletion of §305.46(b)(6).

The commission does not agree with the comment. The commission's rules require aquifer restoration of an in situ uranium mine and require financial assurance for aquifer restoration. Prior to the adoption of these rules, determining the amount of financial assurance for aquifer restoration at an in situ uranium mine has been performed on a piecemeal basis, with no formal process to submit, review and approve the amount of financial assurance. The commission intends to formalize a process by requiring that a cost estimate for restoring the aquifer of a production area be submitted as part of the production area authorization application. Because a production area authorization authorizes mining within a production area, the cost estimate for restoring the mined aquifer in the proposed production area should be included with the application. In developing the application, the miner has completed detailed work on delineating the orebody to be mined (both in terms of depth and area), installed required monitor wells, and investigated and identified the aquifer characteristics of the production zone for determination of Class III well spacing. A miner's decision to pursue mining and obtain the necessary production area authorization is based on economic considerations, and the cost of required aquifer restoration and financial assurance certainly must be included in any economic analysis. If a miner believes that it will be too difficult to establish a cost estimate for restoring an entire production area up front as part of the application of the production area authorization, the miner should consider reducing the size of the production area. As part of an application, the cost estimates should be subjected to formal review by the executive director who may request additional information under the notice of deficiency process of Chapter 281, and be available for review by the public. The commission does not agree that providing an initial cost estimate for aquifer restoration of a production area constitutes an amendment to the type of bond required for groundwater restoration

that is contemplated under TWC, §27.0513(d)(1). The applicant is providing the *initial* cost estimate for aquifer restoration of the production area, not an *amendment* to the type or amount of a bond required for groundwater restoration of the production area. Furthermore, the applicant is providing a *cost estimate* for aquifer restoration as part of the application, not the *financial assurance.* Because financial assurance for aquifer restoration is required by the NRC's requirements for radioactive material licenses authorizing in situ recovery of uranium as part of the financial assurance required for overall decommissioning or closure of a mine, the TCEQ's financial assurance requirements for aquifer restoration are under the radioactive material license to maintain compatibility with the NRC. While the initial cost estimate for aquifer restoration of a production area is required as part of the application for a production area authorization, the financial assurance for aquifer restoration is held under the requirements of the radioactive material license. Because the financial assurance for aquifer restoration is held under the licensing requirements of Chapter 336, and the financial assurance for well plugging and abandonment is held under the area permit requirements of Chapter 331, an amendment application for the production area authorization is not required and the exception in TWC, §27.0513(d)(3) or §55.201(i)(11)(C) would not be triggered for subsequent updates to financial assurance for aquifer restoration or well plugging and abandonment for inflation adjustments or cost increases. No changes were been made in response to this comment.

Amendments

KHH commented that to allow for and encourage improvements in technology, the following change is suggested for §305.62(i)(1)(I): ". . . authorizes a new technology or process that requires an engineering review, unless the new technology or process meets one of the minor amendment criteria, in which case it shall be a minor amendment. . . ."

The commission agrees with this comment. Section 305.62(i)(1)(I) has been revised to indicate that a major amendment is only required for a new technology or new process that does not meet the minor amendment criteria in §305.62(i)(2).

The KCCRB commented that in addition to the cases listed in the proposed rule for major amendments in §305.62(i)(1), the following be added: changes to production area boundaries and changes to an aquifer restoration timetable.

The new subsection is specific to radioactive material licenses. Changes to production area boundaries and to an aquifer restoration timetable are not the subject of radioactive material licenses, rather these amendments are related to UIC permits and authorizations. Classification of major amendments of UIC permits and authorizations were not proposed as part of this rulemaking. Section 305.62(a) - (c) pertains to major amendments other than radioactive material licenses. It is not typical to amend the boundaries of a production area authorization because the required monitor well ring is established as part of the initial authorization. A request to expand a production area of an approved production area authorization would be treated as a major amendment of the production area authorization. The commission's new rules in §331.85(a)(3)(B) require a permitted miner to provide an annual report with update of the mine plan including an estimated schedule for mining and restoration. No change was made in response to this comment.

Mesteña, TMRA, and URI recommended the removal of §305.62(i)(1)(I) from the major amendment type because they believe this classification is overly broad and will potentially lead to future questions that nearly every action qualifies as a major amendment.

The commission agrees that further clarification is warranted. Section 305.62(i)(1)(I) has been revised to indicate that a major amendment is only required for a new technology or new process that does not meet the minor amendment criteria in §305.62(i)(2). This change helps define major amendments more clearly and will allow the executive director to review the proposed new technology or new process in an expedited manner.

Mesteña, TMRA, and URI commented that the proposed language in §305.62(i)(2) to include revisions to procedures as a minor amendment flies in direct conflict with the intent of as low as reasonably achievable (ALARA). To be truly effective, Mesteña, TMRA, and URI believe licensees need the ability to review, revise and amend procedures as needed to ensure that the proper radiological controls are in place. The proposed change not only results in making these existing license conditions useless in light of classifying a procedural change as an amendment, but more importantly, the proposed changes will result in not giving licensees any incentive to strive for continuous improvement. WCS commented that the language in §305.62(i)(2)(A) and (B) requiring a minor amendment for changes in health and safety procedures and facility modifications that do not have a potential significant impact on public health and safety is an added administrative burden and should be administrative amendments. Mesteña, TMRA, and URI suggested a minor amendment be one which does not meet the criteria for a major or administrative amendment.

The commission agrees with the comments in part. The commission recognizes the value of allowing more flexibility for mature operational programs with a demonstrated performance-driven approach and structure in place for objective evaluation based on ALARA principles focused on improving procedures. Minor changes in health and safety procedures that do not have a potential detrimental impact on public health and safety, worker safety, or environmental health, as well as minor modifications to enhance environmental monitoring programs should be expedited. However, for less mature programs and programs that lack the necessary infrastructure, due to the nature of the standard methods provided in procedures, it is necessary for initial operational procedures, and amendments to those procedures, to be reviewed for potential health, safety, and environmental impacts. This ensures that potential impacts are fully vetted in a regulatory review. Procedures are the higher-tiered methods for facility operations and are the basis of work instructions and work permits for more specific tasks. These operating procedures comprise the unit operations that, in combination or used singly, make-up the sequence of work steps necessary for the formulation of a radiation work permit or specific work instruction. The greater flexibility for improvement based on ALARA remains in the lower-tiered work instructions and work permits that are not part of the license amendment process. In recognition of strong operational programs with a demonstrated history of performance-driven operations and adequate internal review structure, §305.62(i)(3) has been revised to include minor modification of amendments as an administrative change as long as modifications are also consistent with the individual license conditions for a specified facility. Modifications that would not alter the present type, location, frequency, or analytical requirements for environmental monitoring could be administrative. Generally, a sampling program is designed and initiated to sample for

all sources of emissions and to gauge the true impacts. Over time, monitoring programs may be modified or refined to capture the changing nature of facility operations. Enhancements to a monitoring program could be implemented in response to a rapidly changing process. Changes such as changing the supplier of reagents or air filter papers may enhance the program and make no substantive impact. There may also be changes in the way data are formatted and reported. Section 305.62(i)(2) has been revised to include the following three criteria for minor amendments: authorizes a modification that is not specifically authorized in an existing condition in a license issued under Chapter 336 and which does not pose a potential detrimental impact on public health and safety, worker safety, or environmental health; authorizes the addition of previously reviewed production or processing equipment, and where an environmental assessment has been completed; or any amendment, after completion of a review, the executive director determines is a minor amendment.

Sierra Club recommended the addition of criteria for major amendments pertaining to changes that are resulted by an enforcement action by the commission or other state or federal agencies authorized to enforce the law.

The commission disagrees with the automatic classification due to enforcement, but agrees that further clarification can be made. Each enforcement action is different and could result in changes that would be considered a minor amendment based on revised §305.62(i)(2). All enforcement actions do not result in a singular, necessary amendment that would be judged to equate to a major amendment. In addition, other TCEQ permitting areas do not require a major amendment or alteration to the permit when an enforcement action occurs. The proposed change as written would be inconsistent with other TCEQ regulatory programs. However, for clarification, the commission has included the term potentially significant impact for major amendments. This will help ensure that the classification of major amendment captures changes resulting from enforcement actions, or any other changes that warrant a higher review.

WCS requested the implementation of a modification program for radioactive materials license, in addition to the amendment process, similar to the program utilized by the commission for industrial solid waste and hazardous waste permits found in §305.69 so the regulated community is sufficiently informed of the expectations of the commission for modifying a license to conduct new activities.

The commission does not agree with this comment. Radioactive materials licenses are very unique and differ from industrial solid waste and hazardous waste permits. Although the modification program is sufficient for the industrial solid waste and hazardous waste permits, it does not translate to radioactive materials licenses nor does it add to the efficiency and effectiveness of the amendment process. The permit modification would be an overly cumbersome process, would not provide the flexibility for radioactive material licensing, and would be inconsistent with licensing concepts that are based on performance. In addition, the permit modification program is not consistent with the amendment types in the NRC process and would potentially impact the state's compatibility. No changes were made in response to this comment.

WCS commented the language in §305.62(i)(1)(B) authorizing receipt of wastes from other states not authorized in the existing license be a major amendment would be severely detrimental to the licenses and should be deleted. WCS contends the location of the waste generator has no bearing on the environmental or human health effect resulting from ultimate disposal of such waste at a licensed facility in Texas. WCS believes the focus should be on the type and quantity of the waste received for ultimate disposal, not where it is generated within the borders of the United States.

The commission agrees with the comment in part and has revised §305.62(i)(1)(B). THSC, §401.207 states that the compact waste disposal facility license holder may not accept low-level radioactive waste generated in another state for disposal under a license issued by the commission unless the waste is accepted under a compact to which the state is a contracting party. Additional radioactive material being accepted for disposal at a licensed low-level radioactive waste facility would require full characterization and assessment of impact in meeting the performance objectives, including potential environmental, worker and public health, and safety impacts that can only be accomplished by regulatory review, necessitating a license amendment. The characterization, evaluation, and analysis of potential waste streams form the basic cornerstone of the low-level radioactive waste disposal regulations. An amendment is necessary to allow for consideration of additional waste streams that would contribute and impact projected volume and radioactivity at the Texas Compact facility at a minimum, as well as possible variations in other waste characteristics that have not been evaluated in any regulatory review. The license limitations for volume and radioactivity, by specific radionuclide in some cases, are directly linked to the inventory projections provided in a license application that are limited to specific waste generators. An evaluation through an application process of potential health, safety, and environmental impacts, as well as impacts to the overall facility design and operations, must be made before additional waste streams can be considered for acceptance. In order for these evaluations to be conducted, information on the specific waste streams and discussion of the related impacts to the facility must be contained in an amendment application. In response to comments, proposed §305.62(i)(1)(B) was revised to categorize as a major amendment a license change that would authorize the receipt of waste that the executive director determines is not authorized in the existing license. Rather than a major amendment designation based on the state of origin of the waste, a major amendment would be required to authorize the receipt of waste that the executive director determines is not authorized in the existing license.

WCS requests the requirement for the determination of an environmental analysis be tied into the statutory requirements of THSC, Chapter 401. WCS also requested that §305.62(i)(1)(K) be revised to cite THSC, §401.113 and §401.263 for determination of when an environmental analysis is required.

The commission does not agree with this comment. The requirements for an environmental analysis are currently tied into the statutory requirements of THSC, Chapter 401. An environmental analysis provides supporting documentation for the completion of the technical review in licensing matters that potentially have a significant effect on human health and the environment. The judgment of when an environmental analysis should be prepared is solely with the TCEQ. An environmental analysis focuses on license application materials submitted by the applicant and the related technical analysis of those materials. If an environmental analysis is prepared by the TCEQ, it is open for public comment, including comment by the applicant. No changes were made in response to this comment.

SUBCHAPTER C. APPLICATION FOR PERMIT OR POST-CLOSURE ORDER

30 TAC §305.49

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations. The amendment is also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendment implements Senate Bill 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625; and TWC, §27.0513.

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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Texas Commission on Environmental Quality
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SUBCHAPTER D. AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS, REVOCATION, AND SUSPENSION OF PERMITS

30 TAC §305.62

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations. The amendment is also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendment implements Senate Bill 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625; and TWC, §27.0513.

§305.62. Amendments.

(a) Amendments generally. A change in a term, condition, or provision of a permit requires an amendment, except under §305.70 of this title (relating to Municipal Solid Waste Class I Modifications), under §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee), under §305.66 of this title (relating to Corrections of Permits), and under §305.64 of this title (relating to Transfer of Permits). The permittee or an affected person may request an amendment. If the permittee requests an amendment, the application shall be processed under Chapter 281 of this title (relating to Applications Processing). If the permittee requests a modification of a solid waste permit, the application shall be processed under §305.69 of this title. If the permittee requests a modification of a municipal solid waste (MSW) permit, the application shall be processed in accordance with

§305.70 of this title. If an affected person requests an amendment, the request shall be submitted to the executive director for review. If the executive director determines the request is not justified, the executive director will respond within 60 days of submittal of the request, stating the reasons for that determination. The person requesting an amendment may petition the commission for a review of the request and the executive director's recommendation. If the executive director determines that an amendment is justified, the amendment will be processed under subsections (d) and (f) of this section.

(b) Application for amendment. An application for amendment shall include all requested changes to the permit. Information sufficient to review the application shall be submitted in the form and manner and under the procedures specified in Subchapter C of this chapter (relating to Application for Permit). The application shall include a statement describing the reason for the requested changes.

(c) Types of amendments, other than amendments for radioactive material licenses in subsection (i) of this section.

(1) A major amendment is an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a permit.

(2) A minor amendment is an amendment to improve or maintain the permitted quality or method of disposal of waste, or injection of fluid if there is neither a significant increase of the quantity of waste or fluid to be discharged or injected nor a material change in the pattern or place of discharge of injection. A minor amendment includes any other change to a permit issued under this chapter that will not cause or relax a standard or criterion which may result in a potential deterioration of quality of water in the state. A minor amendment may also include, but is not limited to:

(A) except for Texas Pollutant Discharge Elimination System (TPDES) permits, changing an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date; and

(B) except for TPDES permits, requiring more frequent monitoring or reporting by the permittee.

(3) Minor modifications for TPDES permits. The executive director may modify a TPDES permit to make corrections or allowances for changes in the permitted activity listed in this subsection (see also §50.45 of this title (relating to Corrections to Permits)). Notice requirements for a minor modification are in §39.151 of this title (relating to Application for Wastewater Discharge Permit, including Application for the Disposal of Sewage Sludge or Water Treatment Sludge). Minor modifications to TPDES permits may only:

(A) correct typographical errors;

(B) require more frequent monitoring or reporting by the permittee;

(C) change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date;

(D) change the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation before discharge under §305.534 of this title (relating to New Sources and New Dischargers);

(E) delete a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except within permit limits;

(F) when the permit becomes final and effective on or after March 9, 1982, add or change provisions to conform with §§305.125, 305.126, 305.531(1), 305.535(c)(1)(B), and 305.537 of this title (relating to Standard Permit Conditions; Additional Standard Permit Conditions for Waste Discharge Permits; Establishing and Calculating Additional Conditions and Limitations for TPDES Permits; Bypasses from TPDES Permitted Facilities; Minimum Requirements for TPDES Permitted Facilities; and Reporting Requirements for Planned Physical Changes to a Permitted Facility); or

(G) incorporate enforceable conditions of a publicly owned treatment works pretreatment program approved under the procedures in 40 Code of Federal Regulations §403.11, as adopted by §315.1 of this title (relating to General Pretreatment Regulations for Existing and New Sources of Pollution).

(d) Good cause for amendments. If good cause exists, the executive director may initiate and the commission may order a major amendment, minor amendment, modification, or minor modification to a permit and the executive director may request an updated application if necessary. Good cause includes, but is not limited to:

(1) there are material and substantial changes to the permitted facility or activity which justify permit conditions that are different or absent in the existing permit;

(2) information, not available at the time of permit issuance, is received by the executive director, justifying amendment of existing permit conditions;

(3) the standards or regulations on which the permit or a permit condition was based have been changed by statute, through promulgation of new or amended standards or regulations, or by judicial decision after the permit was issued;

(4) an act of God, strike, flood, material shortage, or other event over which the permittee has no control and for which there is no reasonably available alternative may be determined to constitute good cause for amendment of a compliance schedule;

(5) for underground injection wells, a determination that the waste being injected is a hazardous waste as defined under §335.1 of this title (relating to Definitions) either because the definition has been revised, or because a previous determination has been changed; and

(6) for Underground Injection Control (UIC) area permits, any information that cumulative effects on the environment are unacceptable.

(e) Amendment of land disposal facility permit. When a permit for a land disposal facility used to manage hazardous waste is reviewed by the commission under §305.127(1)(B)(iii) of this title (relating to Conditions to be Determined for Individual Permits), the commission shall modify the permit as necessary to assure that the facility continues to comply with currently applicable requirements of this chapter and Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste).

(f) Amendment initiated by the executive director. If the executive director determines to file a petition to amend a permit, notice of the determination stating the grounds therefor and a copy of a proposed amendment draft shall be personally served on or mailed to the permittee at the last address of record with the commission. This notice should be given at least 15 days before a petition is filed with the commission. However, such notice period shall not be jurisdictional.

(g) Amendment initiated permit expiration. The existing permit will remain effective and will not expire until commission action on the application for amendment is final. The commission may extend the term of a permit when taking action on an application for amendment.

(h) Amendment application considered a request for renewal. For applications filed under the Texas Water Code, Chapter 26, an application for a major amendment to a permit may also be considered as an application for a renewal of the permit if so requested by the applicant.

(i) Types of amendments for radioactive material licenses authorized in Chapter 336 of this title (relating to Radioactive Substance Rules).

(1) Major amendments. A major amendment is one which:

(A) authorizes a change in the type or concentration limits of wastes to be received;

(B) authorizes receipt of wastes determined by the executive director not to be authorized in the existing license;

(C) authorizes a change in the licensee, owner or operator of the licensed facility;

(D) authorizes closure and the final closure plan for the disposal site;

(E) transfers the license to the custodial agency;

(F) authorizes enlargement of the licensed area beyond the boundaries of the existing license;

(G) authorizes a change of the method specified in the license for disposal of by-product material as defined in the Texas Radiation Control Act, Texas Health and Safety Code, §401.003(3)(B);

(H) grants an exemption from any provision of Chapter 336 of this title;

(I) authorizes a new technology or new process that requires an engineering review, unless the new technology or new process meets criteria in §305.62(i)(2)(A) of this title;

(J) authorizes a reduction in financial assurance amounts; or

(K) authorizes a change which has a potentially significant effect on the human environment and for which the executive director has prepared a written environmental analysis or has determined that an environmental analysis is required;

(2) Minor amendments. An application for a minor amendment is subject to public notice requirements of Chapter 39 of this title (relating to Public Notice), but is not subject to an opportunity to request a contested case hearing. A minor amendment is one which:

(A) authorizes a modification that is not specifically authorized in an existing condition in a license issued under Chapter 336 of this title and which does not pose a potential detrimental impact on public health and safety, worker safety, or environmental health;

(B) authorizes the addition of previously reviewed production or processing equipment, and where an environmental assessment has been completed; or

(C) any amendment, after completion of a review, the executive director determines is a minor amendment.

(3) Administrative amendments. An application for an administrative amendment is not subject to public notice requirements and is not subject to an opportunity to request a contested case hearing. An administrative amendment is one which:

(A) corrects a clerical or typographical error;

(B) changes the mailing address or other contact information of the licensee;

(C) changes the Radiation Safety Officer, if the person meets the criteria in Chapter 336 of this title;

(D) changes the name of an incorporated licensee that amends its articles of incorporation only to reflect a name change, if updated information is provided by the licensee, provided that the Secretary of State can verify that a change in name alone has occurred;

(E) is a federally-mandated change to a license;

(F) corrects citations in license from rules/statutes;

(G) is necessary to address emergencies;

(H) authorizes minor modifications to existing facilities, consistent with individual license conditions for a specified facility with demonstrated performance, that enhance public health and safety or protection of the environment;

(I) authorizes minor modifications to existing facilities, consistent with individual license conditions for a specified facility with demonstrated performance, to enhance environmental monitoring programs and protection of the environment; or

(J) any amendment, after completion of a review, the executive director determines is an administrative amendment.

(j) This subsection applies only to major amendments to MSW permits.

(1) A full permit application shall be submitted when applying for a major amendment to an MSW permit for the following changes:

(A) an increase in the maximum permitted elevation of a landfill;

(B) a lateral expansion of an MSW facility other than changes to expand the buffer zone as defined in §330.3 of this title (relating to Definitions). Changes to the facility legal description to increase the buffer zone may be processed as a permit modification requiring public notice under §305.70(k) of this title;

(C) any increase in the volumetric waste capacity at a landfill or the daily maximum limit of waste acceptance for a Type V processing facility; and

(D) upgrading of a permitted landfill facility to meet the requirements of 40 Code of Federal Regulations Part 258, including facilities which previously have submitted an application to upgrade.

(2) For all other major amendment applications for MSW facilities, only the portions of the permit and attachments to which changes are being proposed are required to be submitted. The executive director's review and any hearing or proceeding on a major amendment subject to this paragraph shall be limited to the proposed changes, including information requested under paragraph (3) of this subsection. Examples of changes for which less than a full application may be submitted for a major amendment include:

(A) addition of an authorization to accept a new waste stream (e.g., Class 1 industrial waste);

(B) changes in waste acceptance and operating hours outside the hours identified in §330.135 of this title (relating to Facility

Operating Hours), or authorization to accept waste or operate on a day not previously authorized; and

(C) addition of an alternative liner design, in accordance with §330.335 of this title (relating to Alternative Liner Design).

(3) The executive director may request any additional information deemed necessary for the review and processing of the application.

(k) This subsection applies only to temporary authorizations made to existing MSW permits or registrations.

(1) Examples of temporary authorizations include:

(A) the use of an alternate daily cover material on a trial basis to properly evaluate cover effectiveness for odor and vector control;

(B) temporary changes in operating hours to accommodate special community events, or prevent disruption of waste services due to holidays;

(C) temporary changes necessary to address disaster situations; and

(D) temporary changes necessary to prevent the disruption of solid waste management activities.

(2) In order to obtain a temporary authorization, a permittee or registrant shall request a temporary authorization and include in the application a specific description of the activities to be conducted, an explanation of why the authorization is necessary, and how long the authorization is needed.

(3) The executive director may approve a temporary authorization for a term of not more than 180 days, and may reissue the temporary authorization once for an additional 180 days, if circumstances warrant the extension.

(4) The executive director may provide verbal authorization for activities related to disasters as described in paragraph (1)(C) of this subsection. When verbal authorization is provided, the permittee or registrant shall document both the details of the temporary changes and the verbal approval, and provide the documentation to the executive director within three days of the request.

(5) Temporary authorizations for municipal solid waste facilities may include actions that would be considered to be either a major or minor change to a permit or registration. Temporary authorizations apply to changes to an MSW facility or its operation that do not reduce the capability of the facility to protect human health and the environment.

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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For further information, please call: (512) 239-6090

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SUBCHAPTER F. PERMIT CHARACTERISTICS AND CONDITIONS

30 TAC §305.127

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations. The amendment is also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendment implements Senate Bill 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625; and TWC, §27.0513.

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 331. UNDERGROUND INJECTION CONTROL

The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts amended §§331.2, 331.7, 331.13, 331.45, 331.46, 331.82, 331.84 - 331.86, 331.103 - 331.107, and 331.143. The commission adopts new §§331.87, 331.108, 331.109, and 331.220 - 331.225.

Sections 331.2, 331.7, 331.82, 331.84, 331.103 - 331.107, 331.143, and 331.221 are adopted *with changes* to the proposed text and will be republished. Sections 331.13, 331.45, 331.46, 331.85 - 331.87, 331.108, 331.109, 331.220, 331.222 - 331.225 are adopted *without changes* to the proposed text as published in the September 5, 2008, issue of the *Texas Register* (33 TexReg 7477) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The changes adopted to this chapter are part of a larger adoption to revise the commission's radiation control and underground injection control (UIC) rules. The purpose of this rulemaking is to implement the remaining portions of Senate Bill (SB) 1604, 80th Legislature, 2007, its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)), and House Bill (HB) 3838, 80th Legislature, 2007. This rulemaking incorporates new provisions for notice and contested case hearing opportunities related to Production Area Authorizations and UIC Area Permits, financial assurance requirements, and new state fees on gross receipts associated with the radioactive waste disposal. HB 3838 specifically addresses the period between uranium exploration, which is regulated by the Railroad Commission of Texas (RRC), and permitting of injection wells for in situ uranium mining, which is regulated by TCEQ. HB 3838 requires TCEQ to establish a registration program for exploration wells permitted by the RRC that are used for development of the UIC area permit application. In response to a previous petition for rulemaking, the commission has also directed staff to review, seek stakeholder input on, and recommend revision of commission rules related to in situ uranium recovery. The adopted amendments to Chapter 331 implement legislative requirements in SB 1604, establishing requirements for area permits and production area authorizations for in situ recovery of uranium, and HB 3838 establishing registration requirements for wells used in the development of an application for an injection well permit authorizing in situ recovery of uranium and revisions based on the commission-directed staff review of the in situ program and the stakeholder input received.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapters 37, 39, 55, 305, and 336.

SECTION BY SECTION DISCUSSION

The commission adopts the amendment to §331.2, Definitions, by revising nine existing definitions and adding two new definitions. Existing definitions under §331.2(83), (85), and (87) - (112) will be renumbered to paragraphs (84), (86), and (88) - (114), respectively to accommodate the two new definitions.

The commission adopts the amendment to the definition of "Activity" under §331.2(2) to include the construction or operation of an injection or production well for the recovery of minerals, or any other classes of injection wells regulated by the commission. This change is necessary for completeness of the term "activity," which is used throughout the rules that apply to underground injection. With this adopted revision, any references to activities regulated under the TCEQ UIC Program will include construction and operation of injection wells. In response to comments, the commission revised this definition to include construction of a monitor well at a Class III injection well site.

In response to comments, the commission revised the term "Affected person" at §331.2(3) to be consistent with the definition of this term at §55.3, Definitions.

The commission adopts the amendment to the definition of "Area permit" under §331.2(10) to specify that an area permit is for two or more production or monitor wells used in operations associated with Class III well activities. This change is necessary to specify that area permits are issued only for Class III wells and not for other types of injection wells regulated by the commission.

In response to comments, the commission revised the definition of the term "Baseline quality" at §331.2(12) to refer to "injection operations" instead of "injection activities."

The commission adopts the amendment to the definition of "Control parameter" under §331.2(28) to clarify that the term includes physical parameters, such as pH or specific conductivity, and that monitoring of a control parameter includes measurement with instrumentation or laboratory analysis of a groundwater sample from a monitoring well. Control parameters are characteristics of the groundwater that are monitored to detect the movement of mining solutions out of the production zone at a Class III well site. In the past, control parameters were almost always a chemical attribute of the groundwater, such as the concentration of certain metals. Groundwater samples were collected and shipped to a laboratory where the concentrations of control parameters were measured using chemical analytical techniques. Physical characteristics of groundwater, however, also can serve as control parameters. Furthermore, advances in technology now allow measurement of certain parameters in the borehole. The change is necessary to allow physical parameters to be used as control parameters, and to allow for measurement of certain control parameters using suitable instrumentation. In response to comments, the commission revised the definition of this term at §331.2(28) to include the word "field" before the word "instrumentation."

The commission adopts the amendment to the definition of "Excursion" under §331.2(38) to clarify that the determination of movement of mining solutions into a monitor well must be based on chemical analysis or instrument measurement of control parameters from groundwater.

The commission adopts the amendment to the definition of "Mine plan" under §331.2(63) which expands the term to include a schedule of proposed mining activities at a Class III well site. Currently, the definition includes only a map of the permit area. The expanded definition addresses the need for the holder of a Class III well area permit to provide the commission information regarding the sequence and timing of mining, and a schedule for aquifer restoration.

The commission adopts the amendment to the definition of "Monitor well" under §331.2(64) to clarify that the term has the same meaning as "monitoring well" as defined in Texas Water Code (TWC), §27.002. "Monitor well" is used throughout the Chapter 331 rules, and this change would provide consistency between these rules and the TWC with regards to the meaning of the two terms. Also, the commission adopts the amendment to §331.2(64)(A) to clarify that designated monitor wells are those wells for which water quality sampling or measurements

with instrumentation is required. This change is necessary to clarify that water quality sampling may be accomplished by measuring water quality with appropriate instruments in addition to determining water quality through conventional chemical analysis of groundwater samples. In response to comments, the commission revised the definition of this term at §331.2(64) to add the word "field" before the word "instrumentation."

The commission adopts the amendment to the definition of "Production area authorization" under §331.2(82) to clarify that the term refers to an authorization issued under the terms of a Class III well area permit, and that this authorization includes requirements regarding production and aquifer restoration. The current definition does not clearly indicate that this term applies to Class III well operations.

The commission adopts new §331.2(83) which defines "Production well." This term is used in existing rules, and should be defined. The adopted definition clarifies that a production well is one that is used for mineral recovery, not for waste injection. In response to comments, the commission revised the definition of this term at §331.2(83) to indicate it refers to a well used to recover uranium, and that the term including an injection well used to recover uranium.

The commission adopts the amendment to the term "Restored aquifer" under existing §331.2(86) to restrict the term to that portion of an aquifer that is within the boundaries of an area permit, and that the aquifer has been restored in accordance with the requirements of §331.104, Establishment of Baseline and Restoration Values. This change is necessary to clarify that "aquifer restoration" applies to the aquifer within the permit boundary, not the entire aquifer. In response to comments, the commission revised the definition of this term at §331.2(89) to refer to groundwater within a production area rather than to the boundaries of the permit.

The commission adopts new §331.2(87) which defines the term "Registered well." HB 3838 required the commission to establish a registration system for wells that would be used to develop applications for Class III well area permits. This new definition is necessary to define this term that is used in Chapter 331, new Subchapter M, which is discussed further in this section.

The commission adopts the amendment to the definition of "Verifying analysis" under existing §331.2(107) to include measurements with instrumentation. Physical characteristics of groundwater also can serve as control parameters, and advances in technology now allow measurement of certain parameters in the borehole. The change is necessary to allow physical parameters to be used as control parameters, and to allow for measurement of certain control parameters using suitable instrumentation.

The commission adopts new §331.7(g) which addresses term limits of existing Class III well area permits. This change implements the requirements of SB 1604, which amended the TWC by adding TWC, §27.0513. Prior to adoption of SB 1604, Class III well area permits were issued without an expiration date. Under SB 1604, the holder of a Class III area well permit issued prior to September 1, 2007 must submit an application for permit renewal before September 1, 2012. Any permit issued prior to September 1, 2007 will expire on September 1, 2012 if an application for renewal is not submitted to the commission before September 1, 2012, although the holder of the permit would not be relieved of obligations under the permit or applicable rules to restore groundwater or to plug and abandon wells authorized under the permit.

The commission adopts the amendment to §331.13(e) to allow the commission to delegate to the executive director the authority to designate an exempt aquifer if no request for a public hearing is received during the comment period provided in public notice. Delegation of authority by the commission to the executive director in uncontested matters is a common practice for most permitting matters addressed by the commission, including injection well permits that may be associated with an aquifer exemption. Delegation in this matter would reduce the time needed to process requests for aquifer exemptions.

The commission adopts the amendment to §331.45(4)(B) to clarify that a demonstration of mechanical integrity is not necessary for baseline wells. The existing rule currently excludes monitor wells from this requirement, and baseline wells are constructed and operated similarly to monitor wells. Unlike Class III injection and production wells through which mining fluids are being pumped on a near-continuous basis, no injection occurs in baseline and monitor wells, and only native groundwater periodically is pumped from baseline wells.

The commission adopts the amendment to §331.46(e) to remove any apparent implication regarding the approval of the use of materials other than cement for plugging wells. Under the existing language in subsection (e), use of a material other than cement for plugging wells requires approval in writing by the executive director. The existing rule language could be interpreted to mean that approval of the use of other plugging material could be granted by means other than permit modification or amendment. Closure of wells must be in accordance with an approved plugging and abandonment plan. A request to plug a well with material other than cement should be subject to the applicable rules for amendments or modifications, and subject to applicable public notice and public participation requirements.

The commission adopts the amendment to §331.82(a) to clarify that the casing in Class III wells must be cemented from the bottom of the casing to the surface. The revision is necessary as the current rule requires casing be cemented to the surface, which implies casing could be cemented from a point above the bottom of the casing to the surface.

The commission adopts the amendment to §331.82(c)(2) to require a demonstration of mechanical integrity prior to injection or production from a Class III well and to require a pressure test each time a tool is placed in a Class III well when that tool could affect the mechanical integrity of the well. The current rule requires a demonstration of mechanical integrity following construction of the well, but not specifically before the well is put into operation. Although it is unlikely an operator of a Class III well would inject or produce fluids from the well prior to testing it for mechanical integrity, the rule revision clarifies that the mechanical integrity of a well must be demonstrated prior to operation of the well. Under existing §331.82(c), an additional test for mechanical integrity on a well may be required if the well has been repaired. During the life of a well, tools may be placed in and withdrawn from a well for various reasons such as to inspect casing, change or repair pumps or tubing, or to clean well screens. These types of actions can result in damage to the well casing, which could affect the mechanical integrity of a well. The revision allows the executive director to require an operator to pressure test a well whenever tools have been placed into the well that could damage casing and affect the mechanical integrity of a well. In response to comments, the commission has revised §331.82(c)(2) to indicate mechanical integrity shall be

demonstrated both following construction of the well and prior to production or injection.

The commission adopts the amendment to §331.82(c)(2)(A)(i) to clarify that Class III wells can be tested for significant leaks using either a single point resistivity survey or a pressure test. The language in the prior rule is unclear, and suggests that both tests are required. The intent of the rule change is that either method may be used to test for significant leaks in a Class III well.

The commission adopts the amendment to §331.82(c)(2)(A)(ii) to clarify that cement records can be used to demonstrate the absence of significant fluid movement in a Class III well.

The commission adopts the amendment to §331.84(c) to clarify that the fluid level in a Class III well must be measured when such measurement is required in a permit. Section 331.84(c) is also amended to clarify that the required bi-monthly samples must be taken at 15-day intervals so as to ensure the collection of independent samples. The adopted 15-day interval would replace the current two-week interval that resulted in three samples a month for two months in each year. In response to comments, the commission has revised §331.84(c) to refer to a "calendar month" instead of "month."

The commission adopts the amendment to replace requirements in existing §331.85(a) with new reporting requirements in §331.85(a). Under the existing rule, an updated map illustrating all newly constructed or newly discovered wells was required under existing subsection (a). Adopted subsection (a) requires an annual report by January 31st of each year. This report, in addition to the updated map that is presently required, must also include data on any newly constructed or newly discovered wells, and updated cost estimates for well closure and aquifer restoration, an update mine map, an updated mining schedule, and an inventory of all injection, production, and monitor wells. This information has been required in the past, and the adopted rule consolidates it into one report due in January each year, which would assist commission staff in reviewing this information.

The commission adopts §331.85(h) to require an operator of a Class III well facility to maintain at the facility copies of all information required under §331.85. Adopted §331.85(h) assists TCEQ field personnel to more expeditiously determine facility compliance with all applicable rules and permit requirements during an inspection of a facility.

The commission adopts the amendment to §331.86(a) to remove language that implies plugging and abandonment plans may be modified though written approval from the executive director. The intent of this section is that any revision of plugging and abandonment plans must be done through a permit amendment or modification, which would need to be approved by the executive director as part of a permit application process.

The commission adopts new §331.87. Under this new section, field measurement using instrumentation, of groundwater parameters is allowed for monitoring purposes provided the field measurement is at least equivalent in quality and sensitivity as that of a chemical analysis. This new section is necessary to address advancements in technology that allow field measurements for certain groundwater quality parameters.

The commission adopts the amendment to §331.103(a) to clarify that the placement of monitor wells to meet the spacing requirements of subsection (a) may be based on information from exploration drilling, as updated with information from production drilling. It is the commission's contention that information from these types of wells is sufficient for the determination of monitor well placement to meet the spacing requirements in subsection (a). As a further point of clarification, monitor wells must meet the spacing requirements in §331.103(a) with respect to the outermost injection and production wells within the production area, not with respect to injection and production wells in the interior of the productions area. In response to comment, the commission revised this subsection to refer to the distance between adjacent mine area monitor wells.

The commission adopts the amendment to §331.104, Establishment of Baseline and Restoration Values, to address both the establishment of baseline groundwater values for restoration and the establishment of parameters for excursion detection.

The commission adopts the amendment to §331.104(a) to require that groundwater samples from monitor and baseline wells be both independent and representative, as both of these characteristics are necessary for valid statistical analysis. A statistically-independent sample is required so that one sampling event will not affect the results or quality of a subsequent sampling event from the same well.

The commission adopts an amendment to re-designate §331.104(b) as subsection (d) with no other changes, and would remove subsection (c), as discussed elsewhere in this section. Under adopted §331.104(b) all baseline wells must be completed within the production zone. Under existing §331.104(d), baseline water quality values for determination of restoration could be based on analytical measurements of groundwater samples from either the baseline wells completed in the production zone within the production area, or from monitor wells completed in the production zone but outside of the production area (that is, outside of the zone of uranium mineralization that is to be mined using in situ techniques). It is the commission's determination that aquifer restoration goals should be based on data from groundwater samples collected from the baseline wells only, as these are the wells that are completed in the production zone within the area of mineralization. Information from wells outside of the production area does not provide pre-mining information on the quality of groundwater within the production zone of the production area. Adopted §331.104(b) would also require the owner or operator to propose a suite of groundwater parameters for restoration.

In response to comments, the commission has made several revisions to §331.104(b). Under the proposed rule, an owner or operator was required to sample all baseline wells and analyze the samples for a suite of parameters determined by the owner or operator and approved by the executive director. This subsection has been revised to require these samples be analyzed for a suite of 26 parameters, with allowance for the owner or operator to add or remove parameters to this list (except for uranium and radium-226) with executive director approval. Also, §331.104(b)(3) was revised to refer to groundwater production zone. Lastly, §331.104(b)(4) was revised to refer to "any other applicable information provided by the applicant or permittee."

The commission adopts §331.104(c), under which a minimum of five baseline wells or one baseline well for every four acres of production area, whichever is greater, are required. Under existing §331.104(a)(2), which would be removed under the adopted amendment, the production area baseline value must be based on samples from at least five wells completed in the production zone. Although this current rule allows for more than five base-

line wells, owners and operators typically propose only five baseline wells. Because a production area may range in size from a few acres to several tens of acres, five wells may or may not provide sufficient characterization of the groundwater for establishment of restoration goals. The adopted amendment ensures a minimum number of baseline wells based on acreage of a production area. Adopted §331.104(c) also requires all baseline wells to be sampled and the results of analyses of those samples be used to determine the suite of restoration parameters.

The commission adopts the amendment to remove existing §331.104(c), under which an owner or operator is required to determine control parameters upper limits from baseline water quality values. It is the commission's intention that control parameter upper limits should be based on information from monitor wells, not baseline wells. Control parameter upper limits are the values of certain parameters that are monitored in the monitor wells that encircle a production area. The purpose of this monitoring is to determine if mining fluids have migrated from the production area by detection of changes in water quality in the monitor wells. In order to do so, the water quality in the monitor wells must be established. Water quality in the monitor wells should be established from information from the monitor wells, which are located outside the zone of mineralization, not from baseline wells, which are completed within the zone of mineralization.

As discussed previously, existing §331.104(b) is being relettered to §331.104(d) under this rulemaking. No other changes to §331.104(d) are adopted. Existing §331.104(d) is deleted so that the requirements for establishing restoration table values can be placed in §331.107, Restoration.

The commission adopts §331.104(e) to require operators to determine control parameters for production and nonproduction wells.

In response to comments, the commission is revising §331.104(e) to remove paragraph (1). Under this paragraph, an owner or operator could determine the presence of an excursion by comparing monitoring results to the mean pre-mining concentration when that mean was estimated using at least 30 measurements for a particular monitoring parameter. Upon further review, the commission realizes that §331.104(b)(1) was incorrectly worded. Paragraph (1) has been removed and paragraph (2), which requires excursions be determined using a statistical method proposed by the owner or operator and approved by the executive director, has been combined with §331.104(e). Additionally, the commission realized that §331.104(e) did not include a requirement that control parameter upper limits for production zone monitor wells shall be determined from pre-mining groundwater sample data from production zone monitor wells, and control parameter upper limits for nonproduction zone monitor wells shall be determined from pre-mining groundwater sample data from nonproduction zone monitor wells. Section 331.104(e) was revised to include these requirements. Lastly, the commission revised §331.104(e) to replace the term "statistical hypothesis test" with the term "statistical method."

The commission adopts the amendment to §331.104(f) to address requirements for groundwater restoration in the case where an owner or operator has requested to re-enter a previously-mined area for additional mining. Under this subsection, an owner or operator would be required to meet the groundwater restoration goals previously established for the production area to be re-entered. It is the commission's intention that when a previously mined area is to be re-entered for additional in situ recovery of uranium, the groundwater restoration goals should be those established prior to in situ mining operations, or as modified by any amendments in accordance with §331.104, Establishment of Baseline and Restoration Values and Control Parameters for Excursion Detection and §331.107, Restoration.

The commission adopts the amendment to §331.105(1) - (4) to refer to Routine Monitoring, Monitoring Duration, Verifying Analysis, and Excursion Monitoring, respectively, instead of Routine Sampling, Duration of Monitoring Program, Verifying Analysis, and Sampling Frequency when mining solutions are present, respectively. Section 331.105(1), (3), and (4) is also amended to clarify that monitoring includes instrument measurements. Additionally, adopted §331.105(3) clarifies that a verifying analysis must be done if the upper control limit is equaled or exceeded in designated monitor wells. Lastly, adopted §331.105(1) and (4) requires monitoring results for control parameters to be completed by the second working day after a sample is collected. In response to comments, the word "field" was added before the word "instrumentation" in §331.105(1).

The commission adopts amendments to §331.106, Remedial Action for Excursion, to refer to the existence of an excursion rather than that mining solutions are present. By making this change, the language in §331.106 would refer to a term, in this case, "excursion" that is defined in previous §331.2, Definitions, rather than the undefined phrase, "that mining solutions are present."

The commission adopts the amendment to §331.106(2) to require, in addition to other parameters identified in this paragraph, analysis for uranium and radium-226 for a verifying analysis. These two parameters are mobilized into the groundwater during in situ mining. Their presence in a verifying analysis of a groundwater sample from a monitor well would provide evidence that an indication of an excursion was associated with the movement of a mining solution from the production area to a monitor well. The commission revised §331.106(2)(A) to remove the phrase "values consistent with."

The commission adopts the amendment to §331.107(a) to require that groundwater in the production zone of the production area must be restored when mining is complete, to require restoration be achieved for all parameters specified in the suite of restoration parameters, and to specify that restoration may be demonstrated by either of two methods. The first method is a direct comparison between the measurement from a groundwater sample for a restoration parameter and the mean for that parameter as determined from all measurements from groundwater samples collected from baseline wells prior to mining activities. The second method is a statistical test proposed by the owner or operator and approved by the executive director. As part of a permit or production area authorization application, the applicant would be required to provide a sufficient explanation for the use of alternative statistical methodology for determining restoration table values. These proposed methods are similar to those for excursion detection and provide the owner or operator two statistical methods for determining if restoration has been achieved. The commission revised §331.107(a) to indicate each Class III injection well permit or production area authorization shall contain a description of the method for determining that groundwater in the production zone within the production area has been restored, rather that requiring it upon issuance or renewal, as production area authorizations are not subject to renewal.

The commission adopts the amendment to §331.107(b) and (c) to specify that aquifer restoration applies to a production area, not the entire permitted area. The commission revised §331.107(b) to require reestablishment of groundwater quality in the affected permit or production area aquifers in accordance with the requirements of §331.107(a), rather than to levels consistent with the values listed in the restoration table for that permit or production area.

The commission adopts the amendment to §331.107(d) to identify the information that must be submitted with the required semi-annual restoration progress report. This information includes analytical data, graphs of analytical data for each restoration parameter, the volume of fluids injected and produced, the volume of fluids disposed, water level measurements, a potentiometric map for each production area, and a summary of progress achieved towards aquifer restoration. In response to comments, the requirement for submission of a hydrograph for each well was removed and the remaining subsections renumbered.

The commission adopts §331.107(e) under which stability sampling is required once restoration has been demonstrated. Section 331.107(e) would be re-designated as subsection (f), and would be amended to extend the period for stability sampling from 180 days to one year. This extended period for stability sampling would allow the owner or operator to determine if water quality is affected by seasonal changes.

The commission adopts an amendment to re-designate §331.107(f) as subsection (g), and amend the subsection to require a permittee to notify the executive director of a determination to cease restoration operations if the permittee decided to request amendment of the restoration values. Under §331.107(f), if a permittee is unsuccessful in restoring the groundwater in a production zone within a production area, he or she may cease restoration operations without notifying the executive director, and request the restoration values to be raised, and the executive director can approve such an amendment after considering the factors identified in §331.107(g)(1). Under the adopted rule, written permission from the executive director would be required for a permittee to cease restoration activities. The permittee would also be required to submit the request for amendment of restoration values within 120 days of receipt of authorization from the executive director to cease restoration operations. These adopted changes allow the executive director to evaluate the permittee's decision to cease restoration operations, and would require the permittee to submit a request for amendment in a timely manner.

The commission adopts the amendment to §331.107(g)(3) to require a permittee to conduct stability sampling for a period of two years (instead of one year) if restoration values are amended. The inability to restore groundwater to the initial restoration values is an indication that in situ mining may have altered the chemistry of the groundwater within the production zone of a production area, and that this change has resulted in making the affected groundwater resistant to a reduction in the concentrations of parameters in the groundwater. As this affected groundwater moves through natural groundwater flow, it would migrate into areas adjacent to the production zone that are unaffected by in situ mining. Once in these areas, it is the commission's contention that chemically reducing conditions in these areas would immobilize these parameters, decreasing the risk of off-site contamination. However, because there may be some increased risk of off-site contamination because original restoration table values are not achieved in such a case, the commission is requiring a stability period of two years when restoration values are amended. Under the adopted rule, the commission would allow a permittee to provide a demonstration that a period of less than two years is appropriate. The commission revised §331.107(g) to indicate that an amendment to a restoration table is contingent upon the owner or operator having made an appropriate effort to achieve restoration in accordance with the requirements of §331.107(a), rather than to levels consistent with values listed in the restoration table for a production area.

The commission adopts the amendment to §331.107(g)(4) to require a permittee to resume restoration efforts if an amendment to the restoration values is not granted.

The commission adopts new §331.108, Independent Third-Party Experts. Under the adopted revision to §55.201, Requests for Reconsideration or Contested Case Hearing, an application for a production area authorization is not subject to a contested case hearing when the application addresses the initial establishment of monitor wells, and the executive director uses the recommendations of an independent, third-party expert. Under SB 1604, the TWC was amended by adding TWC, §27.0513(e), under which the requirements for use of an independent third-party expert are identified.

The commission adopts new §331.108(a) under which the executive director may use the recommendations of an independent third-party expert if requested by an applicant. Under this adopted subsection, the executive director would use the recommendations from an expert provided the expert meets the qualifications identified in §331.108(b), the applicant pays for the cost of the work of the expert, the applicant is not involved in the selection of the expert or the direction of the expert's work, the expert's recommendations meet all applicable statutory and regulatory requirements for the initial establishment of monitor wells, and, in the opinion of the executive director, the expert's recommendations are necessary for the protection of underground sources of drinking water.

The commission adopts new §331.108(b) to require that an expert be either a licensed professional engineer or a licensed professional geoscientist who currently is authorized to practice engineering or geology, respectively, in Texas. In determining whether to designate a person as an expert, the executive director would also consider the person's experience in geology and hydrogeology, experience with in situ mining of uranium, current and previous work experience with the applicant, current and previous work experience with person's or entities that are in opposition to in situ uranium mining, and any other factors the executive director considers to be relevant.

The commission adopts new §331.108(c), under which the executive director would not designate an expert unless a written request from the applicant is received. The commission intends that the choice to use an expert lies with the applicant, who would have to pay the cost of the expert.

The commission adopts new §331.108(d). Under this new subsection, an application for a production area authorization for the initial establishment of monitor wells is not subject to opportunity for a hearing if the executive director uses the recommendations of an expert.

Under adopted new §331.108(e), if the executive director does not use the recommendations of an expert, the application is subject to opportunity for a contested case hearing.

The commission adopts new §331.108(f), under which a person may request to be considered an expert by submitting information to the executive director to demonstrate qualifications under this section.

The commission adopts new §331.108(g), to provide that the use of an expert does not constitute the applicant's selection of the expert.

The commission adopts new §331.108(h), to provide that an expert cannot be an employee of the commission.

The commission adopts new §331.109(a), under which financial assurance for aquifer restoration must be based on cost estimates provided under §331.143, Cost Estimates for Plugging and Abandonment and Aquifer Restoration.

The commission adopts new §331.109(b), under which financial assurance for plugging and abandonment of wells must be based upon cost estimates provided under §331.143.

The commission adopts the amendment to §331.143(a) to include a cost estimate for aquifer restoration for each production area authorization. Existing §331.143(a) requires a cost estimate for plugging and abandonment only. Although financial assurance for aquifer restoration is held under a radioactive materials license, cost estimates for aquifer restoration are reviewed by the UIC program staff. This change would formalize an intra-agency arrangement (and previous interagency arrangement when the licensing program was at the Department of State Health Services) to clearly indicate that responsibility for review of cost estimates for aquifer restoration lies with the UIC program and establish that an applicant must submit the cost estimates for aquifer restoration of a permit or production area as part of the application. Also, the requirement that plugging and abandonment cost estimates, as well as aquifer restoration cost estimates, must equal the maximum cost of each of these items at the point in a facility's operating life has been revised to require that these estimates take into account all costs related to plugging and abandonment and aquifer restoration, respectively. This requirement has been moved to adopted subsection (b). This change is necessary to more clearly state the requirements for cost estimates for both plugging and abandonment as well as for aquifer restoration.

The commission adopts the replacement of existing §331.143(b) with adopted subsection (b) that would require that both the cost estimates for plugging and abandonment and for aquifer restoration must be included. The current rule only refers to plugging and abandonment cost estimates.

The commission adopts an amendment to re-designate §331.143(b) to subsection (c). Adopted subsection (c) would refer to cost estimates both for plugging and abandonment and for aquifer restoration.

The commission adopts §331.143(d), under which the owner or operator of a Class III well facility would be required, on or before December 31st of each year, to review and update as necessary the cost estimates required under §331.143(a). Amended §331.143(d) also requires the owner or operator to submit these updates to the executive director no later than January 31st of each year. Although these estimates currently are submitted to the executive director, there is no specific date on which they must be submitted. The adopted rule establishes a specific date for submission of this information. In response to comments, the commission has revised §331.143(d) to include the requirement to review and update as necessary the cost estimate for aquifer restoration.

The adopted rules amend Chapter 331 by adding new Subchapter M: Requirements for Existing Wells Used for Development of Class III UIC Well Applications. This new subchapter implements the requirements of HB 3838. Under this legislation, the TWC was amended to add TWC, §27.023 and §27.024, and amended TWC, §27.073. These new statutory sections establish requirements for the registration of wells that are used for the development of a Class III injection well permit application. These wells, which initially are drilled under an exploration permit issued by the RRC, are not plugged because they can be used to develop an application for a Class III injection well area permit. Currently, these wells continue to be regulated by the RRC unless they are included in an application for a Class III injection well area permit. The adopted new subchapter would establish regulatory requirements for these wells, including development of a registration to document their existence. Ultimately, these wells would either be permitted under a Class III injection well area permit or would be plugged and abandoned.

The commission adopts new §331.220, Applicability, to establish that the requirements of new subchapter M apply to wells that are used to obtain information to develop an application for a Class III injection well area permit for in situ mining of uranium.

Under the requirements of HB 3838, any wells that are used for the development of an application for a Class III injection well area permit must be registered with the TCEQ. The commission adopts new §331.221(a) to require all existing wells used to develop a Class III injection well permit application be registered with the TCEQ within 30 days of completion and prior to submission of the application, and would require wells drilled after submission of the application to be registered within 30 days of well completion. In response to comments, the commission has revised §331.221(a) to specify that these wells must be registered with the TCEQ, and registration must be within 30 days of completion of casing and well development.

The commission adopts new §331.221(b), under which the type of information required for well registration is identified. This information includes a unique well designation, well location, well depth, well construction information, well operator, name of person who owns land on which the well is located, water level data, and if applicable, the groundwater conservation district in which the well is located.

The commission adopts new §331.221(c), under which the owner or operator would be required to maintain mechanical integrity of any registered well, as defined in adopted §331.2(87). This adopted subsection also requires that any registered well not cause or allow movement of fluid that would result in groundwater pollution. Also, this adopted subsection prohibits injection in a registered well.

The commission adopts new §331.221(d), under which an owner or operator is required to plug and abandon any registered well that is not subsequently authorized under a Class III injection well area permit. In response to comment, the commission revised §331.221(d) to require submission of a certificate of plugging and abandonment of registered wells not covered under a Class III injection well area permit to the executive director within 30 days. The commission further revised this subsection to allow a permittee to submit a request to the executive director for an extension of time for completion of plugging and abandonment required under this subsection. Any request for an extension un-

der this subsection must provide reasonable justification for the extension.

The commission adopts new §331.221(e), under which registered wells are not subject to the commission's permitting, public notice, or hearing requirements. Under TWC, §27.023(b), registered wells are excluded from these requirements, unless they are converted to a well authorized under a Class III injection well permit under adopted new §331.222, Conversion of Registered Wells to Class III Wells.

The commission adopts new §331.222, Conversion of Registered Wells to Class III Wells, which addresses changing the status of a registered well. Under this adopted new section, once a registered well is authorized under a Class III injection well area permit, the registration status of the well ceases and the well is subject to all applicable commission rules, including those regarding permitting, public notice, and hearing requests.

The commission adopts new §331.223(a), under which an owner or operator is required to provide certain information on registered wells to a groundwater conservation district if the proposed permit boundary is within the district's area. The owner or operator must provide to the district information regarding wells that are not in the public record when such wells are encountered, locations of all wells that are recorded in the public record and within the proposed permit area, pre-mining water quality data collected from registered wells, the amount of water produced monthly from each registered well, and a record of strata encountered from each registered well, except for information that is confidential.

The commission adopts new §331.223(b), under which an owner or operator of a registered well is required to provide the information required under adopted new §331.223(a) to the groundwater conservation district within 90 days of receipt of the final information for that well.

The commission adopts new §331.224, Record of Strata, under which the executive director may require a person who receives a Class III injection well area permit or a production area authorization to maintain and provide accurate records regarding the character of strata encountered in drilling an injection well, monitor well, or production well.

The commission adopts new §331.225, Geophysical or Drilling Log, under which the commission may require an applicant for a Class III injection well permit to provide a geophysical or drilling log of an existing well.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission adopts the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of "a major environmental rule" as defined in the statute. "A major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking action implements legislative requirements in SB 1604, establishing requirements for area permits and production area authorizations for in situ recovery of uranium, and HB 3838 establishing registration requirements for wells used in the development of an application for an injection well permit authorizing in situ recovery of uranium. The rulemaking is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the amendments do not alter in a material way the existing requirements for injection wells used for in situ recovery of uranium. The rulemaking action also amends technical requirements for radioactive materials licenses and establishes fees for applications and waste disposal in Chapter 336; amends license application requirements and permit term limits in Chapter 305; amends financial assurance requirements in Chapter 37; amends public notice requirements in Chapter 39; and amends public participation requirements in Chapter 55.

Furthermore, the rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The commission's UIC program is authorized by the United States Environmental Protection Agency (EPA) and the adopted changes for injection well permits, production area authorizations, and aquifer exemptions do not exceed a standard of federal law or requirement of a delegation agreement. There are no federal standards for production area authorizations or for registrations for wells used in the development of a permit application. The adopted rules are compatible with federal law.

The adopted rules do not exceed a requirement of state law. TWC, Chapter 27, the Injection Well Act, establishes requirements for the commission's UIC program. SB 1604 amended the Injection Well Act to establish requirements for area permits used for in situ recovery of uranium, and production area authorizations. HB 3838 amended the Injection Well Act to require the registration of wells used in the development of a permit application. The purpose of the rulemaking is to implement requirements consistent with TWC, Chapter 27, as amended by SB 1604 and HB 3838.

The adopted rules are compatible with the requirements of a delegation agreement or contract between the state and an agency of the federal government. The commission's UIC program is authorized by the EPA, and the adopted rules are compatible with the state's delegation of the UIC program.

The adopted rules are adopted under specific laws. TWC, Chapter 27, establishes requirements for the commission's UIC program and TWC, §27.019, requires the commission to adopt rules reasonably required to implement the Injection Well Act, and TWC, §27.0513 authorizes the commission to adopt rules to establish requirements for production area authorizations.

The commission invited public comments regarding the draft regulatory impact analysis during the public comment period. No

comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment is that implementation of these adopted rules would not constitute a taking of real property.

The purpose of these rules is to implement legislative requirements in SB 1604, establishing requirements for area permits and production area authorizations for in situ recovery of uranium, and HB 3838 establishing registration requirements for wells used in the development of an application for an injection well permit authorizing in situ recovery of uranium. The adopted rule changes in Chapter 331 would substantially advance this purpose by amending the requirements applicable to in situ uranium mining.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The adopted rules for injection wells, permits, production area authorizations and well registrations do not affect real property. The adopted rules apply only to those who use or apply for authorization of injection wells for in situ recovery of uranium. Significant requirements for wells used for in situ recovery of uranium apply in the absence of these adopted rules, including statutory requirements from SB 1604 and HB 3838. Therefore, the adopted rules do not affect real property in a manner that is different than would have been affected without these revisions.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on September 16, 2008. The public comment period closed on October 6, 2008. The commission received comments from Armstrong Ranch (Armstrong), Blackburn Carter, P.C. (BC), the Coastal Bend Group of the Sierra Club (CBGSC), the Goliad County Groundwater Conservation District (GCGCD), the Kleberg County Citizen Review Board (KCCRB), Mesteña Uranium, LLC (Mesteña), Lone Star Chapter of the Sierra Club (Sierra Club), South Texas Opposes Pollution, Inc. (STOP), Texas Mining and Reclamation Association (TMRA), Kelly Hart and Hallman, L.P. on behalf of Uranium Energy Corp and AREVA (KHH), URI, Inc. (URI), and two individuals.

RESPONSE TO COMMENTS

General Comments

Armstrong commented that landowners should also have a say on setting priorities for uses of groundwater in Texas.

The commission in general agrees with this statement, and notes that with the exception of certain restrictions that may be imposed by a local Groundwater Conservation District, landowners, especially those who own surface, oil and gas, and mineral rights on their property essentially have complete control of the use of groundwater beneath that property. No changes were made in response to this comment.

Several persons and entities commented on the use of "valid" statistical methods. GCGCD and STOP both recommended the proposed rules be revised to require valid statistical tests to be performed to remove outliers and to determine the distribution of the data, using either the mean or median. An individual commented the proposed rules do not require the use of even the most basic valid statistical methods, and that proposed revised §331.104 must be significantly revised further to assure valid sampling in obtaining baseline wells. CBGSC recommended that a valid statistical analysis of sample data requires that samples be obtained on a systematic grid across the entire mining area. Sierra Club and STOP commented that the proposed rules lack clarity regarding how to determine a statistically valid number of monitor wells in the production zone or in strata above or below it, and recommended the proposed rules be revised to require a statistically valid number of monitor wells, and valid and accurate statistical testing of monitor well baseline. STOP recommended that a valid statistical test be performed on the water quality data for each well to remove outliers. An individual commented that valid statistical methods should be required.

The commission agrees that any statistical test used to make inferences about populations should be, in the general sense, valid. To the commission, this would include the following considerations: 1) In the case of parametric tests, the data used in the test is appropriate for the distributional characteristics of the data; 2) In the case of the use of a parametric test, the sample data are evaluated to make inferences about the distributional characteristics of the population from which the sample data were obtained; 3) In the case of statistical estimation, the statistical estimator is unbiased (or at least the degree of bias is acceptable, such as in the case of the estimator s, which provides an estimate of σ, the true standard deviation of a distribution), and to the extent possible, the estimator has minimum associated variance; 4) In the case where a statistical hypothesis test is used to make inferences about population parameters, the sampling distribution of the statistic is known (or can be reasonably estimated) under the null hypothesis and under any alternative hypotheses of interest; 5) For a statistical hypothesis test, the critical value of the statistic is chosen such that the test has an acceptable type I error rate; and 6) For a statistical hypothesis test, to the extent possible, the associated power of the statistic is sufficient to detect any desired effect size, thereby reducing the type II error rate to an acceptable level.

It is these factors that the commission, in accordance with proposed revised §331.104(a) and §331.107(a)(1)(B), will take into consideration in evaluating any proposed statistical method proposed by an applicant. No changes were made in response to this comment.

During stakeholder discussion, the term "statistical hypothesis test" in proposed §331.104(e) was indicated to be vague, and it was noted the term is not defined in commission rules. It was suggested the term be replaced with "statistical method."

The commission considers the term "statistical hypothesis test" to be a well-defined and understood term in statistics. However, to avoid potential confusion or vagueness, the final rule is revised

to replace the term "statistical hypothesis test" with "statistical method."

An individual expressed concern regarding the rights of surface owners who do not also own the mineral rights on their property, specifically regarding possible contamination of her private water wells by in situ uranium mining. An individual questioned why the commission did not require mining companies to first prove they would not contaminate groundwater. Lastly, the individual expressed the opinion that mining companies know they cannot restore groundwater using technology presently available.

The commission recognizes that conflicts may arise when the oil and gas or mineral rights beneath a property have been severed from the surface rights of that property, and that the extraction of oil and gas or minerals potentially may result in contamination. Although the commission has no authority to restrict or prohibit the development of minerals based on such potential conflicts, the commission does have the authority to require that in situ mining is done in accordance with all the applicable requirements of Chapter 331. These requirements are designed to prevent contamination of underground sources of drinking water (USDW), as defined at §331.2(105), and as is required under §331.5, Prevention of Pollution, and in general, to protect groundwater in the vicinity of in situ mining operations. No changes were made in response to this comment.

BC stated that borings and tests necessary for uranium exploration may disturb the aquifer at the outset, and that an accurate groundwater baseline should be established BEFORE (BC's emphasis) exploration begins, and added to as the process continues. KCCRB commented that the proposed rules should include a provision that requires background groundwater quality to be determined in exploration areas. BC further commented that baseline should include "a geologic evaluation that incorporates all elements involved with the baseline framework, including but not limited to faults, pinchouts, and other complexities." BC also commented that all water wells in and around the exploration area should be located and evaluated at the outset. Lastly, BC commented that the public and appropriate groundwater conservation districts should be given notice and opportunity to witness testing and split sampling, and that the public has had enough of the industry's "trust me" (BC's emphasis) attitude.

The commission notes that exploration wells are regulated by the RRC; the TCEQ has no authority to adopt rules that apply to the drilling of exploration wells or the sampling and sharing of data from existing water wells to determine pre-exploration groundwater quality. The commission also notes that HB 3837, passed during the 80th Legislature, 2007, amended Natural Resource Code, Chapter 131, to add Subchapter I. This new subchapter included new §131.357, under which a person issued an exploration permit by the RRC is required to provide pre-exploration groundwater quality information to a groundwater conservation district if the exploration area identified in the permit is within a groundwater conservation district's jurisdiction. Rules to implement these requirements will be adopted and enforced by the RRC. No changes were made in response to this comment.

BC commented that the network of baseline wells established at the beginning of exploration should include several wells outside of the ore body itself; in part to examine the aquifer background water quality and in part to serve as a first alert for unexpected consequences of the mining and restoration process.

The commission again emphasizes that the TCEQ does not regulate exploration wells in any manner, and that these wells are under the jurisdiction of the RRC. The commenter appears to be referring to monitor wells required under a Class III injection well area permit and any production area authorizations. If this is the case, the commission notes that requirements for these types of wells are addressed in §331.103, Production Area Monitor Wells. No changes were made in response to this comment.

BC commented that inasmuch as the rules, as proposed, do not discuss exploration, it is difficult to cite a rule area; and that they simply urge the commission to consider the potential for disturbance created by concentrated borings, and to add notice and baseline requirements. GCGCD emphasized the importance of determining pre-mining groundwater quality unaffected by exploration activities.

The commission again notes that regulation of exploration wells is under the jurisdiction of the RRC; the TCEQ has no authority to adopt rules that apply to exploration wells. However, the TCEQ does have jurisdiction over Class III injection wells, which are used for in situ mining. In accordance with the previously applicable and newly adopted requirements of §331.104(a), three separate baselines (pre-mining groundwater quality) must be determined for Class III injection well sites: the mine area baseline, the production area baseline, and nonproduction area baselines. The respective baselines for the mine area and nonproduction area are necessary for the detection of excursions of mining fluids, and the production area baseline is necessary for aquifer restoration. The validity of any of these three baselines depends on each baseline being determined from analysis of groundwater samples that are representative of each respective zone.

Regarding the establishment of baseline values for aquifer restoration, the commission can, if relevant, take into consideration any possible effects exploration drilling may have on water quality in an area. However, the commission is unaware of any evidence that the drilling of shallow exploration wells, such as those drilled for exploration of uranium in South Texas, will disturb an aquifer in a manner that affects the concentrations of chemical species in the groundwater. These wells typically are drilled to depths of a few hundred feet using standard mud-rotary drilling systems. Certain intervals may be cored using a core barrel. Drilling fluids are a mixture of native groundwater and bentonite clay, which is chemically inert. Wells are mechanically logged using conventional geophysical logging tools to measure the natural gamma ray radiation, spontaneous potential, and resistivity of the geologic units penetrated by the borehole. Groundwater quality information in permit applications generally indicate that groundwater quality within zones of uranium mineralization is not significantly different from groundwater quality outside of uranium mineralization with the exception of uranium and radium-226, even in areas where numerous exploration wells were drilled. Within mineralized zones, measurements of uranium concentrations and radium-226 radioactivity are significantly higher than measurements for these constituents in groundwater outside of the mineralized zone. In that uranium obviously occurs in these mineralized zones, and given that radium-226 is one of the products of radioactive decay ("daughter products") of uranium-238, their presence in the groundwater within the mineralized zones is to be expected. These data suggest exploration drilling does not affect groundwater quality. No changes were made in response to this comment.

BC commented that baseline well density and aquifer evaluation elements should be specified at the outset, and that the aquifer characterization should consider the aquifer well beyond the ore

body in order to provide an accurate and continuing evaluation of the effects of exploration, mining, and restoration activities.

The commission does not agree with this comment. Baseline well density currently is specified in §331.103, both for production zone and nonproduction zone monitor wells. As discussed in a previous response, determination of groundwater quality is required for the production zone within the production area, the production zone outside of the production area, and for nonproduction zones within the production area. Establishment of these baselines is for detection of excursions of mining fluids from the production zone of the production area, and for aquifer restoration. Also, as discussed in a previous comment, the commission may consider, if relevant, possible effects of exploration activity, but presently is unaware of any evidence that exploration drilling affects groundwater quality to any significant degree. No changes were made in response to this comment.

BC commented that aquifer characterization should include tests to evaluate the effects of in situ mining before it begins, and that these tests should include, but not be limited to, pump tests, modeling, water level data, and potentiometric maps, and that "the effect of mine production should be predicted in a way that allows objective third-party, that is public information, testing, as the process continues." Lastly, BC commented that copies of required reports and studies should be made available to the groundwater conservation district, and thus, the public.

The commission is unsure of the intent of the comment "evaluate the effects of in situ mining before it begins," but assumes the commenter means the site proposed for in situ mining should be properly characterized with regards to geology and hydrogeology. All applications for Class III injection well area applications and applications for production area authorizations are reviewed for compliance with applicable rules in Chapter 331. Prior to recommendation for issuance of a Class III injection well area permit, the commission considers the items in 30 TAC §331.122, Class III Wells. These items include geologic and hydrogeologic information, and a proposed formation testing program. Within a designated permit area, there may be several production areas, and the results of formation testing for each production area must be submitted with the respective production area authorization application. Unless designated as confidential, all information submitted to the TCEQ is a matter of public record and available to anyone who wishes to review it under the Public Information Act. With regards to confidentiality, the commission discourages the submission of confidential material to the agency. The confidentiality of any material submitted to the agency may be challenged. If information designated as confidential is requested, the matter is referred to the Attorney General of Texas for a determination of confidentiality. No changes were made in response to this comment.

BC commented that the concepts of baseline (and wells) for restoration purposes and monitoring for contaminant migration detection are not clearly separated and described, and noted as an example that the language in §§331.103 - 331.107 seems to mix the concepts and goals of the two. BC suggested these sections of the proposed rules could benefit from clearly stated purposes, goals, and standards for baseline and monitoring concepts, thereby allowing citizens to determine whether the mine was in violation of its permit by reviewing monitoring reporting and related self-enforcement.

The commission strives to provide rules that are clear and concise, and acknowledges that the commenter considers the proposed rules in §§331.103 - 331.107 to not meet this standard. However, without comments that identify BC's specific concerns regarding these proposed rules or the suggestion of alternative rule language, the commission is unable to revise these rules to address those specific concerns. No changes were made in response to this comment.

BC commented that an aquifer exemption should be granted only after a comprehensive demonstration that the hydrogeologic situation meets the EPA standard for an exemption, and that this demonstration must show that the proposed exempted aquifer portion is properly isolated and will remain so during and after completion of exploration, mining, and aquifer restoration. BC further commented that simply drawing an exemption boundary to avoid water wells is hardly the substance of an appropriate proof. BC also commented that the public should be able to review all exploration data, aquifer tests, means of isolation, aquifer behavior computer modeling (in a manner replicable to the public), and other pertinent information as it is developed for each stage of the permit process.

The TCEQ's rules regarding criteria for an aquifer exemption are essentially identical to the criteria in the federal rules for aquifer exemptions; the only difference being the state rule includes an allowance for removal of the exemption. Any revisions to the federal criteria are the purview of the EPA. The commission notes that an aquifer exemption is not required for exploratory drilling. All information submitted with a request for an aquifer exemption is available to the public for review, duplication, and comment, and the commission is adopting formal public notice requirements for an aquifer exemption under Chapter 39. No changes were made in response to this comment.

BC commented that if an application is part of a large contemplated effort, like vertical or lateral expansion, the entire project should be evaluated at the outset, as the public has had enough of the proverbial "camel's nose under the tent" approach to stepwise permitting.

The commission does not agree with this comment. For Class III injection wells, the commission has the authority to make recommendations on issue of Class III injection well permits and production area authorizations based on the type and sufficiency (with respect to applicable regulatory requirements) of information submitted in the respective applications. However, the commission has no authority to require an applicant to address all possible scenarios regarding future activities at a site. First, the applicant may not know what future activities it may decide to pursue, and second, the commission cannot verify an applicant has or is contemplating any such future plans. The commission notes that applications for each of the required authorizations needed to conduct in situ mining in Texas (Class III injection well area permit, aquifer exemption, production area authorizations, Class III injection well, and radioactive materials license) are subject to the applicable regulatory requirements, technical review by the commission, public notice and comment, and opportunity for a contested case hearing. Any subsequent permit or license revisions for expansion of activities would involve a major amendment to the permit or license, and such amendments are subject to the same requirements as the initial permit or license applications. No changes were made in response to this comment.

The commission assumes that the phrase "step-wise permitting" refers to the fact that authorization for in situ mining involves a Class III injection well area permit, an aquifer exemption if the mineralization is in an underground source of drinking water, at least one production area authorization, a Class I injection well

permit for disposal of wastewater generated during the mining process, and a radioactive materials license for a processing facility. The commission appreciates that this approach may be frustrating in that anyone opposed to an in situ mining project may have to contest five separate authorization actions. Although an applicant may choose to submit applications for all of the authorizations at one time and request they be processed together, in accordance with the requirements of 30 TAC Chapter 33, Consolidated Permit Processing, the commission has no authority to require an applicant to do so. No changes were made in response to this comment.

BC commented that the proposed rules are silent regarding what information is required of an applicant to demonstrate that an aquifer meets the criteria for exemption under §331.13, Exempted Aquifer. BC also commented that the public is entitled to a complete geologic characterization of the aquifer or portion of an aquifer being proposed for exemption, including the results of tests of isolation concepts involved, such as pump tests, pilot injection, and recovery experiments.

The commission does not agree with this comment. The explicit criteria for exemption of an aquifer or a portion of an aquifer are in §331.13. Demonstration that an aquifer or a portion of one should be exempted will depend on site-specific factors, which must be addressed in a request for an exemption. The commission notes that with few exceptions, requests for aquifer exemptions are submitted with an application for a Class III injection well area permit, which includes a geologic and hydrogeologic characterization of the site. A request for an aquifer exemption is subject to public notice and opportunity for a contested case hearing (§331.13(e)). No changes were made in response to this comment.

BC commented that deference to the EPA with regards to aquifer exemptions is likely circular, since the EPA appears to rely on recommendations from the TCEQ. BC also commented that exempting part of a drinking water aquifer in South Texas is a serious matter and the public is entitled to a serious effort to prove that a proposal for exemption will work. BC further commented that at proposed new §39.655, Aquifer Exemption, notice requirements for aquifer exemptions provide opportunity for public meeting and contested case hearing, but questioned what such a contested case hearing would be about, and stated the proposed rules would benefit from a statement of what is expected of an applicant for an aquifer demonstration-both an initial demonstration and enforceable rules if predicted isolation was incorrect.

The commission is unaware of any evidence that the EPA relies solely on TCEQ recommendations when considering revision of the state's underground injection control program to include an exemption of an aquifer or a portion of an aquifer. The commission agrees that exempting an aquifer or a portion of one, in accordance with the criteria in §331.13 is a serious matter, be it in South Texas or anywhere else in the state. Any request for an aquifer exemption is evaluated with respect to the criteria in §331.13.

The commission emphasizes that under existing §331.13(e), a request for an aquifer exemption is subject to public notice and opportunity for contested case hearing. Proposed new §39.655 will codify how those requirements are to be met. With regards to the meaning of these proposed new rules, an opportunity for a contested case hearing is just that; anyone who opposes an aquifer exemption may contest the matter through the TCEQ's contested case hearing process. The commission is unsure if the commenter is proposing that proposed new §39.655 should be revised to include requirements for a demonstration to support a request for an aquifer exemption, or if other rules, such as §331.13 should be so revised. In any case, the commission does not agree that specific requirements, other than meeting the criteria in §331.13, should be identified in rule. It is the responsibility of the requestor for the aquifer exemption to provide the necessary information to demonstrate these criteria are met. Any demonstration will be reviewed by the commission for sufficiency. Lastly, the commission notes that isolation of the aquifer or portion of an aquifer for which an exemption is requested is not a criterion for exempting an aquifer or a portion of one. No changes were made in response to this comment.

BC commented that aquifer restoration has been a "black mark" (BC's emphasis) on Texas' environmental protection ledger, from open pit lignite and other mining to in situ uranium mining to clean up of oil and gas aquifer contamination, with problems involving delays, deliberate financial inability to perform and a myriad of roadblocks. BC also commented that Texas has had enough of dishonest aquifer restoration efforts, and this rulemaking is an opportunity for change. STOP commented that in disregard of federal law, state agencies in Texas responsible for regulating in situ mining have, over the past 30 years, issued 36 Class III injection well area permits under rules that do not require real aquifer restoration. STOP notes that the TCEQ has never required the holder of a Class III injection well area permit to restore groundwater in the production zone within a production area to its initially-established pre-mining groundwater quality. In all cases, the owner or operator was granted an amendment to the initially-established pre-mining concentrations of groundwater parameters (that is, the owner or operator was allowed to raise these concentrations).

The commission notes that coal mining and exploration for oil and gas both are regulated by the RRC. Therefore, the commission cannot comment on groundwater contamination or remediation at these types of sites. The commission notes that with the exception of one site, groundwater within the mined zone at in situ uranium mining sites was not restored to the initially-established pre-mining groundwater quality, despite efforts by site operators. The concentration of some constituents in the groundwater, which became elevated due to in situ mining activities, could not be reduced to their respective pre-mining concentrations. In these cases, site operators requested, in accordance with the requirements of §331.107(f), that for certain constituents, higher concentrations be allowed for restoration. Typically at these sites, aquifer restoration could be achieved with regard to many groundwater constituents, and the concentrations of other constituents could be lowered, but not to established pre-mining concentrations. In all cases where an operator requested revision of the established pre-mining concentrations of constituents in the groundwater of the mined zone, the commission evaluated each request under the criteria in §331.107(g)(1) and (2).

The commission is unaware that any Class III injection well area permits were issued contrary to any applicable laws, state or federal, that were in effect at the time the permit was issued. No changes were made in response to this comment.

BC commented that aquifer restoration should proceed according to a firm schedule and meet firm water quality standards, with amendments of each granted only under the most difficult and unforeseen circumstances. BC also commented that the people have had enough of deliberate delays and amended restoration

values that have made a mockery of restoration in the past, and that this rulemaking is the time to do it right.

The commission notes that a mine plan, which includes a schedule for mining and restoration, must be submitted with an application for a Class III injection well area permit (Form TCEQ-10313), and that this schedule is included in a permit. However, a mine schedule is an estimation of activities that occur years in the future, and reasonable adjustments to this schedule may be needed. Under §331.107(b), aquifer restoration must commence within 30 days of completion of mining. Also, under §331.107(c), authorization for expansion of mining into new production areas may be contingent upon an owner or operator achieving restoration progress in previously mined production areas within the schedule set forth in the mine plan. With respect to groundwater quality, pre-mining groundwater quality must be established in accordance with the requirements at §331.104. All amendments to aquifer restoration tables are evaluated based on the considerations under previous §331.107(f)(1).

Further, all requests for amendments to restoration values are approved by the commission only after realization of the findings under previous §331.107(f)(2) which included a determination that reasonable restoration effort had been made, the restoration parameters had stabilized, the formation water would be suitable for any use to which it was suited prior to mining, and that further restoration efforts would consume energy, water or other natural resources of the state without providing a corresponding benefit to the state.

With regards to the commission's statement in the preamble to the proposed rules that aquifer restoration goals should be based on data from groundwater samples collected from baseline wells only, GCGCD commented that there are two considerations: first, a methodology should be provided for obtaining water quality for baseline and monitor wells that accurately represents pre-mining water quality that has not been affected by exploration activities. Second, groundwater quality in the monitor wells must be maintained independent of and in addition to the water quality in the baseline wells located in the production zone. GCGCD further commented that applying TCEQ assumptions that baseline and monitor wells provide a separate set of information, maintaining the integrity of the pre-mining water quality at the monitor wells is critical for the protection of a drinking water aquifer, and that restoration of water in the monitor well must also be addressed if a deterioration of water quality is identified.

The commission agrees with these comments in part. With regards to the establishment of pre-mining water quality unaffected by exploration activities and as expressed in a previous response, it has not been demonstrated that exploration activities affect groundwater quality to any significant degree, or that any such effects persist. The commission further notes that as also discussed in another previous response, pre-exploration baseline must be established in accordance with recent changes to the Texas Natural Resources Code under HB 3837, 80th Legislature, 2007, and that the RRC will adopt rules to address this requirement.

As a matter of clarification regarding subsequent responses, the commission notes the meanings of the following terms. The term "production zone" is the stratigraphic interval extending vertically from the shallowest to the deepest stratum into which mining solutions are authorized to be introduced. The term "production area" is the area generally defined by a line through the outer perimeter of injection and production wells used for in situ mining. Therefore, mining will be in that part of the production zone that underlies the production area. The term "mine area" is that area within a line through the ring of designated monitor wells completed in the production zone. The term "nonproduction zone" is any zone other than the production zone.

The commission agrees that baseline groundwater quality must be established for both the production area and the mine area. (However, the commission emphasizes that the purpose of establishing pre-mining water quality in the production zone within the production area is for aquifer restoration, whereas the purpose of establishing pre-mining water quality in the mine area is for detection of mining fluids that have migrated from the production zone within the production area outwards to a monitor well (such movement of mining fluids is an "excursion," which is defined at §331.2(28))). Aquifer restoration is required for the production zone within the production area; it is not required for groundwater in the monitor wells. Aquifer restoration is necessary (and required in accordance with §331.107) in the production zone within the production area because the groundwater in this zone is affected by the repeated injection and extraction of mining fluids. This is not the case with the groundwater in the monitor wells, which are located outside of the production area. The presence of mining fluids in a monitor well is addressed in previous rule §331.106.

GCGCD and STOP recommended several procedures for establishing pre-mining groundwater quality, both in the production and mine areas, and in monitor well ring. GCGCD and STOP recommended for baseline samples in the mine and production areas: "(1). Baseline wells shall be screened over the entire thickness of sand; if necessary, multiple wells, each screened over a portion of the sand, shall be completed at each monitoring location such that the entire thickness of sand is screened."

The commission agrees that all baseline wells should be screened so as to provide representative samples from a particular zone. However, the commission does not support mandatory screening over an entire interval. The adequacy of a screened interval, or the necessity for multiple screens over an interval should be evaluated based on site-specific factors, such as the thickness of the interval, distribution of mineralization over the interval, and the nature of the parameters for which baseline is being established. No changes were made in response to this comment.

GCGCD and STOP also recommended for baseline samples in the mine and production areas: "(2). A minimum of four samples shall be collected from each well at a frequency of no less than one sample a month."

The commission supports the collection of an adequate number of samples for establishment of pre-mining water quality. However, this can be accomplished by sampling a number of baseline wells, and by the collection of more that one sample from each well. Certainly "the more samples the better" applies to any statistical estimation, prediction, or hypothesis test, but the commission fails to see the significance of four samples, other than to arbitrarily set some minimum requirement. Any evaluation of an applicant's proposed method for establishment of baseline, both under §331.104(b) for aquifer restoration and under §331.104(e) for excursion detection will be based, at least in part, on the number of samples used to establish these baselines, and on the method in which data from these samples are used to establish respective baselines. Any such evaluation would also consider whether or not the samples were independent and representa-

tive, as required under §331.014(a). No changes were made in response to this comment.

GCGCD and STOP also recommended for baseline samples in the mine and production areas: "(3). Valid statistical tests shall be performed on the water quality data for each well to remove outliers and determine the distribution of the data. If data for a groundwater quality parameter are distributed normally or log-normally, the mean (average) may be calculated (minus outliers) for that parameter. For data that are not distributed normally or log-normally, the median value shall be used for the parameter (minus outliers), or additional samples may be collected to retest the distribution. If outliers are removed, a minimum of three samples must remain to calculate the mean or median for a parameter."

The commission agrees that "valid" statistical methods should be used in any statistical analysis, and a discussion of the term "valid" is provided in a previous response. However, the commission opposes the arbitrary elimination of outliers. Although statistical tests should be performed to identify any potential outliers, the commission does not agree that all outliers should be summarily discarded. Any outlier (either high or low) should not be discarded unless it is determined its value was the result of a typographical or transcription error, faulty analysis, or improper sampling. Methods may be used to accommodate an outlier (for example, see Outliers in Statistical Data by V. Barnett and T. Lewis, 1994, 3rd edition, John Wiley and Sons), but one should never be discarded except under the above-mentioned circumstances. Also, the commission notes that the sample mean (average) is a point estimate of the true mean of a distribution, and the sample median is a point estimate of the true median of a distribution. For a normal distribution (or any other symmetrical distribution, for that matter), the true mean equals the true median, whereas in a log-normal distribution the true mean is greater than the true median (see Statistical Methods for Environmental Pollution Monitoring, 1987, by Richard O. Gilbert, page 171). Therefore, the commission does not see the logic in using the sample mean for data presumed to be from a population characterized by a normal or log-normal distribution, but using sample median for data presumed not to be from a population characterized by one of these distributional types. Lastly, the commission notes that use of the sample median is a method used to accommodate outliers. No changes were made in response to this comment.

GCGCD and STOP also recommended for baseline samples in the mine and production areas: "(4). If multiple wells are installed at a monitoring location, the mean or median from each well will be used to determine the baseline value for each parameter at the well location. A valid statistical test will be performed with the mean or median values to determine the distribution of each parameter. If a normal or log-normal distribution is demonstrated, the mean (average) can be calculated for the parameter. For data that do not follow a normal or log-normal distribution, the median value shall be used to represent the parameter for that well location."

The commission agrees that all wells installed at a monitoring location should be sampled. However, with regards to use of the sample mean or sample median, the commission offers the same explanation provided in response to the commenters' item (3). That is, the commission does not agree that a sample mean should be used for data presumed to be from a normally or log-normally distributed population and that a sample median should be used for data presumed to be from a population that is not normally or log-normally distributed. No changes were made in response to this comment.

GCGCD and STOP also recommended for baseline samples in the mine and production areas: "(5). Baseline water quality in the mine area and production area will be established independently and calculated using the mean or median for each parameter from each well location. A valid statistical test will be performed with the mean or median values to determine the distribution of each parameter."

The commission agrees that groundwater quality in the baseline wells should be established independently from groundwater quality in the monitor wells, but again emphasizes that groundwater quality in the baseline wells (those wells completed in the production zone of the production area) is to be used for aquifer restoration goals and groundwater quality in the monitor wells is to be used for detection of excursions. With respect to the suggested use of mean and median, the commission does not agree that a sample mean should be used for data presumed to be from a normally or log-normally distributed population and that a sample median should be used for data presumed to be from a population that is not normally or log-normally distributed. No changes were made in response to this comment.

GCGCD and STOP also recommended for baseline samples in the mine and production areas: "(6). The baseline water quality for the mine area and production area will serve as the restoration values for the mine area and production area. Each area will be restored to its pre-mining baseline levels."

The commission again emphasizes that aquifer restoration is required for the area where the production zone is mined using in situ techniques; that is the production zone within the production area. It is the groundwater in this zone within the production area that is affected by injection of mining fluids, and therefore must be restored to pre-mining conditions. For the mine area, which is the area enclosed by the ring of production zone monitor wells that surround the production area, groundwater quality is determined so that any injected mining fluids that migrate from the production zone within the production area can be detected. Because mining fluids are not purposefully injected into the production zone outwards from the production area, this part of the production zone should not be affected by mining fluids, except for short periods of time during an excursion. All excursions must be addressed in accordance with the existing requirements in §331.106. No changes were made in response to this comment.

For baseline samples for the monitoring well ring, GCGCD recommended a methodology consisting of six items. Items 1 through 5 in this recommended methodology are identical to items 1 through 5 of their recommended methodology for baseline samples in the mine and production zone, in items 1 through 5 for the production areas. For these five items, the commission's responses are identical, respectively, to the responses to items 1 through 5 of GCGCD's recommended methodology for baseline sample in the production and mine area. Item 6 of GCGCD's recommended methodology for baseline samples for the monitor well ring was as follows: "(6). Upper control limits for excursions will be calculated for the baseline values using a valid statistical test (e.g., upper 95% confidence interval)."

The commission agrees that the term "control parameter" is defined at §331.2(28) as a groundwater constituent monitored on a routine basis to detect or confirm the presence of mining solutions in a monitor wells. The term "upper limit" is defined at

§331.2(108) as a parameter value that, when exceeded, indicates mining solutions may be present in a monitor well should be based on statistical methods for which the sampling distribution is known, or at least can be estimated, and on a test that is appropriate for the distribution of the data (at least in the case of a parametric test). Lastly, the critical value for the statistic should be chosen to provide an acceptable type I error rate, and, to the extent possible, the power of the statistic should be sufficient to provide reasonable assurance that the null hypothesis is not being accepted incorrectly. With regards to use of a 95% confidence interval, the commission refers GCGCD to the discussion on tolerance intervals elsewhere in this response to comments.

STOP provided recommendations identical to those made by GCGCD with regard to items 1 through 5, respectively, for baseline samples in the mine and production area, and for baseline samples for the monitor well ring, except that STOP referred to the second category as "baseline samples in the non-production zone of the production area and in the non-production zone of the mine area."

The commission's response to STOP's recommendations are the same as the responses to GCGCD's recommendations regarding these items.

With regards to baseline samples in the mine and production areas, and with baseline samples in the non-production zone of the production area and in the non-production zone of the mine area, STOP made the following recommendations: a four-acre grid shall be established over the non-production zone of the production area and a baseline well installed at each node of the grid; an eight-acre grid shall be established over the non-production zone of the mine area and a baseline well installed at each node of the grid; and wells shall be installed as soon as preliminary exploratory boreholes have delineated the ore deposit, and must be completed and sampled at least once before exploration activities are finished.

The commission does not agree with these recommendations. Non-production zone monitoring currently is required under §331.104(b) for the purpose of detecting excursions from the production zone within the production area to non-production zones. In accordance with these requirements, an owner or operator must have monitor wells in any freshwater aquifer overlying the production zone. These wells must be located within 50 feet on either side of a line through the center of the production area, with a minimum of one well per every four acres, and one well per eight acres for wells completed in any additional overlying freshwater aquifers. The executive director may authorize changes or adjustments in the location of these wells to ensure detection of excursions. The commission notes that exploratory wells are regulated by the Railroad Commission of Texas. The TCEQ has no authority to impose the requirements for exploration activities. No changes were made in response to this comment.

GCGCD commented that the monitoring requirements in 30 TAC Chapter 330, Municipal Solid Waste, are prescriptive and more protective of human health and the environment, relative to the monitoring requirements in Chapter 331, and questions why Chapter 331 does not have this rigorous approach. CBGSC commented that Chapter 330 is far superior in its statistical approach as compared to proposed revised §331.104, and that a similar approach to §331.104 would be good. An individual suggested it would be wise to revise the proposed rules to conform to those in Chapter 330 with regards to statistical requirements.

The commission acknowledges the commenters' assessment of the groundwater monitoring requirements in Chapter 330 as compared to groundwater monitoring requirements in Chapter 331. The relative protectiveness afforded by each set of monitoring rules is a matter of opinion, and, although a detailed comparison of the groundwater monitoring requirements from each of these chapters is beyond the scope of this response to comments, the commission notes that under §330.403(a)(2), the minimum spacing for monitor wells is 600 feet, and greater spacing is allowed if it can be demonstrated to be protective. The Chapter 330 rules regarding statistical methods are more prescriptive in that specific statistical tests are required although other tests, approved by the executive director, are allowed (§330.405(e). Also, under §330.407(a)(1), four independent samples are required, although the executive director may approve an alternate sampling frequency §330.47(a)(2). The commission contends the requirements of proposed §331.104, although they do not specify specific statistical tests, are comparable to the Chapter 330 requirements for detection monitoring at §330.407, Detection Monitoring Program for Type I Landfills. No changes were made in response to this comment.

GCGCD commented that water quality in the monitor wells must be maintained independent of and in addition to the water quality in the baseline wells completed in the production zone of the production area.

The commission agrees with this comment and notes that proposed revisions to §331.104 include this requirement. However, the commission again emphasizes that the purpose of a determination of water quality in baseline wells is for aquifer restoration, whereas the purpose of a determination of water quality in monitor wells is for excursion detection. Aquifer restoration in the production zone of the production area is necessary because the continuous injection of mining fluids over time in this zone within this area affects its groundwater quality. In the area of the production zone monitor wells, mining fluids are not purposely injected, and therefore will not affect this groundwater to the degree groundwater is affected in the production zone within the production area. In accordance with the requirements in §331.106 and proposed revisions to this section, when mining fluids are detected in a monitor well, the operator must take actions to clean up the excursion in a practical and expeditious manner.

GCGCD commented that if groundwater in a monitor well is affected, that groundwater should be restored if there is a deterioration of its water quality.

The commission agrees with the comment and notes that any excursions detected in a monitor well must be addressed in accordance with the requirements of §331.106 which includes notification, analysis and clean-up.

Sierra Club commented that they are supportive of a more regional approach to groundwater quality, and that mining companies also provide information and testing of any existing wells in the mining area and adjacent lands. Sierra Club also commented that water quality data from other state agencies should be included in the application.

The commission notes that in accordance with §331.122(2)(B), the commission, prior to issuing a Class III injection well permit, shall consider a tabulation of all reasonably available data on all wells within the area of review. This information would include any available water quality data from wells within the area of review, as defined at §331.42, Area of Review.

Sierra Club and STOP recommended the proposed rules be revised to include the following specific requirements: 1) A statistically valid number of monitor wells in the production zone, including the strata above and below the mining, sufficient to determine the water quality and detect any excursion in a timely manner; 2) A valid and accurate statistical testing of the monitoring wells to determine pre-mining baseline; 3) Upper control limits based on a valid statistical test or the monitor well baseline, such as the upper 95% confidence interval; 4) Nested wells where the thickness of the sand is too great for a single screen interval; 5) Restoration of the Mine Area and the monitor well area to actual pre-mining concentrations; and 6) Notice requirements to the TCEQ and property owners within two hours if there is a change in concentration of any constituent which may affect drinking water quality of a private well.

The commission offers the following comments on each of these respective suggested requirements: 1) The commission is unclear as to the meaning of "a statistically valid number of monitor wells." The number of monitor wells should be dependent on such considerations as geology and hydrogeology, and the commission is uncertain how this would be determined in a statistical manner. No changes were made in response to this comment; 2) The commission agrees that determination of pre-mining baseline for excursion detection is essential, and notes this subject is addressed in new §331.104(e). Under new §331.104(e), any statistical test chosen by an applicant or operator must be approved by the executive director, who will evaluate the proposed method. No changes were made in response to this comment; 3) As expressed in the previous comment, the commission agrees that determination of baseline for excursion detection should be based on appropriate statistical tests. With regards to the provided example of an upper 95% confidence interval, the commission notes that use of this method carries the same observations the commission makes in a subsequent response regarding use of a tolerance interval. That is, the commission does not agree that a tolerance interval methodology must be used, but that the choice of statistical method for a hypothesis test should be based on the appropriateness of the method to the distributional characteristics of the data. No changes were made in response to this comment; 4) The commission agrees that multiple monitor wells may be necessary at a single monitoring location in certain circumstances, such as excessive sand thickness. However, the commission can require such wells, when necessary, under §331.103, Production Area Monitor Wells. No changes were made in response to this comment; 5) The commission disagrees that aquifer restoration should be required for the area between the production area and the surrounding monitor well ring. It is within the production zone of the production area that mining fluids are injected, and it is groundwater in this zone within this area that will require restoration. Any excursions of mining fluids from this zone will be detected in the monitor wells, prompting remediation of the excursion in accordance with the requirements of existing §331.106. No changes were made in response to this comment; and 6) Under proposed §331.106, an operator is required to notify the commission of any excursions, sample the affected wells for an expanded list of groundwater parameters, and initiate actions to clean up the groundwater in the affected wells to baseline quality for the monitor wells. Also, when mining fluids are present in a monitor well, the operator must increase the sampling frequency to twice a week (§331.105(4)). These actions provide a rapid response to an excursion, and are designed to ensure an excursion is contained and remedied, preventing it from further migration and possibly affected off-site wells. Although the commission can and would notify any property owner if it thought an excursion could affect that property owner's well, it sees no need to require notification of landowners in the event of any excursion. In addition, the executive director is required under TWC, §5.235 to notify a county judge and county health officials when the executive director acquires information that confirms that a potential public health hazard exists because usable groundwater has been or is being contaminated. No changes were made in response to this comment.

CBGSC commented that a valid statistical analysis of sample data requires samples to be obtained from wells located on a systematic grid across the entire mining areas surrounded by monitor wells or randomly selected with an appropriate statistical procedure, and that no such requirements for locating baseline wells are included in the proposed rules. CBGSC emphasized that without these requirements, data resulting from sampling of baseline wells cannot be representative in a statistical sense, and will not yield valid statistical results.

The commission agrees that data used to establish baseline should be representative of the groundwater for which baseline is to be established. In evaluating an applicant's proposed baseline determination, the commission takes into consideration whether the samples used to establish baseline are representative, and has revised §331.104(a) to require representative samples. Obtaining representative samples would certainly involve evaluation of the locations of baseline wells, and any evaluation by the commission regarding whether samples are representative would include consideration of how the baseline wells were located.

CBGSC recommended that because data obtained from sampling of baseline wells are all-important in establishing aquifer restoration values, the commission should consult with the most highly qualified statisticians specializing in applied sampling design in order to establish protocols for obtaining a systematic or random sample of baseline wells. CBGSC emphasized that establishment of such protocols would assure that data used to determine aquifer restoration values are statistically sound.

The commission appreciates that there are statisticians that specialize in sample design, and that the establishment of such protocols are valuable in assuring that aquifer restoration values are determined in a statistically sound manner. The commission notes that there are agency employees that have statistical expertise to address issues, such as sample design, and that numerous guidance documents and texts on statistical analysis also are available to agency staff.

An individual commented that they were surprised to learn that groundwater at in situ uranium mining sites in Texas has never been restored to pre-mining groundwater quality.

Commission records indicate that with the exception of one production area authorization (Production Area Authorization UR01941PAA3 at COGEMA's O'Hearn Mine), aquifer restoration values at all other sites were amended to allow for higher concentrations of certain groundwater constituents to meet aquifer restoration requirements. As discussed in a previous response, the commission notes that at these sites, the concentration of many of the groundwater constituents were reduced to the initially-established aquifer restoration values, but that for other constituents, concentrations were reduced by restoration efforts, but not to the initially-established restoration values. All amendments to restoration values were in accordance with the requirements of existing §331.107(f). The commission also

notes that the pre-mining groundwater quality at all mining sites did not meet federal primary drinking water standards for one or more regulated constituents, and that at all sites, the radioactivity associated with radium-226 in the groundwater exceeded the primary drinking water standard of 5.0 picocuries per liter.

KCCRB commented that although groundwater quality within a uranium mineralized zone is affected by this mineralization, groundwater in other portions of an aquifer above and below the mineralized zone may not be affected, and the groundwater in these zones could be suitable for any use and that this groundwater should be protected. KCCRB recommended that the rules should include requirements that groundwater quality be established for the entire thickness of the aquifer, not just for those portions in the immediate vicinity of the aquifer.

The commission agrees that groundwater quality within a uranium mineralized zone is affected by this mineralization, and that groundwater in other portions of an aquifer above and below the mineralized zone generally is not affected by this mineralization. Further, the commission emphasizes that all underground sources of drinking water (USDW) are protected, and that in situ mining can only be conducted in an aquifer or portion of an aquifer that is not a USDW because it either does not meet the definition at §331.5 for a USDW, or because it has been exempted in accordance with the requirements in §331.13. Also, under existing §331.103, groundwater monitoring currently is required in the production zone outside of the production area and in nonproduction zones above the production zone, and any excursion on mining fluids from the production zone within the production area must be addressed in accordance with the requirements of §331.106. An owner or operator is required to determine the quality of groundwater quality in the production zone within the production area, in the production zone outside of the production area, and in non-production zones. No changes were made in response to this comment.

STOP commented that with the passage of SB 1604, the opportunity for a contested case hearing apparently has been eliminated regarding amendments to restoration tables.

The commission does not agree with this comment. Section 32 of SB 1604, passed during the 80th Texas Legislature, 2007, amended TWC, Chapter 27 by adding new §27.0513. Under new TWC, §27.0513(d)(1), an application for a production area authorization is an uncontested matter not subject to opportunity for a contested case hearing unless the application seeks an amendment to a restoration table. Therefore, such an application is subject to opportunity for a contested case hearing. This part of the statute is codified under the final rule at §55.201(i)(11)(A).

STOP commented that if the commission cannot determine the actual pre-mining groundwater quality based on regulations that do not require objective sampling and proper statistical analysis, then there is no basis for drawing a conclusion about the restoration of mined areas.

The commission does not agree that pre-mining groundwater quality cannot be determined based on applicable rules. Under new §331.104(a), all samples must be independent and representative, and a determination of aquifer restoration must be based on average values for aquifer restoration parameters or a statistical method approved by the executive director. These requirements will ensure that pre-mining groundwater quality will be appropriately determined, which is necessary for determining if aquifer restoration has been accomplished in accordance with the requirements of §331.107.

STOP requested the following changes be made to the proposed rules: a requirement for separate baseline testing for the production zone in the production area, the production zone in the mine area, the non-production zone in the production area, and the non-production zone in the mine area; use of an appropriate statistical method to select the location and depth of wells to be sampled to ensure that baseline wells are representative of the area being studied; use of an appropriate number of wells so that the results obtained are representative of the area being studied; collection of an appropriate number of water samples from each selected well so that the results obtained are representative of the water being studied; collection of water samples by a qualified independent contractor; use of appropriate methods to collect and preserve water samples for the laboratory; appropriate timing of each sample collected to assure that each water sample is independent; and use of the mean if a normal distribution or lognormal distribution is found; otherwise, use of the median.

The commission again notes that groundwater quality must be established for the production zone within the production area, the production zone outside of the production area, and for non-production zones. However, for the reasons discussed in a previous response, pre-mining groundwater quality for the purpose of aquifer restoration is required only for the production zone within the production area. Determination of pre-mining groundwater quality in the production zone outside of the production area and in non-production zones is necessary for groundwater monitoring to determine if an excursion has occurred.

The commission does not agree with these recommendations for the following reasons: the depth of wells is determined by the depth of the zone to be monitored; and location of monitor wells is prescribed under §331.103. Under proposed new §331.104(b), baseline wells for the determination of aquifer restoration must be completed in the production zone within the production area, although the location of these wells otherwise is not specifically addressed by rule. However, the commission will evaluate the location of these wells pursuant to new §331.104(a), with respect to the requirement for representative samples. Likewise, the number of baseline wells and the number of samples from each of these wells will be evaluated under this criterion. The commission does not agree that the collection of samples by an independent contractor is necessary. All samples collected by the owner or operator must be in accordance with an approved sampling plan referenced in the Class III injection well area permit, and the commission conducts sampling on a routine basis to ensure the integrity of the sample results reported by the owner or operator. Again, all samples must be independent and representative. As discussed in another response, independence, in a strict statistical sense, is difficult to demonstrate. However, the commission can require that any sampling frequency can be reasonably based on other factors (for example, see method described in EPA Guidance Document on the Statistical Analysis of Ground-water Monitoring Data at RCRA facilities). Lastly, as discussed in a previous response, the commission does not see the logic in using the sample mean for data that are normally or lognormally distributed, and the sample median for data that are not. No changes were made in response to this comment.

STOP commented that uranium mineralization that is mined using in situ techniques in South Texas occurs in drinking water aquifers, and cited Uranium Resources, Inc.'s (URI's) Kingville

Dome Mine in Kleberg County as an example. STOP noted that uranium mineralization at this site occurs in sands of the Goliad Formation, which is the only aquifer that provides groundwater in Kleberg County. STOP further noted that according to the Texas Water Development Board, numerous drinking water wells are completed with sands of the Goliad Formation within the same interval that contains the uranium mineralization at the Kingsville Dome Mine, including wells that supply drinking water to the city of Kingsville. STOP also noted that a cone of depression is associated with this well field, inducing groundwater in the area to flow towards the wellfield. Lastly, STOP noted that URI reported in 2008 that the concentration of uranium within the groundwater at their production area authorization PAA2 is above 3,000 micograms per liter, even after years of restoration efforts.

The commission acknowledges that in South Texas, those areas of uranium mineralization that have been mined using in situ techniques all occur in formations that would be underground sources of drinking water, if the portion of the aquifer had not been designated as an exempt aquifer. The commission is unsure of the term "drinking water aquifer" as this term is not defined in state statutes or regulations. However, the commission assumes the term refers to an aquifer that contains groundwater that meets or essentially meets primary drinking water standards. The commission also acknowledges the importance of the Goliad Formation as a source of groundwater, not only for Kleberg County, but for numerous counties in South Texas. With respect to STOP's comments regarding the wells that supply water to the City of Kingville and the associated cone of depression, the commission is unsure of the significance of this comment. STOP appears to be implying that the groundwater within URI's PAA2, which contains elevated concentrations of uranium, could be directed toward the cone of depression created by pumping of Kingville's water wells. The commission notes that all mining operations are required to confine mining solutions within the production zone within the area of designated production zone monitor wells under §331.102, Confinement of Mining Solution, regardless of the groundwater gradient.

STOP commented that the legislature has required the commission to establish the methods for determining restoration table values, but that the proposed changes to those rules do not follow the statute as written. STOP also commented that under TWC, §27.0513(c) the legislature has required the commission to write rules in which the sampling process is objective and in which proper statistical measurements are used so that the results are reliable and valid, and that any other meaning is absurd. STOP further commented that the proposed rules: provide for sampling that is not objective, as the company selects which wells to test and performs all testing; are biased toward a finding of high concentrations of uranium and radium by excluding 75% of the groundwater within the authorization to mine (only the ore zone is required to be tested); provide for the arithmetic mean which allows any outlier to unfairly influence the result; and alternatively, allow an owner or operator to select the method for determining groundwater quality. Therefore, according to STOP the proposed rules are neither reliable nor valid.

The commission notes that at TWC, §27.0513(c) the commission is required by rule to establish application requirements, technical requirements, including the methods for determining restoration table values, and procedural requirements for any authorization. The commission's opinion is that the existing rules and the proposed revisions to those rules meet this requirement. Regarding the specific requirements STOP believes are implied in the requirement at TWC, §27.0513(c), the commission notes all of these issues are specifically addressed in other responses. No changes were made in response to this comment.

STOP commented that improper determination of aquifer restoration values has led to a misrepresentation of groundwater quality in South Texas by the mining industry and the commission. STOP noted that the proposed rules continue to allow amendments to aquifer restoration values, allowing mining companies to leave mine sites contaminated with radiation. STOP emphasized this rulemaking is an opportunity to correct past errors regarding amendments to aquifer restoration values.

The commission does not agree with this comment. Groundwater in the production zone within the production area at all production area authorizations was restored in accordance with the requirements of §331.107. The allowance of amendments to aquifer restoration values is necessary to allow for higher aquifer restoration values in certain cases. The commission contends that aquifer restoration in all cases should result in attainment of pre-mining groundwater quality in the production zone within the production area unless this requirement must be met by the use of excessive amounts of groundwater and other resources, without providing a corresponding benefit to the state. The commission notes that groundwater quality in all cases was improved and that at all sites, pre-mining groundwater quality did not meet primary drinking water standards. The revisions to the previous rules provide greater protection to groundwater resources in the vicinity of in situ uranium mines.

STOP commented that the proposed rules do not meet the requirements of TWC, §27.0513(c) in that they do not address application requirements, technical requirements, including the methods for determining restoration table values, and procedural requirements for any authorization. STOP expressed the opinion that the proposed rules for the determination of water quality in the monitor well ring and establishment of upper control parameters fail to provide objective sampling and valid result, nor do these proposed rules require sufficient monitor wells to produce either a representative sample or to detect excursions. STOP further opined that that excursions are cleaned up, but restoration is not required. Lastly, STOP commented that there are no notice requirements for wells monitored in accordance with §331.84(d) (wells within 1/4 mile of the injection site).

The commission does not agree with these comments, as expressed in other provided responses that address these respective comments and concerns.

Definitions

KHH commented that the definition of "activity" at §331.2(2) should include a reference to monitoring wells.

The commission agrees with this comment. Under the proposed rules, the definition of the term "Activity" at §331.2(2) was revised to include injection or production wells and other classes of injection wells regulated by the commission. In that monitor wells at Class III injection well sites are regulated by the commission, the final rule at §331.2(2), is amended to include a reference to monitor wells.

TMRA commented that the definition of the term "affected person" at §331.2(3) should be revised to be consistent with the definition of this term at TWC, §5.115 and at §55.3.

The commission agrees with this comment and the final rule at §331.2(3) has been revised accordingly.

TMRA commented that the definition of the term "area permit" at proposed revised §331.2(10) should be revised to delete the comma following the word "production" and the following words "or monitoring."

The commission is unsure of the purpose of this proposed revision. Under this rulemaking, the commission proposed revision of this definition to include all wells that are authorized under a Class III injection well area permit; these wells include injection wells, production wells, and monitor wells. No changes were made in response to this comment.

KHH commented that the definition of the term "baseline quality" at §331.2(12) may be confusing because this definition includes the term "injection activities." KHH emphasizes that the definition of the term "activity" includes construction of wells, but that under §331.2(12), baseline quality must be determined prior to "injection activities." KHH commented that based on these two definitions, a person could interpret §331.2(12) to mean that baseline quality must be established prior to well construction, which clearly is impossible, and suggested §331.2(12) be revised by replacing "injection activities" with "injection operations."

To avoid possible confusion regarding this matter, the commission has amended the final rule at §331.2(12) to refer to "injection operations" rather than "injection activities."

Mesteña and TMRA commented that the definition of the term "control parameter" in §331.2(28) should be further revised to indicate the term includes measurement with field instrumentation.

The commission agrees with these comments, and the final rule at §331.2(28) had been amended to indicate the term "control parameter" to include measurement with field instrumentation.

TMRA commented that the proposed revisions to the term "excursion" at §331.2(38) should be deleted, as further refinement of the term serves no practical purpose. TMRA further commented that it is not the definition of the term "excursion" that triggers permit obligations, but rather one or more exceedences of control parameter upper limits, and stated "because of this direct linkage to exceedence of one or more control parameter upper limits, the stated purpose of the amendment has already been accomplished without any amendment being required. As stated, the proposed change to the definition appears to needlessly foreclose consideration of any information other than control parameter analysis in determining whether an excursion has or has not occurred."

Although the commission agrees that it is not the definition of the term "excursion" that triggers the requirements under §331.106, it is the existence of an excursion that causes an operator to respond, in accordance with the requirements of §331.106, to an excursion. The purpose of the proposed revisions to §331.2(38) is to emphasize that identification of an excursion is based on analysis of groundwater samples from monitor wells, and the analysis of those samples for the presence of designated control parameters. The commission is unaware of how an excursion would be identified except through the use of control parameters. No changes were made in response to this comment.

With regards to the proposed revised definition of the term "mine plan" at §331.2(63), TMRA and URI commented that it is important to note the significance of estimating the schedule and that the estimated nature of the mine plan schedule should be included in the definition. TMRA and URI also commented that the TCEQ should also recognize that the report is adjusted annually. TMRA further commented that a clarification is needed for the proposed subsection (b) language, as it is not clear how the scheduling weighs into permit approval or subsequent permit regulation, if it does at all. TMRA stated that the progression of the mining is subject to many technical and economic factors that may accelerate or slow the mining schedule and that the schedule should not be used to regulate the progress of mining. TMRA asked the question "if a mine does not progress in accordance with the timetable included in the permit application, what is the regulatory implication?" TMRA commented that the basis for this provision, an explanation of how it will be used, and the boundary of enforcement in the context of mining timetables is not included in the preamble and as such, is potentially subject to unanticipated use. Without context and proper safeguards, this proposed provision adds unacceptable uncertainty into the permit regulatory process and should not be included in the adopted rule.

The commission does not agree with this comment. The proposed revised definition at §331.2(63)(B) specifies that the mine plan will include an estimated schedule indicating the sequence and timetable for mining and any required aquifer restoration. Annual updates of the mine plan already are required under proposed revisions to §331.85(3)(B). The commission appreciates that the progression of mining is subject to many technical and economic factors and that some flexibility is necessary regarding the projected time to complete various operations associated with mining. Revisions to a mine schedule will occur; this is why the schedule is an estimate. However, the commission's concern is not so much that the mine schedule is strictly followed, but that mining operations and subsequent restoration are completed within a reasonable amount of time, with allowances for technical and economic factors. The time required for mining and restoration should not be indefinite, with numerous extensions that are not reasonably justified. No changes were made in response to this comment.

TMRA commented that the definition of the term "monitor well" at proposed new §331.2(64) should include the term "instrumentation" to indicate sampling from a monitor well may be done using field instrumentation.

The commission agrees with this comment, and the final rule at §331.2(64) has been revised to indicate that a monitor well is any well used for the sampling or measurement with field instrumentation of any chemical or physical property of subsurface strata or their contained fluids.

TMRA commented that the proposed new definition for the term "production well" at §331.2(83) should not be adopted. TMRA notes that this proposed new definition is inconsistent with the existing definition for this term at TWC, §27.002(16) in that the definition in the statute includes injection wells, and refers only to wells used to recover uranium. Given this existing statutory definition, the commission is revising proposed new §331.2(83) to be consistent with the existing statutory definition.

The commission disagrees that this proposed new definition should be deleted. As discussed in the preamble to the proposed rule, this term is used in Chapter 331, and therefore should be defined. However, the commission acknowledges that the definition of this term at TWC, §27.002(16) includes any well used for injection to recover uranium. The commission also notes that "injection well" is defined at §331.2(47) as a well into which fluids are being injected. Therefore, the commission is keeping the definition of the term "production well" in the final

rule, but is amending the definition to be compatible with the definition at TWC, §27.002(16).

KHH commented that the proposed revised definition of the term "restored aquifer" at §331.2(89) referenced the aquifer within the permit area. KHH noted that aquifer restoration is required for the aquifer within a production area, not the entire permit area, and suggested this definition be revised to reflect this requirement. Mesteña and TMRA commented that the proposed revised definition of the term "restored aquifer" at §331.2(89) does not reference this term to the exempt portion of the aquifer. Also, Mesteña and TMRA commented that the definition incorrectly suggests that completion of aquifer restoration requires achievement of restoration table values rather than restoration to water consistent with restoration table values. Mesteña, TMRA, and URI recommended this definition be revised to reference the exempted portion of the aquifer, and to include a statement that restoration is achieved if the groundwater quality is returned to the same class of use to which to values of the applicable restoration table indicate it is suited.

The commission agrees with the comment from KHH, and the proposed revised definition of "restored aquifer" is amended to refer to "production area" rather than "permit area" in the final rule. The commission acknowledges that restoration will occur in the exempted portion of the aquifer, in cases where an aquifer exemption was required. However, mineralization could occur in a unit that is not an exempted aquifer or an underground source of drinking water (although the commission is aware that in Texas, areas of uranium mineralization that have been mined using in situ techniques all have occurred in exempted USDW-quality aquifers). In such a case, the suggested reference to an exempted aquifer may cause unnecessary confusion. With regards to Mesteña's and TMRA's comment on restoration to a class of use, the commission notes that in accordance with the requirements of §331.107(b), there is no mention of "class of use" in these requirements. Consideration of class of use is only in accordance with requests for amendments to restoration values (§331.107(g)(1)(A) and (2)(C)). Therefore, the commission sees no need to revise this definition as proposed by Mesteña and TMRA.

TMRA commented that under existing definition at §331.2(108) for the term "upper limit, an exceedence of an upper limit indicates mining solutions may be present in designated monitor wells. TMRA noted that the term "verifying analysis," defined under §331.2(109) indicates mining solutions are assumed to be present if such an exceedence is confirmed by a verifying analysis. TMRA recommended existing §331.2(108) be revised to read "Upper limit-a value for a parameter of groundwater in one or more designated monitor wells which, when exceeded, may indicated the presence of mining solution in that groundwater."

The commission fails to see the advantage of TMRA's proposed definition for the term "upper limit" over the existing definition at §331.2(108): a parameter value established by the commission in a permit/production area authorization which when exceeded indicates mining solutions may be present in a designated monitor well. If an upper limit for the parameter is exceeded in a monitor well, this exceedence is interpreted to be an indication of an excursion mining fluids from the production zone within the production area to a monitor well. With respect to the definition of the term "verifying analysis" at §331.2(109), the commission sees no conflict between this definition and the one at §331.2(108). If an upper limit is exceeded, it is an indication that mining fluids may be present in a monitor well. In such a case, the operator is allowed to take a second groundwater sample from that well and analyze that sample to confirm the exceedence. No changes were made in response to this comment.

TMRA commented that the definition of the term "verifying analysis" at §331.2(109) should be revised to include the phrase "or measurement with instrumentation" as measurements with field instrumentation can yield representative, reliable, and reproducible results.

The commission notes that proposed rule §331.2(109) contained this term as does the final rule.

Exempted Aquifer

Sierra Club commented that they did not support the proposed revisions to §331.13(e), which would allow the commission to delegate to the executive director the authority to designate an aquifer exemption if no request for a contested case hearing is received within the designated comment period provided in the public notice. Sierra Club stated that the commissioners should continue to make decisions about aquifer exemptions, even if it is only to agree with the executive director. Sierra Club also commented that they support a requirement for an aquifer exemption to be recorded in the county deed, and that they support a time limit on aquifer exemptions. Sierra Club provided suggested alternate draft language for §331.13(e) that included these suggested changes. TMRA commented that they supported the proposed revision, but that the proposed language invited a conflict with §331.13(d), under which no aquifer exemption shall be final unless approved by the EPA.

The commission does not agree that the commission should not delegate to the executive director the authority to designate an exempt aquifer in the absence of opposition to that exemption. As stated in the proposed rules, delegation of authority by the commission to the executive director in uncontested matters is a common practice for most permitting matters addressed by the commission, including injection well permits that may be associated with aquifer exemptions. Delegation in this matter would reduce the time needed to process requests for aquifer exemptions.

The commission considered proposing rules that would require an aquifer exemption to be recorded in the county deed. The intent of such a requirement would be to provide additional notice to a potential buyer of property that was over an exempted aquifer. However, after further consideration, the commission did not require deed recordation of an aquifer exemption, but did include expansion of the notice requirements for aquifer exemptions.

The commission was intrigued by Sierra Club's recommendation to place a term on aquifer exemptions. However, placing a term limit on aquifer exemptions is problematic. Under §331.13(f), an aquifer exemption can only be removed by the commission after notice and opportunity for a public hearing. Additionally, an aquifer exemption involves a change to the state's authorized underground injection control program, and any changes to this program must be approved by the EPA. Placing a term on an aquifer exemption would effectively circumvent these existing requirements.

With regards to a possible conflict with existing §331.13(d), the commission does not agree that the proposed new language at §331.13(e) may be in conflict with the proposed language to revise existing §331.13(e). The proposed language speaks only to decisions made by the commission on the designation of an

exempt aquifer. The commission has the authority to designate an exempt aquifer. However, for that aquifer exemption to be in effect, the commission must petition the EPA for a revision to its authorized underground injection control program to include this designation. Even if the executive director designates an exempt aquifer, final approval is required by the EPA as part of an UIC program revision. Without EPA's approval of this petition, the aquifer exemption is not in effect.

Executive Director Approval of Construction and Completion

TMRA commented they are in favor of the proposed revision to §331.45(4)(B), which excluded baseline wells from the requirement for mechanical integrity testing.

The commission acknowledges TMRA's support of this proposed revision, and this revision is retained in the final rule.

Closure Standards

KHH commented that under §331.46(d), changes in plugging and abandonment of wells might constitute a permit amendment rather than a permit modification. KHH further notes that under §305.72(b), amendments to plugging and abandonment plans is a minor modification. KHH requested clarification on this matter.

Under §305.72(b)(6), the executive director may amend a plugging and abandonment plan that has been updated under §305.154(7) as a minor modification of the permit. Other changes to plugging and abandonment plans, as referenced at §331.46(d), would necessitate a permit amendment.

TMRA commented that because §331.83(g) and (i) appear to indicate monitor wells are included in the scope of Class III wells, it is unclear whether existing §331.46(d) is limited to Class III injection well or also reaches baseline and monitor wells associated with Class III uranium solution mining operations. TMRA further commented that they do not support the inclusion of baseline and monitor wells in the scope of §331.46(d) as this level of regulation is inconsistent with the regulatory requirements in other program areas of the TCEQ with regards to monitor wells.

The commission notes that there are no rules at §331.83(g) and (i), but acknowledges that both baseline wells (as defined at existing §331.2(13)) and monitor wells (as defined at existing §331.2(64)) are not explicitly identified as being Class III injection wells, as defined at §331.11(2). However, the commission emphasizes that both baseline and monitor wells are included in a production area authorization as the term is defined in §331.2(82). Section 331.11(c) provides that baseline and monitor wells associated with Class III injection wells with the jurisdiction of the commission are subject to the rules specified in Chapter 331. Further, the Class III injection well area permit application (Form TCEQ-10313) includes a requirement that the applicant provide a description of closing procedures to be taken to restore affected surface areas to include plugging of wells. To the commission, this requirement applies to all wells at the site. Therefore, the requirements for plugging and abandonment of wells apply to baseline and monitor wells.

KHH commented that under §331.46(i), there is reference to "a Class III production zone that underlies or is in an exempted aquifer." KHH stated that production cannot lawfully occur in a non-exempt portion of an aquifer, therefore a production zone cannot underlie an exempted aquifer, and suggested this section be revised to state that the closure plan shall demonstrate that no contaminants from the production zone will enter a USDW or freshwater aquifer.

The commission does not agree with this comment. Although all in situ mining of uranium in Texas to date has occurred in exempted USDW-quality aquifers, in situ mining of uranium or other minerals conceivably could occur in an aquifer that is not of USDW quality. Therefore, in situ mining could occur in a production zone underlying an exempted aquifer.

Construction Requirements

Mesteña and TMRA commented that to avoid confusion, mechanical integrity, as described in revised §331.82(c)(2), should be revised to indicate mechanical integrity must be demonstrated both following well construction and prior to injection. Mesteña and TMRA also commented that this revision was necessary to avoid conflict with the definitions of the terms "injection operations" at §331.2(51), "underground injection" at §331.2(103), and "well injection" at §331.2(109). TMRA asked for a clarification of the meaning of the term "tool," and who will make the determination that the "tool" could affect the mechanical integrity.

The commission agrees with this comment in regard to the requirement that integrity must be demonstrated both following well construction and prior to injection, but is unsure of the specific relation of this requirement to the other three referenced definitions. Nevertheless, §331.82(c)(2) has been further revised to indicate that mechanical integrity must be demonstrated both following well construction and prior to injection. The term "tool," as used in the drilling industry, logically includes numerous mechanical devices; however the intent of this proposed revision is to address any potential damage to the casing that could occur from insertion of any such device in the well. An obvious example would be the use of any device used to retrieve a defective packer, a stuck pump, or parts that had broken from a drill bit. The commission would not consider the insertion of a sonde for standard geophypsical logging to represent a "tool" that could affect mechanical integrity, except in cases where the sonde is lost in the hole (requiring that a device be inserted in the well to retrieve the sonde) or the sonde becomes stuck in the well requiring insertion of a device to free it. The commission is relying on the operator to make a judgment when the use of a tool may compromise mechanical integrity of a well, and strongly emphasizes all Class III wells must have mechanical integrity as described in §331.43.

STOP commented that §331.82(i) addresses the determination of the number and location of monitor wells, but does not address how a statistically valid number of monitor wells should be determined. STOP emphasized this determination is important for determining representative pre-mining baseline water quality.

As discussed elsewhere in this response, the commission notes that under §331.104(a), baseline samples must be representative and independent, which speaks to the condition of baseline well spacing and to the adequate number of samples for establishment of baseline.

Monitoring Requirements

TMRA commented that the term "calendar" should be included in the proposed revision to §331.84(c) to distinguish between a calendar month and a 30-day period.

Under §331.84(c), two samples were required each month, and these samples have to be taken at two-week intervals. This requirement was problematic in that if the two-week interval is strictly enforced, an operator would be required to take 26 samples in a year, whereas the two-sample-per-month requirement

is 24 samples a year. The purpose of these samples is to identify any changes in the groundwater quality. The requirement for two samples a month, at two-week intervals, is to avoid a situation where the two samples are taken close together, such as one or two days apart. The proposed revision sets the time interval for the two samples at 15-days, rather than two-weeks. The commission agrees with TMRA that the designation should be each calendar month, rather than every 30 days, and the final rule at §331.84(c) has been amended accordingly.

Sierra Club commented that in addition §331.84(d) requires quarterly monitoring of private wells located within 1/4 mile of mining, but there is requirement of notice should the values be above safe drinking water levels, and no requirement for clean-up. Essentially the mining company and TCEQ will be made aware of potential problems for local users, but they themselves will not know. STOP commented that §331.84(d) does not address the correction of the migration of mining fluids into a private well, nor does it contain a notice requirement.

The commission is uncertain regarding the intent of Sierra Club's comment, but assumes they are noting there are no requirements for notice. Under existing §331.84(d), the commission may specify at least quarterly monitoring for wells within 1/4 mile of the injection site to detect any migration from the injection zone into fresh water. This provision speaks to existing §331.42(b)(3), under which an applicant for a Class III injection well area permit must identify all existing wells within the project area (that is, the requested permit area), plus the area 1/4 mile outward from the permit area boundary. The purpose of the requirement at §331.42(b)(3) is to identify any wells that, because of their age, construction, or condition, could serve as a pathway for injected fluids to migrate into a USDW. The purpose of §331.84(d) is to allow the commission to require, in addition to the monitor well requirements at §331.103, the monitoring of any other wells within 1/4 mile of the permit area. Typically, such wells are hydrologically down-gradient of the injection site, and provide an additional point for monitoring groundwater quality at the site. The commission notes that these wells usually are on private property, and monitoring of these wells is contingent on permission to do so from the landowner. No changes were made in response to this comment.

Reporting Requirements

Sierra Club commented that they supported the proposed revisions to §331.85, which details the information required in the annual report. Sierra Club recommended this provision be revised to also include submission of water quality data and water quantity use, and that this information should be submitted to any groundwater conservation district whose jurisdiction includes the area of the permitted Class III injection well site.

The commission does not agree with this comment. Water quality data presently is submitted to the executive director on a quarterly basis in accordance with the requirements of §331.85(e). Although the commission appreciates the concerns regarding the amount of water used for in situ operations, the commission has no authority to regulate water use at in situ sites; therefore, an owner or operator is not required to maintain records on water use. These reports certainly may be of interest not only to groundwater conservation districts but to other entities and persons as well. The commission emphasizes that these reports are a matter of public records, and as such, are available to the public at TCEQ headquarters in Austin for viewing and copying subject to the Public Information Act. Requirements to provide reports to a third-party are difficult for the TCEQ to enforce and may inundate a third-party with unwanted documents or may subject an entity to record management requirements for records that may not be wanted or needed. Given this public availability, the commission sees no need to require they be sent to a groundwater conservation district. No changes were made in response to this comment.

TMRA commented that the proposed revisions to §331.85(a) appear to require a due date of January 31, not December 31, for the annual report, as stated in the preamble to the proposed rules. TMRA suggested the proposed rules should be revised to allow the agency to stagger the dates on which annual reports are required of various permittees to allow the agency to better manage its work flow.

The commission agrees that the date of December 31st in §331.85(a) in the proposed rule is in error. The final rule has been amended to reference a due date of January 31st for the annual report required under §331.85. Although the commission appreciates TMRA's suggestion to stagger submission of annual reports, the commission cannot readily impose different requirements on different companies, at least not in regard to submission of reports.

With regards to the proposed new §331.85(a)(3), under which an operator is required to provide in the annual report updated cost estimates for well closure and aquifer restoration, URI and TMRA commented they agree the annual report is the proper venue for the review of cost estimates for well closure and aquifer restoration, and is consistent with the Nuclear Regulatory Commission's (NRC's) regulations at 10 Code of Federal Regulations (CFR) Part 40, Appendix A, Criterion 9 for the regulation of in situ uranium mining operations in non-agreement states. TMRA and URI further commented that as specified in the comment on §305.49(b)(6), a uranium operator will annually have additional delineation and operating data that will provide for a reasoned evaluation of changes that may be warranted to these estimates.

The commission acknowledges TMRA's comment regarding this proposed revision to §331.85(a)(3).

TMRA commented that with respect to proposed new §331.85(h), under which an operator is required to maintain copies of all data required under this section such that these documents are available for inspection at all times by the executive director, this proposed revision should be revised to allow for all documents to be submitted and kept in a readily accessible electronic form.

The commission is agreeable to an operator maintaining data in an electronic format, provided the format is one that does not allow alteration of the document (that is, the report is maintained in a "read only" format).

Production Area Monitor Wells

Sierra Club commented that the maximum well spacing for production zone monitor wells required under §331.103 should be 200 feet rather than the present 400 feet to better ensure the detection of an excursion.

The commission does not agree with this comment, as it is unaware of any evidence to indicate the existing maximum spacing requirements at §331.103 are inadequate. At in situ uranium sites in Texas, excursions have been detected and addressed. Additionally, there are no documented cases of off-site contamination associated with these sites. The commission emphasizes that the present 400-foot spacing is a maximum; closer spacing can be required by the executive director if warranted by local

geologic and hydrogeologic conditions. The executive director also notes that in NUREG-1569, the NRC recommends a maximum spacing of 500 feet at these sites, and that the maximum spacing allowed at municipal solid waste landfills is 600 feet, with allowance for a greater spacing if justified. No changes were made in response to this comment.

With regard to the proposed revisions to §331.103(a), TMRA and URI commented that it is troublesome to use an exact spacing requirement of 400 feet from the production area when the extent of the production area is based on exploration drilling, which by its nature is not exact. TMRA and URI recommended revisions to this section to reflect the fact that the 400 feet is a target distance estimated from the results of exploration drilling. Also, TMRA commented that they considered problematic the proposed rule language to the distance "between each of the monitor wells," as distance can be measured only between a pair of points and it cannot be measured "between" one point only. TMRA recommended proposed revisions to existing §331.103(a) be revised as follows: ". . . monitor wells shall be spaced no greater than 400 feet from the production area." The measurement shall be based, at the permittee's election either as the location of the anticipated production area was once estimated based on exploratory drilling or as the location of the production area appeared after the completion of mining ". . . The distance between each pair of adjacent mine area monitor wells shall be. . . ."

The existing requirement at §331.103(a) is that monitor wells be spaced no greater than 400 feet from the production area, and the intent of the proposed revision simply was to allow the operator to make this determination on information from exploration drilling. This approach is logical to the commission, as the boundary of the production zone is first established by exploration drilling. By allowing the operator to base the extent of the production area on exploration drilling, he or she is protected from possible endless numbers of amendments to a production area authorization because the boundary of the production area, through mining, is found to vary such that the 400-foot requirement is exceeded by a few feet for some monitor wells. TMRA's suggested revisions appear to include this intent, with the option of demonstrating this spacing requirement on the final delineation of the production area, although the commission finds the suggested language to be confusing by its lack of completeness. With regards to this second option, the commission is not comfortable with an operator demonstrating compliance with the 400-foot spacing requirement after mining is complete. The purpose of monitor wells is for the detection of mining fluids that have escaped from the production zone within the production area. The spacing and angle requirements in §331.104(a) are designed to ensure to that these escaped mining fluids are detected. Compliance with these spacing requirements should be demonstrated prior to mining, not after it is completed. The commission has revised the final, as suggested by TMRA, to refer to the spacing between adjacent wells.

Establishment of Baseline and Control Parameters for Excursion Detection

KCCRB commented that if mining activities have occurred, proposed revised §331.104 should be further revised to include a demonstration that all samples used to establish baseline and control parameter concentrations are unaffected by the mining operations. KCCRB also commented that the definition of "mining operations" should include any activity that could reasonably be expected to affect groundwater, such as the injection of fluids from mining or well development.

The commission is unsure of the meaning of KCCRB's comment, as both baseline for aquifer restoration and for the establishment of control parameter values must be established prior to any mining activities in a production area. The commission assumes KCCRB is referring to a situation where one production area within a permitted area has been mined, and the operator is developing baseline data for a subsequent production area. Further, the commission assumes the commenter is concerned that the groundwater within the subsequently planned production area may have been affected by mining activities at the first production area.

Under such a scenario, groundwater in the subsequent production area would have to have been affected by an excursion of mining fluids from mining at the first production area. The commission notes, however, that any excursions would be detected in the production zone monitor wells, and under the requirements of existing §331.106, an operator must clean up the excursion in any affected monitor well. With regard to well development, the commission notes that development of a well involves alternate pumping and production of water to flush fine material from the sand or gravel packed in the annular space between the wellbore and the screen. However, this procedure should not affect groundwater quality in the well to any degree or for any extended period of time. Sampling procedures, such as purging prior to sampling, also will ensure the groundwater sample is representative. No changes were made in response to this comment.

KHH commented that the meaning of the term "independent" at revised §331.104(a), with regards to samples, was unclear, and suggested this section be revised to replace "independent and representative" with "statistically." TMRA asked for an explanation of the meaning of these two terms.

The commission notes that the statistical methods commonly employed in groundwater monitoring (and for baseline determination at Class III injection well sites) are based on the presumption the data are representative and independent. Independence in this case refers to samples that are not correlated. For example, groundwater samples collected one minute apart, from the same well, have a high probability of being similar, whereas samples taken 6 months apart, from the same well, have a much lower probability of being similar, or in this case, correlated. Also, respective samples taken at the same time from two wells ten feet apart have a high probability of being correlated, whereas respective samples taken at the same time from two wells 5,000 feet apart, have a much lower probability of being similar. As a practical matter, independence may be difficult to quantify, but some reasonable efforts should be made by the operator to ensure samples are independent. One common method is to take groundwater velocity into consideration for example, see the method described in EPA's Guidance Document on the Statistical Analysis of Ground-water Monitoring Data at RCRA Facilities. Another common method is to provide adequate well spacing, avoiding using data only from wells that are close together, or "clustered." No changes were made in response to this comment.

KHH commented that its clients are in agreement with the proposed revisions to §331.104(b), which would allow the list of aquifer restoration constituents to be determined on site-specific conditions. However, KHH expressed concern that subsection (b)(1) and (2) would be difficult to implement. Under subsection (b)(1), an applicant must identify all constituents

in the groundwater in the production zone of the production area; under subsection (b)(2), an applicant must identify all constituents in the solutions injected into the production zone. KHH suggested that this proposed rule be revised to require the 26 constituents identified in TCEQ's UIC Technical Guidance I: Groundwater Analysis (*http://www.tceq.state.tx.us/permitting/waste_permits/uic_permits/UIC_Guidance_Class_3.html*), unless the applicant can demonstrate that not all 26 constituents occur in the area, or that other constituents, not on the list, occur in the groundwater in the production area. Mesteña offered similar comments, noting that the proposed requirements were unrealistically broad, and that the standard list of 26 constituents has been used for decades. Mesteña proposed that proposed revised §331.104(b) be further revised to require baseline be determined from the standard list of 26 parameters and any other parameters required by the executive director, and to delete proposed new §331.104(b)(1) - (4).

TMRA commented that this proposed subsection is particularly at risk of inconsistent interpretation and implementation, and noted that as indicated in the preamble, the uranium solution mining industry has routinely analyzed groundwater samples for the parameters list included in TCEQ Technical Guideline I: Groundwater Analysis. TMRA also stated that while the proposed new language may provide for flexibility, it also potentially invites/requires extensive groundwater sampling and analysis to determine what might be or might not be present in the groundwater as a regulator may be unwilling to agree to a parameters list without a degree of sampling that may become excessive and unreasonable. TMRA further stated that the intent of the subsection, which is essentially to inject better science into the process, may be to refer to the standard list of 26 parameters and then provide flexibility on a case-specific basis to recommend other parameters or a subset of the 26 parameters. URI commented that the proposed requirements are unrealistically broad, and potentially will require an owner or operator to sample for every element in the periodic table. URI emphasized that the standard list of constituents is based on years of experience in uranium in situ mining in Texas, and absent a compelling reason to expand this list, this historical analysis list should not be changed.

TMRA stated that inclusion of "approved by the executive director" adds confusion and is potentially superfluous depending on the planned manner in which this subsection will be implemented, and that by the very nature of the permitting process, executive director approval of the content of a permit application is a mandatory condition for permit application approval. TMRA suggested that unless this language indicates another executive director approval or preliminary approval, in advance of the permitting review process, it should be stricken. TMRA advocated that the TCEQ allow a preliminary approval process for a parameters list to be approved in advance of permit application submission and review. Then, if the executive director disagrees with the proposed parameters list, adjustments, which might include additional sampling, can be completed before the application is submitted, which will streamline the process and make compliance with stipulated deadlines for applicant response to any TCEQ Notices of Deficiency less contingent on the possible need for additional collection, analysis, and review of analytical data for groundwater samples.

The purpose of this proposed rule was to provide applicants a method to base the list of aquifer restoration constituents on the actual quality of the groundwater in the production zone within the production area, rather than analyzing for all 26 constituents identified in agency guidance and required in the agency's application for a production area authorization. Additionally, the commission wanted to ensure that all possible constituents in the groundwater, or that might be introduced into the groundwater, were identified. However, the commission appreciates that determining all constituents in groundwater is an open-ended requirement. Therefore, in the final rule, §331.104(b) is revised to require an applicant to establish aquifer restoration values for the traditional 26 constituents, but allow for the applicant to propose an alternate list of restoration constituents, and to allow the commission to require analysis for constituents other than the 26 required under this new rule. Also, §331.104(b) is further revised in the final rule to require demonstration to support any alternate list, provided that any alternate list must include uranium and radium-226.

TMRA recommended the term "all" in proposed new §331.104(b)(1) be replaced with "the relevant and appropriate" as "all" has literally limitless interpretation. TMRA also commented that the proposed language suggests a reference to the concentrations of some typical constituents of the native groundwater of the production zone and perhaps to a few physical properties such as pH and conductivity, and recommended the rule provision should be revised to state the customary list of 26 or so constituents and the properties of pH and alkalinity.

As discussed in the previous response, proposed new §331.104 has been revised to require an applicant to establish aquifer restoration values for the traditional 26 constituents, but allow for the applicant to propose an alternate list of restoration constituents. Also in the final rule, §331.104(b) is further revised to require demonstration to support any alternate list, provided that any alternate list must include uranium and radium-226.

TRMA commented that proposed new §331.104(b)(2) does not include a list of the relevant physical characteristics and chemical constituents of the proposed lixiviant.

The commission notes that this proposed rule has been revised in the final rule from being a requirement to being a consideration taken by the executive director in evaluating a proposed list of alternate restoration parameters. The purpose of this proposed rule is to allow an applicant or operator to propose the removal or addition of constituents to the standard list of 26 parameters based on any relevant physical or chemical characteristics of the injected fluid that could affect the groundwater quality. In that the applicant or operator must make this demonstration, it is the responsibility of the applicant to identify any relevant characteristics of the proposed injection fluid.

TMRA commented that proposed new §331.104(b)(3) invites a list or a subset of the list of the chemical constituents which may be mobilized from the host matrix of the production zone during mining. TMRA further commented that as was the case with the prior requests for "all parameters," this cannot be a list of "all parameters" because such a request is literally limitless and therefore, does not serve a purpose. TMRA suggested that this proposed rule be revised to read as follows: "the constituents which may be mobilized from the host matrix of the production zone during the in situ recovery process; and. . . ."

The commission notes that this proposed rule has been revised from being a requirement to being a consideration taken by the executive director in evaluating a proposed list of alternate restoration parameters. Otherwise, the commission agrees with the recommended change, and the final rule has been revised accordingly.

Sierra Club commented that proposed new §331.104(b) should be revised to include the following requirements: sampling of groundwater-bearing zones above and below the production zone to establish pre-mining groundwater quality in these zones for excursion control; baseline wells shall not be clustered; each baseline well is sampled a minimum of twice a month over a period of four months; and split sampling with the TCEQ.

The commission notes that under §331.104(a) and proposed new §331.104(e) an operator is required to establish baseline water quality in non-production zones. Also, the commission currently conducts split sampling with operators during site inspections. The commission agrees that baseline wells should not be clustered, but emphasizes that under proposed §331.104(a), baseline samples must be representative and independent, which speaks to the condition of baseline well spacing and to the adequate number of samples for establishment of baseline.

Sierra Club commented that with respect to proposed new §331.104(c), it supports the comments of hydrogeologist George Rice, who recommends using a 95% upper tolerance limit for the declaration of excursions and the use of nested wells with shorter screen lengths to prevent dilution. Sierra Club further commented that these requirements would make detection of excursions more likely than the methods presently suggested in NRC guidance document NUREG-1569. STOP agreed with the use of this method as proposed by Mr. Rice, and noted that by using this method to evaluate monitoring data from URI's Kingsville Dome Mine, Mr. Rice concluded there were more excursions than reported by URI, based on their use of other methods.

The commission in general is not opposed to the use of a tolerance interval methodology for excursion detection, provided the percentage of analytical measurements below the detection limit is not too high, and provided the data used in the test are from a normal distribution (or, in the case of log-normally distributed data, the data are log-transformed to yield normally-distributed data) when a parametric tolerance interval methodology is used. However, the commission does not agree that a tolerance interval methodology should be required by rule. The choice of statistical method for a hypothesis tests should be based on the appropriateness of the method to the distributional characteristics of the data (at least in the case of parametric tests).

The commission notes that the tolerance interval is a technique to estimate a population proportion. Tolerance intervals are constructed to contain a particular proportion of a population (known as the "coverage") with a particular probability. For example, a tolerance interval could be constructed such that the interval has an associated probability of 0.95 of containing 95% of a population. Such an interval is generally described as a 95/95 tolerance interval. The commission further notes that although tolerance intervals are for interval estimation, they are sometimes used as a statistical hypothesis test, such as in groundwater monitoring. Background data are collected and used to construct a tolerance interval; then subsequent compliance sample measurements are compared to the tolerance interval (generally to the upper tolerance limit). If the compliance sample measurement exceeds the upper tolerance limit, it is concluded that the groundwater has been affected; otherwise it is concluded that there is no effect. Again, the commission in general is not opposed to using tolerance intervals in this manner, but emphasizes that if a tolerance interval methodology is used, a new tolerance interval must be constructed for each test (in the case of groundwater monitoring, a new interval must be constructed for each sampling period). Only by doing this can the associated type I error rate of 0.05 be maintained. No changes were made in response to this comment.

STOP commented that under §331.104, an owner or operator is allowed to establish aquifer restoration values simply by averaging sample results from five wells completed in the production zone. STOP further commented that this rule allows an owner or operator, unsupervised, to select any five laboratory results from hundreds of wells, submit these results to the TCEQ, who then simply average them to establish aquifer restoration values.

The commission agrees that under §331.104(a)(2), an owner or operator must use data from at least five production area baseline wells. The commission also agrees that under §331.104(d)(1), an owner or operator is allowed to base aquifer restoration values on the sample mean, or under §331.104(d)(2), aquifer restoration may be based on predictions of restoration quality that are reasonably certain after giving consideration to the factors specified in §331.107(f).

The commission notes that the five-well requirement is a minimum. Also, as is allowed under existing §331.104(d)(1), an owner or operator may, to establish aquifer restoration values, use either the average values from samples from the baseline wells completed in the production zone within the production area, or the average values from samples from the production zone monitor wells. The commission agrees that determination of aquifer restoration values should be based on an adequate number of sample analyses, and notes that revisions to §331.014(c) require a minimum of five baseline wells completed in the production zone of the production area, or one well for every four acres of production area, whichever is greater. The commission disagrees that an owner or operator chooses five samples from hundreds of possible exploration wells. These exploration wells are not cased, screened, or developed, and any determination of water quality based on analysis of groundwater from one of these wells would not be accepted as being representative of groundwater at that location. The main problem would be that any sample from an uncased well most likely could be diluted from the drilling mud, resulting in an underestimation of concentrations of constituents in the groundwater. The existing allowance at §331.104(d) for the use of the sample mean (average) for determining aquifer restoration values has been retained in the final rule at §331.107(a)(1)(A), with an option for use of a statistical method approved by the executive director at §331.107(a)(1)(B).

STOP commented that aquifer restoration values should not be based on pre-mining groundwater quality data from just the production zone within the production area, as is required under the final rule at §331.104(b). Instead, STOP recommends aquifer restoration values be based on data from groundwater throughout the entire vertical section of the aquifer, including non-production zones above and below the production zone, both within the production area and the mine area. STOP's main concern regarding establishment of aquifer restoration values solely on groundwater quality data from production zone within the production area appears to be that groundwater outside of the production zone within the production area could be contaminated by excursions of mining fluids, and that these affected zones and areas also need to be restored. STOP commented that there is no requirement that the groundwater quality outside the production zone of the production area be established.

The commission does not agree with these comments. Aquifer restoration values should be based on the pre-mining groundwater quality in the zone to be mined (the production zone within the production area). The pre-mining groundwater quality in this zone within this area is affected by the presence of naturally-occurring uranium mineralization. Neither the production zone outside of the production area nor non-production zones are mineralized; therefore, groundwater quality within them will be different from that which is in contact with uranium mineralization (that is, the production zone within the production area). Given these differences in groundwater quality, and given that it will be the groundwater within the production zone within the production area that will be affected by in situ mining, the commission fails to understand how basing aquifer restoration in the production zone within the production area on groundwater quality data not from this zone and area would be representative of the pre-mining groundwater quality in the production zone within the production area.

The commission notes that groundwater quality, for the purpose of the detection of excursion, must be established in the production zone outside of the production area and in non-production zones §331.104(e), and that any excursions affecting these areas and zones must be addressed under §331.106. Aquifer restoration in accordance with §331.107 is not required for these zones and areas because Class III injection wells are not operated in these zones. The injection and re-injection of mining fluids is confined to the production zone within the production area, as that is where the uranium is; injection of mining fluids does not occur in non-production zones or in the production zone outside the production area.

STOP commented that determination of control parameter upper limits, as required under §331.104(c), is based on groundwater quality data from the ore zone (that is, the production zone within the production area), not the monitor well ring outside of the ore zone. STOP also commented that few chemical constituents are used for groundwater monitoring to detect the excursions of mining fluids from the production zone within the production area to monitor wells outside of this zone. STOP noted that at URI's Kingsville Dome Mine, only uranium, conductivity, and chlorides are used as monitoring parameters for excursion detection. STOP further noted that upper control limits for these three control parameters were determined as follows: 5.0 milligrams per liter (mg/L) was added to the highest pre-mining sample value for uranium; and 25% was added to the highest pre-mining sample value for conductivity and chlorides.

The commission acknowledges these comments, and notes that control parameters are those parameters that are used to detect excursions, and that the upper limit for a control parameter is the value of that parameter that, when exceeded, indicates mining fluids may be present in a monitor well. Typically, owners or operators have been allowed to base control parameter upper limits on the highest measured value for a parameter in a groundwater sample either from the production zone within the production area or from the production zone outside the production area.

The commission notes that under the requirements of previous §331.104(c), the baseline water quality values for a permit or production area were used to determine control parameter upper limits. Under previous §331.104(a), three separate baselines were identified (mine area, production area, and non-production area), the commission in the proposed rule revised §331.104 to require data from wells completed in the production zone within the production area to be used for determination of aquifer restoration values (final rule at §331.104(b)). Similarly, it is the commission's determination that upper control limits should be based on data from the monitor wells, not the baseline wells completed in the production zone within the production area. However, the commission notes that this specific requirement was not clearly included in the proposed rule. Accordingly, new §331.104(e) has been revised to include this requirement.

The commission notes that historical data from in situ sites in South Texas indicate that groundwater quality from the production zone of these two areas (the production zone within the production area and the production zone outside the production area) tends to be similar except for uranium and radium-226. The use of either adding 5.0 mg/L to the highest value for a parameter or by adding 25% to the highest value for a parameter is recommended in NRC Guidance Document NUREG-1569. As discussed elsewhere in this response, the commission is not opposed to using data from both these areas to determine upper control limits, provided the data are subjected to an appropriate statistical test to determine if they are from the same population.

The commission also notes that adequate detection of excursions does not require the use of numerous control parameters. Control parameters should be those constituents in the groundwater that are mobile and easily detected (such as chlorides, for example). The commission notes that under §331.106(2), when an excursion in a monitor well has been verified, the owner or operator must sample for an expanded list of groundwater parameters, including uranium and radium-226.

TMRA commented that in proposed new §331.104(d), if the "accepted methods" and the "TCEQ Quality Assurance Project Plan (QAPP)" are stated in rules formally adopted by the TCEQ, the rule(s) should be cited. TMRA notes that unless formally adopted as rules, these cannot be valid or effective except perhaps against specific individuals subject to permits containing them as conditions. TMRA further commented that unless these have been adopted as rules, TCEQ is barred from enforcing them as rules. See TWC, §5.103(a) and (c) and §5.105 and Texas Government Code, §2001.004 and §2001.005.

The commission does not agree with this comment. The commission is complying with TWC, §5.103 and §5.105 and the Administrative Procedures Act because the commission is requiring that sampling be in accordance with the TCEQ QAPP, as a requirement of the rule stated in §331.104(d).

KHH commented that the direct comparison method described in paragraph (1) of proposed new §331.104(e)(1) was inappropriate in that this method would result in an unacceptable level of "false positive." KHH also questioned the reason for the requirement of 30 samples, and asked if the intent was 30 samples total or 30 samples from each monitor well. Mesteña commented that this proposed requirement would result in an unacceptably high type I error rate (that is, a decision that an excursion has occurred when it has not). With regard to proposed new §331.104(e)(1), Mesteña also commented that the standard for identifying excursions is based on Nuclear Regulatory Guidance Document NUREG-1569, in which the authors suggest upper control limits for excursion detection should be determined by one of the following methods: a statistical test (such as the student t-test); adding 25% to the highest sample value for a parameter; adding 5 standard deviations to the sample mean for a parameter (in areas with groundwater that contains less than 500 mg/L total dissolved solids); or increasing the concentration of a parameter by a specific amount (for parameters that have a narrow statistical distribution).

Mesteña appeared to recommend that language in proposed new §331.104(e)(1) be revised to remove the statement: "the baseline water quality values for a permit or production area shall be used to determine control parameter upper limits." Given that this statement is not included in the proposed rule, the commission is unclear as to the intent of Mesteña's apparent recommendation. Mesteña also recommended that proposed new §331.104(e)(1) be revised to require that if a sample measurement from a groundwater sample for a control parameter exceeds the maximum (rather that the mean) value determined by the pre-mining sample set, then an excursion will be assumed to have occurred.

TMRA submitted similar concerns to those of Mesteña's regarding the use of the sample mean for excursion detection, and recommended the proposed rule be revised to require that conductivity, uranium, and chloride be used as control parameters, and that upper control limits be calculated as follows: add a value of 5 mg/L to the maximum uranium value determined on the baseline sampling of the mine area Wells and the production area wells of the production area being authorized; add 25% to the maximum conductivity value determined in the baseline sampling of the mine area wells and the production area wells of the production area being authorized; or add 25% to the maximum chloride value determined in the baseline sampling of the mine area wells and the production area wells of the production area being authorized.

URI commented that the method proposed in new §331.104(e) will not work because of the natural variability in the concentrations of groundwater parameters across an area. The proposed method, according to URI, will result in excursions being declared even in areas where there has been no mining, and provided an example using data from URI's Vasquez Mine. URI noted that historically, the methods for excursion detection approved by the TCEQ are the three methods listed in the comments from TMRA. URI stated that these methods account for natural variability, prevent false positives, and provide an early and reliable indication of an excursion. URI also noted these three methods are the ones evaluated by the NRC for in situ mines outside of Texas (URI referenced NRC Guidance Document NUREG-1569: Standard Review Plan for In-situ Uranium Extraction License Application, p. 5-40). URI's recommended revisions to this proposed rule were the same as the recommendations suggested by TMRA and Mesteña.

Upon further review of proposed §331.104(e)(1), the commission realized that the proposed language is in error because the detection of a control parameter in a monitor well that is greater than the mean value of the control parameter before mining is not an indicator of an excursion. The intent of this proposed rule was to provide a method for excursion detection that was based on the z-test, as described in "Probability and Statistics for Engineers and the Sciences, 1987, 2nd edition, Jay, L. Devore, Brooks/Cole Publishing Co." With a sample size of 30, valid test results can be obtained without requiring that the data be normally distributed. However, this test is not a direct comparison of the sample mean to future sample values as described in the proposed rule. Although the commission appreciates the suggested revisions recommended by TMRA and Mesteña recommendation regarding comparison of sample results to pre-mining sample values for excursion detection, the commission has decided to require that excursion detection be based on a statistical method proposed by the applicant and approved by the executive director. This allows the applicant flexibility in deciding what statistical method is appropriate for a site based on specific distributional characteristics of the groundwater sample data, and based on an acceptable type I error rate for the statistical test. Accordingly, new §331.104(e)(1) has been deleted.

Sierra Club expressed support of proposed new §331.104(e), under which an operation is required to choose control parameters that will provide timely and reliable detection of excursions. However, Sierra Club commented that proposed new §331.104(e) lacked clarity about how to determine a statistically valid number of monitor wells, both in the production zone and in non-production zones.

The commission acknowledges Sierra Club's support of new §331.104(e), and their concern regarding determination of an adequate number of monitor wells. However, the purpose of new §331.104(e) is to provide the requirement that selected control parameters are suitable for detection of excursions. Control parameters should be those constituents in the groundwater that are mobile and easily detected (such as chlorides, for example). With regard to the number of monitor wells, as previously discussed, the commission may require additional monitor wells if there is evidence that a smaller well spacing is necessary, based on site-specific conditions.

With regards to monitoring for excursions, STOP commented that proposed new §331.104(e)(1) partly corrects the existing rule.

The commission acknowledges this comment. However, §331.104(e)(1) was proposed in error and has been deleted.

Monitoring Standards

TMRA commented that they support the proposed revisions to §331.105(1) and (3) to include instrument measurement in the proposed language, and noted that field instrumentation coupled with the appropriate field quality assurance/quality control can yield representative, reliable, and reproducible results. This will potentially reduce analytical costs and streamline the process. The proposed rule should be amended to allow for direct instrument analysis. With regards to the proposed revisions to §331.105(3), TMRA also commented that the proposed revised rule should be further revised to reference "any well" with "designated well" to promote consistent interpretation and consistency in terminology with §331.105 and §331.105(4).

The commission acknowledges TMRA's support of the proposed revisions to these rules. However, the commission is unsure of TMRA's intent in suggesting the proposed revised language be further revised to allow "direct" measurement. Based on previous comments from TMRA regarding instrument measurement, the commission is further revising the language to allow for measurement by field instrumentation. Also, the commission agrees that revised §331.105(3) should be further revised to reference "designated monitor wells" rather than "any well," as this monitoring standard applies specifically to designated monitor wells; the final rule has been amended accordingly.

Remedial Action for Excursion

TMRA commented that the proposed revision to §331.106, under which the existing language "if the verifying analysis indicates that mining solutions are present in a designated monitor well. . ." is revised to "if the verifying analysis indicates the existence of an excursion in a designated monitor well. . . ." is unnecessary because the presumption that an excursion is due to mining solutions from permitted activities seems clear, and therefore there is no need to indicate it in the text.

The commission acknowledges that the proposed revision (33 TexReg 7478) to this rule is minor, as the definition at §331.2(38) for the term "excursion" is "the movement of mining solutions into a designated monitor well." The commission intends to use defined terms in the rules. Based on the definition of the term "verifying analysis," reference to an "excursion" rather than to "that mining solutions are present" at §331.105 is preferable to the commission. The commission notes that under §331.106(2)(B), an operator can make a demonstration that the change in groundwater quality (as evidenced by the verifying analysis) is not due to the presence of mining fluids, and that the adopted change better speaks to the assumption of the presence of mining fluids in the definition of the term "verifying analysis."

Sierra Club commented that it agrees that uranium and radon must be added under §331.106 as basic constituents as part of groundwater monitoring.

The commission acknowledges this agreement, but notes that the revisions to §331.106 in the adopted rule adds uranium and radium-226 to the expanded list of constituents for which an operator must sample during an excursion. Radon is not included in §331.106. No change has been made in response to this comment.

STOP commented that under proposed §331.106(2)(A), an owner or operator must clean up all designated monitor wells, all zones outside of the production zone, and the production zone outside of the mine area that contain mining fluids, and that clean up is deemed to have been accomplished when water quality in an affected monitor well has been restored to values consistent with current local baseline, as confirmed by three consecutive daily samples for control parameters. STOP noted that the terms "clean up" and "current local baseline" are not defined. STOP also noted that only the groundwater in the affected monitor well is "cleaned up," and the stabilization period is only three days. Therefore, according to STOP, the area contaminated by mining fluids between the production area and the ring of monitor wells encircling the production area is not addressed.

The commission emphasizes that under revised §331.106(2)(A), well clean up is deemed to be accomplished when water quality in a designated well is restored to current local baseline quality as confirmed by three consecutive daily samples for the control parameters. Therefore, the term "clean up," although not specifically defined, is based on a specific requirement. Based on other comments, the phrase "consistent with" has been deleted due to the vagueness of the term. The commission appreciates that an excursion will extend from the edge of the production area outward to a monitor well, and that the area between these two points also will contain mining fluids. However, the restoration of this area, at least in the context of the term with regards to the production zone within the production area, is warranted. Under §331.102, mining fluids must be confined to the mine area, or the area within the monitor well ring that surrounds the production area. Excursions will affect the area between the edge of the production zone and the monitor well ring, but this effect is in no way comparable to that in the production zone within the production area, where mining fluids are injected and re-injected on a continuous basis for extended periods of time. Excursions typically are addressed by increasing the withdrawal rate in nearby production wells, which induces groundwater to flow towards the production area, thereby "pulling" the excursion back into the production area.

Restoration

STOP commented that proposed revisions to §331.107, which must be read in conjunction with proposed revisions to §331.104, allow for aquifer restoration values to be established either by taking the mean concentration for each restoration parameter, or by using a statistical method proposed by the owner or operator and approved by the executive director. STOP expressed the opinion that these methods are biased towards the owner or operator of an in situ mining operation.

The commission acknowledges STOP's opinion regarding this matter, but disagrees that these methods represent a regulatory bias for the owner or operator. The commission intends that independent and representative water quality samples be taken based on accepted methodologies for sample collection, preservation and analyses.

STOP commented that proposed changes to §331.107 continue the practice of allowing amendments to aquifer restoration values, and as a result, drinking water with the mine is degraded with chemicals that are a danger to public health.

The commission acknowledges that revisions to §331.107(g) do not remove the allowance of amendments to aquifer restoration values. The commission also acknowledges that the in situ mining process results in the elevation of concentrations of certain parameters in the groundwater within the production zone within the production area. With respect to this groundwater posing a danger to public health, the commission emphasizes that groundwater within a zone that contains naturally-occurring uranium mineralization generally is not suitable for human consumption prior to any mining activities. Historical commission records confirm that pre-mining groundwater quality at all in situ uranium mining sites in Texas exceeded primary drinking water standards for various parameters. That is to say, groundwater within the mineralized zones at these sites was unsuitable for human consumption before any mining was done.

In accordance with the requirements of §331.102, mining fluids must be confined to the production zone within the mine area. To help ensure this requirement is met, both production zone and non-production zones monitor wells are required. Once mining is complete, the affected groundwater must be restored to pre-mining quality, determined in accordance with the requirements of §331.104, in accordance with the requirements in §331.107. Amendments to the initially-established aquifer restoration values are allowed, but after consideration of the factors at §331.107(g)(1), and only after making affirmative findings in §331.107(g)(2) that reasonable restoration effort had been made, that the restoration parameters had stabilized, that the formation water would be suitable for any use to which it was suited prior to mining, and that further restoration efforts would consume energy, water or other natural resources of the state without providing a corresponding benefit to the state.

STOP submitted the following comment regarding aquifer restoration: furthermore, by using "class of use" or "any use to which it was reasonably suited prior to mining," any error in the pre-mining baseline which set the concentration of a particular chemical above the MCL allowed for drinking water, livestock and irrigation changes the "use." Therefore, a concentration of uranium which allegedly was above 0.03 mg/L pre-mining can be amended to any value above 0.03 mg/L, greatly changing water quality--a change which then threatens all adjacent areas once the mine is closed and negative pressure is removed. An example of this can be found at Uranium Resources, Inc.'s

Longoria Mine PAA2 where the Restoration Table value of uranium was 0.037 mg/L. This value was amended to 3.0 mg/L, eighty-two times higher, but still within the same "class of use" since it can be argued that 0.037 is above the MCL for uranium.

The commission assumes the commenter is referring the use of the term "any use to which is was reasonably suited prior to mining" at §331.107(g)(1)(A). The commission notes that the term "class of use" does not appear in §331.107, but assumes the commenter is referring to §331.107(f)(2)(C) "the formation water present in the aquifer would be suitable for any use to which it was reasonably suited prior to mining." Also, the commission notes that although maximum concentration levels (MCLs) have been established for public drinking water systems (30 TAC Chapter 290), which provide water for human consumption, rules have not been adopted that establish MCLs for other uses, such as livestock, farming, industry, and wildlife.

The commission disagrees that an initially-established aquifer restoration value can be amended to any value. All aquifer restoration values that have been amended were done so in accordance with the requirements of §331.107(g). The commission notes that any determination of the "class of use" of groundwater is based on many factors, such as the actual pre-mining use of the groundwater and the groundwater's possible future use. Specific MCLs for different groundwater parameters may vary within a "class of use." For example, the recommended (but not regulatory) upper concentration limits for dissolved solids in water depends on the type of livestock that will use the water (see page 213 of United States Geological Water-Supply Paper 2254). The concentrations of parameters that may be incorporated into crops through irrigation may or may not be important depending on how a crop's harvest is used. It is these types of factors the commission takes under consideration before allowing an amendment to a restoration table value. No changes were made in response to this comment.

STOP commented that both EPA and commission rules allow for an aquifer or a portion of one to be exempted from being a USDW, whereby that aquifer or its portion is no longer protected as a USDW. STOP expressed the opinion that the EPA and the commission collaborated to apply this exemption to areas that include both the production area and the mine area at all in situ uranium mining sites in Texas, which has resulted in exempted areas that are larger than the area of the ore zone. STOP also noted that production area authorizations have required establishment of groundwater quality outside of the ore zone, which clearly demonstrates groundwater outside the ore zone is suitable for domestic use. Lastly, STOP commented that it is indefensible for the commission to use an invalid statistical approach for determination of baseline for aquifer restoration, then to adopt rules that allow that baseline to be increased, resulting in commission-authorized contamination of a domestic water supply. STOP requested that the commission not allow for amendments to aquifer restoration values.

The commission acknowledges that aquifer exemptions are allowed in the federal rules at 40 CFR §146.4 and in the state rules at §331.13. The criteria for designating an exempt aquifer are the same in both the federal and state rules, although §331.13(a) subjects any request for an aquifer exemption to public notice and opportunity for a contested case hearing. Further at §331.13(d), no designation of an exempted aquifer is final until approved by the EPA.

The area of an aquifer exemption necessarily extends beyond the area of mineralization to accommodate the production zone monitor wells that encircle the production area. The fact that the quality of the groundwater outside of the production zone of the production area in no way demonstrates or implies that this groundwater is suitable for domestic use (that is, for human consumption). Whether or not it is suitable for such use is irrelevant in this case. Groundwater quality is established outside of the production zone within the production area for the purposes of groundwater monitoring required under §331.103. By establishing this groundwater quality prior to mining, any subsequent changes in this groundwater quality, determined from monitoring this groundwater through the use of monitor wells, can be evaluated to determine if mining fluids have traveled outside of the production zone within the production area, subjecting the owner or operator to the requirements of §331.106 (Remedial Action for Excursion). As discussed elsewhere in this response, the allowance for amendments to aquifer restoration values is warranted, and that the commission needs the flexibility to approve such amendments. The use of "valid statistical methods" is addressed previously in response to another comment. The commission intends that any statistical test used to make an inference about a population should be valid. Lastly, the commission disagrees that amendments to aquifer restoration values represent commission-sanctioned contamination of a domestic water supply. First, amendments are justified in certain cases, each of which is evaluated in accordance with the criteria in §331.107(g). Second, as discussed in a previous response, the groundwater in all the zones mined in Texas did not meet primary drinking water standards prior to mining. No changes were made in response to this comment.

STOP commented that because the commission's regulations do not require a statistically valid baseline and allow amendments to so-called pre-mining baseline, they have resulted in 30 years of allowing owners and operators to leave mines contaminated. STOP expressed the opinion that the term "restoration," within the context of in situ mining, has no meaning today, and because amendments to all restoration tables have been allowed in Texas, the state is viewed as the poster child of bad uranium mining regulation and practice.

The commission notes that the subject of "valid" statistical methods is addressed previously in response to another comment. The commission intends that any statistical test used to make an inference about a population should be valid. Also, the commission has noted in previous responses that groundwater in the mined production zones within the production areas has not been restored to the initially-established pre-mining groundwater quality (with one exception). However, the commission notes that the pre-mining groundwater quality in the production zone within the production area at these sites did not meet primary drinking water standards prior to mining. The commission further notes that the concentrations of many of the groundwater parameters in the production zone within the production area at these sites was reduced to at or below pre-mining concentrations. The concentration of other groundwater parameters at these sites were reduced, but not to at or below pre-mining levels. Decisions to allow for amendments to restoration values that were not achieved were based on the considerations in §331.107(g)(1) and on the findings in §331.107(g)(2).

URI commented that the TCEQ rules at §331.107 should be revised to clearly state that aquifer restoration requirements are "goals" (URI's emphasis) and that groundwater within a mined zone must be restored to levels consistent with pre-mining groundwater quality of the mined zone (that is, the production zone within the production area). URI stated that stakeholders

recently have claimed (mistakenly, in URI's opinion), that the groundwater in the mined zone must be restored "exactly" (URI's emphasis) to pre-mining quality. URI expressed the opinion that aquifer restoration is not meant to be determined by "hard-and-fast" values because natural variation of concentrations for each groundwater parameter will result in the concentration of a parameter exceeding a precisely calculated value. Rather, according to URI, groundwater quality that has been affected by in situ mining should be restored to a quality that is consistent with pre-mining groundwater quality. URI suggested that groundwater quality should be restored to an average concentration within an appropriate statistical range of variability, and the standard of "consistent with" should be retained in the rule to provide the commission with the flexibility to judge if a deviation from established aquifer restoration values is meaningful, or just due to natural variability.

The commission disagrees with the concept to make restoration values merely goals. The commission acknowledges that because established restoration table values are determined by the mean value of a number of baseline wells or by some other statistical method there is inherent variability above or below the established restoration table value for each baseline well. However, there needs to be a method to determine readily when restoration has been completed. The restoration table values are established for a production area prior to mining in the permittee's application for production area authorization. If the permittee doubts that the values in the production area authorization can be achieved, the permittee should not mine. The permittee should continue restoration until the values in each baseline well are equal to or below the restoration table values (or within an established range for pH). If the permittee's efforts to restore cannot achieve restoration by demonstrating that each baseline well has been restored to values for all parameters equal to or below the restoration table value (or within an established range for pH), then the permittee may apply for a restoration table amendment under the process of §331.107(g).

TMRA commented that §331.107 appears to codify permit conditions, and that the inclusion of "approved by the executive director" adds confusion and is potentially superfluous depending on the planned manner in which this subsection will be implemented. TMRA noted that by the very nature of the permitting process, executive director approval of the content of a permit application is a mandatory condition for permit application approval. TMRA recommended that unless this language indicates another executive director approval or preliminary approval, in advance of the permitting review process, it should be deleted.

The commission assumes TMRA is referring to the revision to existing §331.107(a), under which upon issuance and renewal, Class III injection well permits or production area authorizations shall contain a description of the method for determining that groundwater in the production zone within the production area has been restored. The commission disagrees that the language is codifying permit conditions. Rather, the revision to §331.107(a) is requiring that aquifer restoration be addressed in a permit or production area authorization. The requirement of approval by the executive director at both new §331.107(a)(1)(B) and (2)(B) is necessary because each of these new provisions offer the owner or operator the option of using a statistical method, and any such proposed method should require executive director approval. The commission emphasizes that it is not the intent of new §331.107(a)(1)(B) to allow for formal approval by the executive director of a proposed statistical method prior to submission of an application. The executive director will review a proposed statistical method as part of the review of an application.

Based on a review of the revisions to §331.107(a) in response to TMRA's comments, the commission notes that the phrase "upon issuance and renewal, Class III permits or production area authorizations shall contain. . ." needs further revision, as this phrase is incorrect in that production area authorizations are not subject to renewal, as are Class III injection well permits (see §305.127(A)(ii)). Also, the commission notes that amended permits or production area authorizations should contain a description of the method for determining that groundwater in the production zone within the production area has been restored. Accordingly, §331.107(a) is further revised to require this description in any permit or production area authorization.

TMRA commented that although the proposed rules allow for relief from a restoration table, the proposed restoration rule does not acknowledge the possibility of any exception for any reason.

The intent of the revisions to §331.107(a) were to allow an operator to demonstrate that aquifer restoration has been achieved either by a direct comparison of groundwater sample analysis results to established restoration values (which are documented in a restoration table) or by use of a statistical method. The commission does not consider the second option as being relief from a restoration table, but rather the opportunity for an operator to demonstrate established restoration goals have been met, and to make this demonstration with a statistical method other than a direct comparison.

TMRA commented that under the current and the proposed definitions of a "mine plan" (see §331.2(63)), a "mine plan" clearly is only an estimate of the sequence and timetable for any required aquifer restoration, and that proposed §331.107(c) defeats this definition by converting the estimated timetable into a presumptively binding and enforceable requirement. TMRA further commented that this proposed rule makes this inconsistent change without mention of any relevant policy considerations or analysis and certainly without mention of who, if anyone, may be adversely affected and whether such a person had other appropriate remedies beyond the scope of commission jurisdiction. TMRA noted that many, if not all, of those who have recently complained to the commission of delayed groundwater restoration have been persons who either had no justiciable interest in the matter (for example, they did not complain of the quality of water from any well on their property nor the water from any well they relied upon) or if they had an interest, they were bound by and had legal remedies under leases or surface use agreements which remained unimpaired by any permit but outside the commission's jurisdiction.

As discussed in previous comments, the mine schedule submitted in a mine plan is an estimate of the time required to complete mining and aquifer restoration activities in a production area, and because it is an estimate, it is awkward to enforce. Again, however, the commission emphasizes that the time required for mining should not be indefinite, and that the commission expects owners and operators to make every reasonable effort to complete mining and restoration with the time specified in the mine schedule. If progress is not made in restoring mined production areas, the commission may deny or limit expansion of further mining. And, the executive director may consider initiation of permitting or enforcement actions to require a permittee to conduct restoration activities in accordance with the permit and authorization if a permittee fails to conduct required restoration.

Both KCCRB and Sierra Club commented that they oppose the amendment of restoration values, as is allowed under proposed revised §331.107, and recommended that if such amendments are to be allowed, only one amendment for each production area authorization should be allowed. Sierra Club also commented that the proposed changes to §331.107 continue the practice of allowing an amendment to initially-established premining groundwater quality in the production zone within the production area.

The commission appreciates the recommendation that an operator should not be allowed to amend restoration values over and over. However, although the commission prefers to be parsimonious regarding any changes to established restoration values, the commission needs the flexibility to allow more than one amendment to restoration values at any particular production area. Any amendments to restoration values will be in accordance with the criteria in §331.107(g).

BC commented that the proposed rules seem to assume an applicant will extend the timetable and amend the restoration values. This section should be done to "motivate" (emphasis BC's) the applicant to do what he says he will do in the application. BC also commented that, at least, proposed revised §331.107(c) should read SHALL (emphasis BC's) rather than may, and that amended restoration value applications should be formal and subject to notice and opportunity for a contested case hearing. Sierra Club recommended the proposed rules include a requirement that within a permitted area, authorization to mine a new production area cannot commence until aquifer restoration is achieved in previously mined production areas in that permitted area.

The commission disagrees that the rules are based on an assumption that a permittee will extend the timetable in the mine plan and amend restoration values. With respect to using the word "shall" rather than "may" in §331.107(c), the commission assumes the commenter is referring to the phrase "authorization for expansion of mining into new production areas may {shall} be contingent upon achieving restoration progress in previously mined production areas within the schedule set forth in the mine plan." The commission does not agree with this suggested rule revision. Certainly the commission will invoke this restriction in a case where an operator is not making a good faith effort to meet the aquifer restoration requirements of §331.107, or in the case where an operator is experiencing significant difficulty in restoring the aquifer in a mined production area. However, in cases where aquifer restoration is proceeding in a satisfactory manner at a mined production area, the commission should have the option to allow the operator to proceed with mining at a new production area. The commission does agree that amendments to restoration values should be formal and subject to public notice and opportunity for a contested case hearing, and notes that any amendment to restoration values in a production area authorization is considered to be an major amendment, as defined in §305.62, Amendment, which is subject to public notice and opportunity for a contested case hearing.

Sierra Club commented that the terms "class of use" and "or any use to which it was reasonably suited prior to mining" allows companies the ability to drastically amend restoration values, provided doing so does not change the class of use of the groundwater. Sierra Club further commented that the commission has for over 30 years allowed companies to amend restoration tables, which effectively allowed these companies to contaminate groundwater without cleaning it up.

The commission does not agree with this comment, and responds that amendments to restoration table values were approved only if the requirements of §331.107(g) were met. Although the approval of these amendments by the commission has allowed companies to restore groundwater in the production zone within the production area to levels above the initially-established background levels for certain constituents, the commission considers these instances to be in full accordance with §331.107(g) and does not constitute contamination of an underground source of drinking water. Therefore, under both state and federal regulation, no further restoration or remediation is required in such cases. The commission assumes that the commenter is referring to the considerations in existing §331.107(f) regarding amendments to restoration tables regarding the terms "class of use" and "or any other use to which it was reasonably suited prior to mining." Under §331.107(g), an operator may request amendment of a restoration table value after appropriate effort has been made to achieve aquifer restoration. In evaluating such a request, the commission considers, in accordance with the requirements of §331.107(g)(1), among other things, uses for which the groundwater in the production area was suited at baseline water quality levels; actual existing use of ground water in the production area prior to and during mining; potential future uses of groundwater of baseline quality and of proposed restoration quality; and the harmful effects of levels of a particular parameter. Under the requirements of §331.107(g)(2), the commission may amend a restoration table if certain findings are realized, including that the values for the restoration parameters have stabilized; and that the formation water in the exempted portion of the aquifer would be suitable for any use to which it was reasonably suitable prior to mining.

KCCRB commented that they support proposed new §55.201(i)(11), under which opportunity for a contested case hearing exists in the case of an amendment to a restoration table. Sierra Club recommended that the proposed rules be revised to add language to make it clear that an amendment to a restoration table should be open to opportunity for a contested case hearing.

The commission notes that under §55.201(i)(11)(A), an application for a production area authorization is not subject to opportunity for a contested case hearing unless the authorization seeks an amendment to a restoration table value. Therefore, an amendment to change any restoration value is subject to opportunity for a contested case hearing.

Mesteña commented that the requirements under proposed revised §331.107(a)(1)(A), that aquifer restoration values be based on the mean concentration of all sample measurements from baseline wells prior to mining activities, is problematic because the location of the baseline wells is not indicated. Mesteña emphasized that analysis of groundwater samples from wells completed in the production zone should be used to determine the pre-mining groundwater quality that will be the basis for aquifer restoration. Mesteña further emphasized that analysis of groundwater samples from wells completed in the production zone but not in the production area also should be used for this baseline determination, as is currently allowed under §331.104(d)(1). According to Mesteña, data from these wells will provide additional information regarding variability of the groundwater quality in the production zone. Lastly, Mesteña referenced NRC's NUREG-1569, and recognized that in this guidance, the NRC recognizes the difference in groundwater quality between mine area and the production area, and recommended proposed new §331.107(1)(A) be revised to dis-

tinguish between wells completed in the production zone of the production area and other wells. Mesteña recommended that proposed revised §331.107(1)(A) be revised to allow for baseline determination as is currently allowed under §331.104(d)(1). TMRA and URI submitted comments and recommendations similar to Mesteña's.

The revisions to §331.107(a)(1)(A) are based on the premise that groundwater quality in the production zone within the production area (that is, the area that contains the zone of uranium mineralization to be mined), may be, at least for certain constituents, different from the groundwater quality in the production zone outside of the production area (that is, the area of the production zone peripheral to, but beyond the mineralized area). For aquifer restoration, it is the quality of groundwater in the production zone within the production area that is of interest. It is this groundwater quality that represents the pre-mining groundwater quality of the zone to be mined, and that will be affected by in situ mining. Therefore, although the commission understands that any estimation of groundwater quality in any zone within any area is improved with additional data, all data used to determine groundwater quality should be representative of the particular groundwater. The groundwater quality data from the production zone outside the production area is not necessarily representative of the groundwater quality in the production zone within the production area. Therefore, the commission again emphasizes that the establishment of baseline for aquifer restoration (or for any groundwater baseline conditions, for that matter) should be based on representative data.

The commission acknowledges that under previous §331.107(d)(1), determination of baseline was based on the higher of two sample means: the sample mean of data from wells completed in the production zone of the production area (production area baseline wells); or the sample mean of data from wells completed in the production zone outside the production area (the production zoned monitor wells). The commission fails to understand, however, how this method provides a good estimate of the groundwater quality in the production zone within the production area. Using this methodology, a person is assuming two separate populations (the groundwater quality in the production zone in the production area, and the groundwater quality in the production zone outside the production area), computing a point estimate of the true mean of each population, and then choosing the higher estimate as representative of the true mean of the population represented by the groundwater in the production zone within the production area.

A more defensible methodology would be to use an appropriate statistical test to compare the two sample data sets to determine if they were from the same population. If the test indicated they were from the same population, then the sample mean could be computed using the combined data from both populations. Because of the increased sample size, this estimate of the true mean would have less associated variance than either estimate based on the separate data sets, and therefore would provide a better estimate of the true mean. The commission contends such a methodology could be proposed by an applicant under new §331.107(a)(1)(2).

The CBGSC also commented on proposed new §3312.107(a)(1)(A), stating that determination of restoration values on the sample mean from a limited sample data set was unadvisable because the sample mean is sensitive to extreme values (CBGSC provided an example based on data from the Vasquez Mine in Duval County to illustrate this effect). CBGSC recommended that in situations where the sample data set includes extreme values, the sample median should be used instead of the sample mean. An individual commented that companies are allowed to use a small sample size to calculate a sample mean, and if the sample data set contain outliers, the sample mean will be biased. The individual also commented that using a small sample data set to identify the distributional characteristics of the underlying distribution is not a statistically sound practice.

The commission agrees that the sample mean can be influenced by extreme values, be they extremely high or extremely low, and that extreme values have less effect on the sample median. The method described in new §331.107(a)(1)(A) presently is allowed under §331.104(d)(1) and was retained to allow its use, albeit in a more restricted manner in that restoration values must be based on data from wells completed in the production zone within the production area. In such cases as the example provided by CBGSC, the commission can determine that a sample data set is not representative, as required under revised §331.104(a), and require additional samples from existing baseline wells or the completion of additional baseline wells. Alternatively, under new §331.107(b), the commission may allow use of the sample median. The commission notes that in the case of a small data set that has an extreme value, which can significantly affect the sample mean, use of the sample median is a example of accommodation of an outlier. The commission also agrees that the power associated with a statistical hypothesis test used to determine the distributional characteristic of the population from which the sample is drawn will increase as the sample size increases (the term "sample size," as used in statistics, refers to the number of realizations drawn from a population; that is, the number of samples taken). Any test for determining normality should be done using a suitable sample size, and the commission would take this factor into consideration regarding any test used to test data.

KHH commented that under proposed revised §331.107(d), the informational requirements for the semi-annual aquifer restoration report are burdensome to both the operator and the commission, and that the informational requirements for water levels, hydrographs, and potentiometric maps provide no meaningful measure of aquifer restoration progress. KHH suggested these requirements be eliminated.

The purpose of the revisions to §331.107(d) was to identify specific information that should be included in these semi-annual reports. The requested information is the type that typically is collected during restoration activities. With regards to potentiometric maps, the commission considers such maps a basic element of any groundwater report. However, the requirement for hydrographs of each baseline and monitor well is not essential to evaluating aquifer restoration progress. Section 331.107(d) is revised to remove this requirement.

TMRA commented that the wording "have been restored to the values. . ." at proposed new §331.107(e) is inconsistent with the wording "levels consistent with the values. . ." as used in §331.107(b). Different wording invites confusion unless it is meant to indicate a different threshold. If it does indicate a different threshold, the difference in thresholds is unclear as well as why a different threshold is intended.

The commission agrees with this comment, and notes that the definition of the term "restored aquifer" at §331.2(89) was revised to delete the phrase "levels consistent with restoration table values or better as verified by an approved sampling program" in

the final rule. The term "consistent with" does not provide sufficient certainty for determining when restoration is complete. In making this revision, the commission inadvertently neglected to remove it from §331.106(2)(A) and §331.107(b) and revised §331.107(g). The adopted rules have been revised to correct these omissions. If a permittee cannot restore to levels equal to or better than the restoration table values, the permittee may apply for an amendment of the production area authorization to revise the restoration table values.

GCGCD commented that the stability period requirements in §331.107(e), which is proposed new §331.107(f) should be based on groundwater flow velocity rather than a set time period because it is the groundwater flow velocity that determines how fast groundwater travels from the production zone to the monitor wells. GCGCD emphasized that slower moving groundwater from the production zone may not reach a monitor well in the proposed one year stability period; therefore groundwater from a production zone that was not properly restored would not be detected in such a situation. KCCRB commented that not much is known about the kinetics of oxidation-reduction reactions involved with in situ uranium mining, making it difficult to predict the length of time required for conditions within the mined portion of an aquifer to return to pre-mining reducing conditions. Because of this, KCCRB recommended that revised §331.107(f) (Stability Sampling), under which the stability period is revised from 180 days to one year, or to two years if the restoration table was amended, should be revised to five years, and that this could be reduced to two years in a future rulemaking if subsequent information indicates no problems during the five-year period. KCCRB also commented that if monitoring is limited to one or two years, possible problems may not be detected, and that given the uncertainty with reestablishing reducing conditions, a five-year monitoring period is reasonable. Mesteña, TMRA, and URI commented that the presently required 180-day stability period is consistent with requirements in other states, and absent evidence supporting the need to increase the monitoring period, the industry should not be arbitrarily compelled to extend this period. LSCSC commented that they fail to see the rationale for either a one-year or a two-year stability sampling period, and experience of Texas communities has been that groundwater quality after mining can vary depending upon local conditions. Sierra Club recommends a five-year stability sampling period, one-year of data simply is insufficient time to determine if groundwater quality has stabilized. TMRA recommended that absent evidence supporting the need to increase the monitoring period, TCEQ should not arbitrarily burden property owners with the additional delay resulting from extending this period. Armstrong commented that the stability period should only be as long as is scientifically justified. TMRA and URI expressed the opinion the current language in §331.107(e) that requires the executive director to determine within 45 days of receipt of all sample analysis results whether or not restoration has been achieved is reasonable, and should not be deleted, as proposed.

The commission does not agree with these comments. The stability period commences only after the owner or operator has determined aquifer restoration has been achieved in accordance with §331.107. Production area baseline wells are monitored for stability, not the production zone monitor wells in the monitor well ring. There is no injection or production of fluids from the production zone within the production area during the stability period. The purpose of the stability period is to verify that the concentrations of constituents in the groundwater, after restoration activity, have stabilized. This stabilization is verified through groundwater sampling in accordance with the requirements of §331.107(f) in the final rule. The assumption that an aquifer has not been restored is tested during the stability period. Under the adopted rules, the stability period is increased from 180 days to one year to account for possible seasonal variations in the concentrations of groundwater constituents. In the case where restoration values have been revised in accordance with the requirements of §331.107(f), the stability period is two years. The commission contends that a longer stability period is warranted in the case of amended restoration values because such amendments are the result of an operator being unable, at least for some constituents, to return groundwater constituent concentrations to the initially-established pre-mining levels. As discussed in the preamble to the proposed rule, the inability to restore groundwater to initially-established pre-mining conditions may indicate that in situ mining affected the chemistry of the groundwater within the production zone of a production area, making the affected groundwater resistant to restoration. Because of difficulty by the operator to restore the affected aquifer to initially-established pre-mining conditions, thus requiring an amendment to restoration values, an extended stability period is warranted to help ensure that stability has been achieved. The commission emphasizes that the two-year stability period would begin only after aquifer restoration activities have ceased. This revision quadruples the stability period presently required, and should provide adequate assurance that the affected groundwater has stabilized. With regards to Sierra Club's comments regarding the experience of Texas communities, this comment appears to imply that wells providing drinking water for human consumption have been affected by in situ mining. If this assumption is correct, the commission is unaware of any documented case where in situ mining has resulted in off-site contamination.

The commission appreciates that other states only require a stability period of 180 days. However, as previously discussed, the commission contends that one year of stability sampling is necessary to evaluate if any changes in groundwater quality are due simply to seasonal variation or to lingering effects of in situ mining. Again, the need to amend restoration values is an indication that in situ mining may have affected the aquifer to an extent that the groundwater is resistant to restoration. The commission contends that a minimum period of two years in such a case is warranted to ensure that aquifer restoration efforts have overcome affected groundwater's apparent resistance to restoration. The commission also notes that under §331.107(g)(3), an operator may provide a demonstration that two years of stability sampling is not warranted. Lastly, for the reasons discussed above, the commission considers the required stability periods to be scientifically justified.

With regards to the amount of time allowed to the executive director to determine if aquifer restoration has been achieved, (45 days from receipt of all sample analysis results under the current rule), the commission emphasizes the importance of such a determination, and further emphasizes that the executive director's review time should not be limited. Further, the commission notes that the review of these data will be accomplished as expeditiously as possible. No changes were made in response to this comment.

TMRA commented that proposed revisions to §331.107(e) (redesignated as §331.107(f) in the final rule) do not provide for long term monitoring.

The commission is unsure of meaning of the term "long term monitoring" as used by TMRA. Generally, the term refers to monitoring after facility operations have ceased and a facility has been closed. For example, at hazardous waste landfill facilities, once the landfill has been closed, groundwater monitoring is required for a period of 30 years (40 CFR §264.117). In this respect, the commission agrees that the final rule at §331.107(f) does not provide for long term monitoring.

TMRA commented that the 45 days allowed to the executive director for determination of achievement of aquifer restoration under §331.107(f) is reasonable.

The commission does not agree with this comment. Given the importance of the data submitted to demonstrate achievement of aquifer restoration, the executive director should not be limited to 45 days for review of these data. No change has been made in response to this comment.

Mesteña and TMRA commented that in proposed revised §331.107(g)(2)(B) and (3), the value of 180 should be revised to 365 days to match the text.

The commission notes that these proposed revised rules specify one calendar year for stability sampling, not 180 days.

Mesteña and TMRA commented that the two-year stability sampling period required under §331.107(g)(3) when a restoration table has been amended is counter-intuitive. TCEQ approval to amend restoration values implies that all items in §331.104(f)(A) - (D) have been met. Mesteña stated that if this is the case, then "the hazard has been quantified, and was deemed acceptable by the TCEQ." Mesteña further commented that the proposed language should be deleted as it results in no added benefit for the State or the permittee. URI commented that absent some evidence supporting the need to increase the stability period, the industry should not be burdened with extending this period.

The commission notes that there is no existing §§331.104(f)(A) - (D), and that §331.104(f) pertains to re-entry into previously mined area for additional mining. The commission assumes the commenters possibly were referring to the considerations under revised §331.107(g)(1), which the commission uses to determine if a restoration table should be amended. If so, the commission emphasizes that any decision to amend restoration values is based on these considerations and the findings detailed at §331.107(g)(2), and involves no implications of any kind. Amendments to restoration tables typically involve raising the restoration values for certain constituents to the levels that have been achieved at the time the amendment is requested, and, any approval by the commission of such an amendment means the commission considers the amendment request to be consistent with the requirements of §331.107(g). In any event, whether an operator has achieved aquifer restoration based on the initially-established restoration values or on amended restoration values, a stability period is still required. As discussed in a previous response, the commission contends that an extended stability period is justified when aquifer restoration values have been amended. No changes were made in response to this comment.

Independent Third-Party Experts

BC commented that the concept of an independent third-party expert, addressed under proposed new rule §331.108 is unclear, and that it appears an applicant can choose to request use of such an expert for the purpose of the initial establishment of requirements pertaining to monitoring wells, and that by doing so avoids opportunity for a contested case hearing. BC asked if use of an expert removes just the monitoring well plan from opportunity for a contested case hearing, or does it remove the entire application from such an opportunity? BC commented that there are numerous issues related to an application for a production area authorization, not just the initial establishment of monitor wells, yet proposed §331.108(c) may be read to indicate the opportunity for a contested case hearing on an application for a production area authorization that includes initial establishment of monitoring wells is available only if the commission determines that the monitoring well plan is inadequate. BC further commented that the idea of removing the opportunity for a contested case hearing under these circumstances is not right, and that the present language in §331.108(c) appears to be ill-planned. KCCRB commented that simply because an independent, third-party expert advises the TCEQ on a limited portion of an application, the entire application should not be exempt from opportunity for a contested case hearing. GCGCD questioned if proposed new §331.108(d), under which there is no opportunity for a contested case hearing if the executive director uses the recommendations of an independent, third-party expert, is a denial of the public's rights. Sierra Club commented that even if the commission uses the recommendations of an independent, third-party expert regarding the initial establishment of monitor wells, opportunity for a contested case hearing is available regarding all other parts of an application for a production area authorization.

The language in new §331.108 is based on SB 1604, §32 adopted during the 80th Legislature, 2007, which revised the TWC to add new §27.0513. Based on TWC, §27.0513(e), the concept regarding an independent, third-party expert is that any conclusions reached by such an expert are not influenced by the applicant, either through selection of the expert, compensation to the expert, or through supervision of the expert's work. Under TWC, §27.0513(d), an application for a production area authorization submitted after September 1, 2007 is an uncontested matter not subject to a contested case hearing or the hearing requirements of Texas Government Code, Chapter 2001. This exemption from opportunity for a contested case hearing applies to the entire application. Three exceptions are provided at TWC, §27.0513(d)(1) - (3) regarding this exemption from opportunity for a contested case hearing. At TWC, §27.0513(d)(2), an application that seeks the initial establishment of monitoring wells for any area covered by the authorization is subject to opportunity for a contested case hearing unless the executive director uses the recommendations of an independent, third-party expert. Regarding TWC, §27.0513(d)(2), an application that seeks the initial establishment of monitoring wells for any area covered by the authorization is subject to opportunity for a contested case hearing, and this opportunity applies to the entire application. However, if the executive director used the recommendations of an independent, third-party expert with regards to the initial establishment of monitor wells, then no opportunity for a contested case hearing exists for the entire application. Although the application for the production area authorization is not subject to an opportunity for a contested case hearing, the application will still be subject to an opportunity for public comment, and the public can comment on the recommendations of the third-party expert.

Sierra Club commented that in regard to the independent, third-party expert addressed in proposed new §331.108, the proposed rules should be revised to allow for public comment on any person selected as an independent, third-party expert.

The commission does not agree with this comment. Proposed new §331.108 is based on SB 1604, §32 which was passed during the 80th Legislature, 2007. This section of the bill amended the TWC, by adding new §27.0513. Under new TWC, §27.0513(e), the legislature described the requirements for use of such an expert by the commission. These requirements did not include public comment on any designated expert. However, even though not subject to a contested case hearing, an application and a draft production area authorization are still subject to existing opportunities for public comment, and the public may comment on the recommendations and use of the third-party expert.

TMRA commented that proposed new §331.108(a)(1) - (3) respond to specific provisions of SB 1604, §32(d)(2) now codified as TWC, §27.0513, which allow for a production area authorization application to avoid hearing exposure if the executive director "uses the recommendation of an independent, third-party expert chosen by the commission" in deciding the adequacy of the location, number, depth, spacing and design of monitor wells initially designated for a production area. TMRA noted that the statutory language does not require nor even allow the TCEQ to give up or delegate its authority or responsibility in approving production area monitor wells to another person. Rather, according to TMRA, it merely allows the executive director to "use the recommendation" of an independent and qualified expert in determining whether proposed monitor wells (which have already been proposed, installed, tested and documented) are adequate in number, location, depth, spacing and design to serve their intended purpose.

The commission does not agree that the language in new §331.108(a)(1) - (3) says the commission is surrendering its authority or responsibility in approving production area monitor wells to another person (in this case, an independent, third-party expert). Rather this new language simply implements the requirements of TWC, §27.0513(e), under which the executive director may use an independent third-party expert. These requirements, which are at TWC, §27.0513(e)(1) - (3), are that the expert meet the qualifications set by commission rules for such an expert, the applicant for the authorization agrees to pay for the costs for the work of the expert; and the applicant for the authorization not be involved in the selection of the expert or the direction of the work of the expert.

TMRA commented that to ensure the statutory language at TWC, §27.0513(d)(2) is implemented effectively, the TCEQ should keep the process as simple as possible consistent with implementing the statutory provisions and allowing the TCEQ to take the benefit of additional expertise in its decision-making processes.

The commission agrees with this comment, and notes that the new language at §§331.108(a)(1) - (3) is identical to the statutory language at TWC, §27.0513(e)(1) - (3). With regards to the exemption from opportunity for a contested case hearing pursuant to TWC, §27.0513(d)(2), the commission notes that the rule language at §55.201(i)(11) is identical to the statutory language at TWC, §27.0513(d)(2). With regard to the process of use of an independent, third-party expert for the purpose of new §55.201(i)(11), the commission envisions that an applicant will prepare an application for a new production authorization, which will include information regarding the initial establishment of monitor wells. The applicant, at the time of submission of this application to the commission, will request that the commission procure the services of an independent, third-party expert to review that portion of the application that addresses initial establishment of monitor wells. The executive director will procure the services of such an expert, in accordance with the commission's procurement process, to review that portion of the application that addresses initial establishment of monitor wells, and submit recommendations to the executive director regarding that portion of the application. If the executive director uses the recommendations of the expert, the application will be exempt from opportunity for a contested case hearing. If the executive director does not use the recommendations of the expert, the application will be subject to opportunity for a contested case hearing.

TMRA commented that there is no need for the executive director to be burdened by onerous details in selecting and contracting with qualified experts, as the executive director and the TCEQ are well able to identify qualified professionals and to identify those who are sufficiently independent to offer the executive director useful advice. TMRA also commented that the qualifications set out in §331.108(b) should be stated as guidance for the executive director to consider in anticipation of selecting an "expert" whose advice will prove both independent and useful.

The commission does not agree with this comment. Under TWC, §27.0513(e)(1), the commission by rule is required to establish qualifications for independent, third-party experts. Given the importance of the expert (use of his or her recommendations exempts certain applications from opportunity for a contested case hearing), any requirements for an expert should be in rule. If that guidance is not enforceable (except when so designated by rule), the qualifications for an expert necessarily must be established by rule, not guidance. To this end, the commission crafted these proposed qualifications to be both specific (with regards to the expert being either a licensed professional engineer or a licensed professional geoscientist), and general regarding work experience and other relevant factors.

TMRA commented that the exact statutory language is extremely important: the statute does not call for the executive director to give up TCEQ regulatory authority by "adopting," "incorporating," or "approving" the advice of an independent, third-party expert. Rather, TMRA noted, the statute instead calls upon the executive director to "use the expert's recommendation, which calls for the executive director to take the benefit of the expert's advice and presumably for the TCEQ, which is the state's designated repository of expertise in such matters, to digest that advice in reaching its decision on a production area authorization application.

As expressed in a previous response, the commission is not surrendering any of its authority or responsibility through the proposed rules regarding the use of an independent, third-party expert. With regards to the term "uses" in TWC, §27.0513(d)(2), the commission considers this to mean that an independent, third-party expert has submitted recommendations regarding the initial establishment of monitor wells, and that the commission has reviewed these recommendations and accepts them.

TMRA commented that the statute does not dictate either the specific question or questions to be asked of the expert; nor does it dictate the scope, form or detail of the response to be required from the expert. Therefore, to avoid an illegal delegation of ultimate authority to a third-party, the executive director should not ask the independent expert to answer for the TCEQ the ultimate regulatory questions the TCEQ must provide. Instead, the TCEQ should solicit commentary on any matters the executive director

may regard as useful and within the province of the expert's professional expertise.

The commission agrees that the statute appears to be silent on these matters. Again, the commission does not consider the rules regarding independent, third-party experts to represent the commission's surrender of any of its authority or responsibilities.

TMRA commented that the language of proposed §331.108(a)(4) would require the executive director to task the independent, third-party expert with framing a new and independent monitoring proposal and allow the executive director to "use" such advice only in the case that the third-party expert's proposal met all of the applicable regulatory requirements. TMRA suggested this language be deleted for two reasons: first, a production area authorization application determination is about the adequacy of the applicant's application; and in the case of the expert, it is specifically about the monitor wells the applicant has already installed, not about a third person's recommendation for some other set of wells; second, the expert need not and should not be asked to present and justify a new set of monitor wells for examination by the TCEQ. TMRA suggested the starting point should be the pending production area authorization application, and the expert's contribution may be directed to any number of questions: what changes must be made to the proposed monitor well configuration to make it effective; or, if it is effective, what changes, if any, could make it better? TMRA also recommended that for consistency, "monitoring" should be revised to "monitor."

The commission does not agree that the new language in §331.108(a)(4) requires the executive director to task the expert in the manner described by TMRA. Section 331.108(a)(4) simply allows the executive director to not use the expert's recommendations if they are contrary to existing statutory and regulatory requirements. This language does not set out the requirements detailed by TMRA. The commission notes that revisions to the definition of the term "monitor well" at §331.2(64) specify that the term is synonymous with the term "monitoring well." No changes were made in response to this comment.

TMRA commented that they consider proposed new §331.108(d) to be fatally defective because the statute under which the use of an independent, third-party expert may be used by the commission does not require the commission to require the expert to produce a wholly new monitor well proposal, nor does it require the commission to adopt, incorporate, or impose the expert's recommendations. Rather, according to TMRA it calls for the commission to USE (TMRA's emphasis) the expert's recommendations. TMRA proposed the language of this proposed new provision be revised to reflect the action to be taken when the commission has made a decision after "using" (TMRA's emphasis) the recommendation of the expert.

The commission finds this comment to be vague, as TMRA places emphasis on the terms "use" and "using," but provides no explanation for this emphasis. TMRA appears to imply that if an independent, third-party expert submits recommendations (however detailed or trivial) regarding the initial placement of monitor wells, and if the commission simply reviews these recommendations, then the commission has "used" the recommendation of an independent, third-party, and there is no opportunity for a contested case hearing on the application.

With regards to the term "uses" in TWC, §27.0513(d)(2), the commission considers this to mean that an independent, third-party expert has submitted recommendations regarding the initial establishment of monitor wells, and that the executive director has reviewed these recommendations and accepts them. The purpose of new §331.108(d) is to allow the executive director to not accept the recommendations of the expert if those recommendations are in conflict with the requirements of §331.103. And, if the executive director does not accept (that is, use) the recommendations of the expert, then the application should not be exempt from opportunity for a contested case hearing. The executive director's "use" of the expert's recommendation is not all or nothing. The executive director may enter into a contract or other arrangement with the expert to delineate the scope of work and the expectations from the expert's review. If the executive director has questions or concerns about the adequacy of the expert's recommendations, these concerns can be worked out through the contract process or the executive director could seek the recommendations of another expert. The commission emphasizes that the executive director's acceptance under §331.108(d), of an expert's recommendations regarding the initial establishment of monitor wells exempts the entire production area application from opportunity for a contested case hearing, which is no small matter. Given the importance of this matter, any recommendations from an expert accepted by the executive director should at least have the integrity of being consistent with the requirements of applicable rules, especially the requirements at §331.103. If an applicant requests the benefit of the third-party expert provision, the commission intends for the expert's input to be meaningful. The commission would expect the expert to opine on whether the proposed monitor wells comply with rule and permit requirements and if site-specific information at a proposed production area warrants any additional considerations with respect to monitor wells, such as for example, the placement of additional non-production zone monitor wells in any overlying or underlying aquifers. If the executive director determines that the recommendation meets the requirements and uses the recommendation in the production area authorization, the application is not subject to the contested case hearing requirements. No changes were made in response to this comment.

TMRA and URI commented that the proposed §331.108(e) states that if the executive director determines that the recommendations from the designated independent third-party expert do not meet the requirements for the initial establishment of monitor wells in accordance §331.103, either in whole or in part, the application for a production area authorization will be subject to opportunity for contested case hearing, regardless of subsequent changes to the application. TMRA and URI further commented that this provision potentially gives the recommendation of the expert greater weight over the applicant's proposed monitor well plan than the applicant's proposal and the authority of the executive director to approve or deny the applicant's plan and/or seek an adjustment in the applicant's plan which would achieve compliance with the rule. TMRA and URI expressed the opinion that, in effect, proposed §331.108 would give the independent expert the ability to nullify the applicant's ability to avoid a hearing, just by giving an arbitrary recommendation that is inconsistent with the rule.

The commission does not agree with this comment. Again, the commission emphasizes that exempting an application from opportunity for a contested case hearing is not a matter to be considered lightly. Also, the commission emphasizes that such exemptions are dependent on the statutory requirement at TWC, §27.0513(d)(2) that the executive director use the recommendations of the expert; however, it does not compel the executive

director to use these recommendations. The commission does not consider it likely that an expert would provide recommendations on monitoring wells that are contrary to the rule or permit requirements applicable to monitoring wells because the process for the procurement of the expert's services would identify the activities that the expert is requested to perform. The executive director may enter into a contract or other arrangement with the expert to delineate the scope of work and the expectations from the expert's review. If the executive director has questions or concerns about the adequacy of the expert's recommendations, the concern's can be worked out through the contract process or the executive director could seek the recommendations of another expert. Therefore, if the executive director does not use the recommendations of the expert, the exemption from opportunity for a contested case hearing does not apply to the application. The language at new §331.108(e) in no way compromises the executive director's authority regarding approval or denial of an application. It simply gives the executive director the option of rejecting (that is, not using) the recommendations of the expert if those recommendations are contrary to statutory or regulatory requirements, specifically the requirements at §331.103. No change has been made in response to this comment.

TMRA and URI commented that the proposed process is wrong because the statutory language at proposed new §331.108(e) does not allow the executive director to yield its authority or responsibility in reviewing or approving underground injection control permits or authorizations to an expert; neither does it give the expert the authority to modify, withdraw or negate a pending production area authorization application. Rather, it merely allows the executive director to "use the recommendation" of an independent and qualified expert in determining whether the monitor wells are adequate in number, location, depth, spacing and design to serve their intended purpose.

The commission does not agree with this comment. As discussed in previous responses, new §331.108(e) does not compel the executive director to surrender any of its authority or responsibility regarding independent, third-party experts. Additionally, this new language conveys no authority to the expert. No change has been made in response to this comment.

TMRA and URI expressed the opinion that the statute does not require adopting, incorporating, or approving the expert's advice. The expert's determination is about the adequacy in accordance §331.103 of the applicant's monitor well placement. It does not require or allow the expert to formulate an alternate monitor well proposal. By simply "using the recommendation" of the expert, the executive director is able to take the benefit of the expert's advice, digest and either use it or discard it in whole or part in reaching the expert's decision on a production area authorization application. Certainly the executive director should not be bound to take bad expert advice, that does not meet the requirements for the initial establishment of monitor wells in §331.103, and be forced to send that bad recommendation to a hearing examiner for a ruling.

The commission agrees in part with these comments. The commission agrees that the statute does not require the executive director to adopt or incorporate, or approve the recommendations from an independent, third-party expert; it simply allows the executive director to use these recommendations. The commission agrees (and has advocated in previous comments) that any recommendations from an expert should speak to the requirements at §331.103. The commission agrees that the expert is not required to formulate an alternate monitor well proposal. However, the expert may offer recommendations on the applicant's proposed initial establishment of monitor wells. Indeed, that is the responsibility of the expert; that is the purpose for which the applicant requests such an expert, and agrees to compensate the expert for his or her recommendations.

The executive director's "use" of the expert's recommendations is not all or nothing. With regards to "using the recommendations" of the expert, as suggested by TMRA, the commission again emphasizes the decision to use these recommendations lies with the executive director; the commission is not compelled by statute to use them.

Mesteña commented that under proposed new §331.108(e), if the executive director determines the recommendations from an independent, third-party expert do not meet the requirements for the initial establishment of monitor wells, regardless of subsequent changes, the application for a production area authorization will not be exempt from opportunity for contested case hearing, as is allowed under proposed new §55.201(i)(11). Mesteña further commented that the proposed rules regarding such experts are restrictive and opaque to the point of being unworkabale. Mesteña recommended that this section be revised to remove the reference to opportunity for a contested case hearing, to indicate these applications are subject to final technical review for compliance with §331.103, and to state that if the executive director use the expert's recommendations regarding the initial establishment of monitor wells, no opportunity for a contested case hearing exists.

It appears that Mesteña is contending that if an independent, third-party expert submits recommendations on the initial establishment of monitor wells, this is all that is required for the production area authorization application, in total, to be exempt from opportunity for a contested case hearing. It appears that Mesteña is also contending that this is the case, regardless of the nature of the recommendation of the expert. As discussed in the previous response, the commission contends it is not the intent of TWC, §27.0513(d)(2) to exempt this type of application from opportunity for a contested case hearing simply because an independent, third-party expert submitted recommendations to the commission. If the commission does not use these recommendations because they do not satisfy regulatory requirements, then the requirements of TWC, §27.0513(d)(2) have not been met, and the application is not exempt from opportunity for a contested case hearing. No changes were made in response to this comment.

During stakeholder discussion, it was noted that it is unclear if an application is subject to opportunity for a contested case hearing if the executive director uses some, but not all, of an expert's recommendations, and it was asked that the commission clarify what percentage of an expert's recommendations must be used to remove the opportunity for a contested case hearing on an application, as allowed under the final rule in §55.201(i)(11).

The executive director's use of the expert's recommendations is not all or nothing. The commission considers it will have used the recommendations of an independent, third-party expert if it uses a substantial portion (and not necessarily all), of the expert's recommendations. In that it is problematic to set a specific percentage of the expert's recommendations, no such percentage is being established in this rulemaking. Use of the expert's recommendations will be determined on a case-by-case basis. The commission notes that this process will include discussions with the expert regarding his or her recommendations, with opportunity for the expert to explain the recommendations. The

commission may return the recommendations to the expert for reconsideration if the recommendations do not meet the requirements of §331.103 for the establishment of monitor wells. Opportunity for an expert to reconsider any recommendations he or she makes will be included in the contract between the commission and the expert.

Cost Estimates for Financial Assurance

With regards to proposed new §331.109, Cost Estimates for Financial Assurance, TMRA commented that the commission should not use the issuance of a production area authorization as the occasion to set or approve the form or amount of financial assurance to be provided by a permittee, and referenced rule §305.49(b)(6). TMRA further commented that as a practical matter, because delineation drilling and development of a production area may take two years or more, there is no practical way for a miner to make a meaningful estimate of the total aquifer restoration cost for an entire production area before commencing mining within one or more wellfields within a production area. Therefore, useful estimates of restoration costs cannot be provided prior to the drilling and operations for which a production area authorization is required. URI commented the requirements for a cost estimate for aquifer restoration is unworkable as stated in their comments on proposed revisions to §§37.9045(b), 305.49(b)(6), and 55.201(i)(11).

The commission notes that in accordance with new §305.49(6), relating to Additional Contents of Application for an Injection Well Permit, an application for a production area authorization shall be submitted with and contain a cost estimate for aquifer restoration and well plugging and abandonment. The commission assumes that by submitting an application for a production area authorization, the owner or operator has completed detailed work on delineating the ore-body to be mined (both in terms of depth and area), installed required monitor wells, and investigated and identified the aquifer characteristics of the production zone for determination of Class III well spacing, at least on an initial basis. In fact, the commission questions why a person would submit an application for a production area authorization without having completed these tasks. Furthermore, any decision to pursue mining (and obtaining the necessary production area authorization) is based on economic considerations, and the cost required for plugging and abandonment of all wells and for aquifer restoration certainly must be included in any economic analysis. The commission realizes that these cost estimates will be adjusted over time. Submission of these initial cost estimates in an application for a production area authorization provides the commission the opportunity to review and comment on the factors taken into consideration to estimate these costs. For example, factors such as required pore volumes, flare factors, effective porosity of the production zone, pumping and electrical costs, water treatment and disposal costs, and laboratory analytical costs are all factors to be considered regarding the cost of aquifer restoration. If a permittee believes that it will be too difficult to establish a cost estimate for restoring an entire production area up front as part of the application of the production area authorization, the permittee should consider reducing the size of the production area. In any case, as required under new §305.49(b)(6), these estimates must be included in an application for a production area authorization. These cost estimates should also be available for review by the public as part of an application. Lastly, the commission notes that establishment of the form of financial assurance for plugging and abandonment of wells and for aquifer restoration is not required under new §305.49(b)(6), and therefore is not required under new §331.109. Financial assurance for aquifer restoration is required to be held under the radioactive material license. Because the financial assurance for aquifer restoration is held under the licensing requirements of Chapter 336, and the financial assurance for well plugging and abandonment is held under the area permit requirements of Chapter 331, an amendment application for the production area authorization is not required and the exception in TWC, §27.0513(d)(3) or §55.201(i)(11)(C) would not be triggered for subsequent updates to financial assurance for aquifer restoration or well plugging and abandonment for inflation adjustments or cost increases. No changes were made in response to this comment.

Cost Estimates for Plugging and Abandonment and Aquifer Restoration

Mesteña commented that the requirement at proposed revised §331.143(a) specifies the cost estimate for plugging and abandonment of wells must be based on the time when such activities are "most expensive" is vague, and that the cost estimates should be based on those accepted by the executive director. Mesteña recommended the proposed revised rule be further revised to remove the reference to "most expensive" and add language to reflect such estimates must be in an amount acceptable to the executive director and consistent with the facility. Mesteña also recommended that proposed revised §331.143(a)(2) (concerning Cost Estimates For Aquifer Restoration) be revised from "aquifer restoration for each production area authorization" to read as follows: the cost for independent third-party completion of all aquifer restoration for subsection (i): all injection operations for the same permit area in which mining has been completed but for which the corresponding aquifer restoration obligations have not been discharged, clause (ii) all injection operations within the same permit area which are underway; and clause (iii) - all injection operations in the same permit area which will be commenced in the next 60 days.

The commission emphasizes that any cost estimates must be acceptable to the executive director. The commission emphasizes the importance of having financial assurance that is based on the most current cost estimates for plugging and abandonment of wells and aquifer restoration. The intent of these requirements is to ensure all factors have been considered in deriving these cost estimates. Factors that may affect when activities are most expensive include the permittee's plans for the maximum number of wells, changes to expected electrical rates, changes to well servicing expenses, or growing current cost estimates to future costs based on inflation and time-value of money to the projected time when closure is scheduled to occur. However, to avoid confusion, the final rule in §331.143(b)(1) and (2) is revised to remove the term "most expensive" and replace it with the requirement that these estimates must take into account all costs related to plugging and abandonment and aquifer restoration, respectively. With regard to Mesteña's proposed revision to §331.143(a)(2), this amount of detail is not necessary and could restrict the ability to assess adequate closure costs. No changes were made in response to this comment.

Mesteña recommended that proposed new §331.143(b)(1) should be revised to remove the requirement that the cost estimate for plugging and abandonment must be equal to the cost of plugging and abandonment at the point in the facilities life that makes this activity most expensive, and that this language should be further revised to require these costs must equal those acceptable to the executive director.

The commission again emphasizes that any cost estimates must be acceptable to the executive director. As discussed in the previous response, the final rule in §331.143(b)(1) has been revised to remove the term "most expensive," and to require that the estimate take into account all costs related to plugging and abandonment.

Mesteña recommended that proposed new §331.143(b)(2) should be revised to remove the requirement that cost estimates for aquifer restoration must be equal to the cost of for aquifer restoration at the point in the facilities life that makes this activity most expensive. Mesteña further recommended that proposed revised §331.143(b)(2) to add the following language: the cost estimate under subsection (a)(2) must include the cost for independent, third-party completion of all aquifer restoration; for clause (i) all injection operations for the same permit area in which mining has been completed but for which the corresponding aquifer restoration obligations have not been discharged; clause (ii) all injection operations within the same permit area which are underway; and clause (iii) all injection operations in the same permit area which will be commenced in the next 60 days and specified in the most recent annual report in subsection (d).

As expressed in the previous response, the purpose of the "most expensive" requirement is to ensure that the operator has considered all factors in deriving these cost estimates. As discussed in the previous response, the final rule in §331.143(b)(1) has been revised to remove the term "most expensive," and to require that the estimate take into account all costs related to aquifer restoration.

TMRA and URI commented that proposed revisions to §331.143 are confusing and conflicting regulatory requirements. TMRA and URI stated that first, the paragraph seems to be tailored to plugging and abandonment for a single injection well, and that in the case of a single well it may be possible to perform a worst case "most expensive" analysis. However, TMRA and URI noted that Class III injection wells, permitted under an area permit, are continuously increased in number, and "most expensive" is impossible to determine early in a project. Therefore according to TMRA and URI, reliance on the annual update is necessary. TMRA and URI recommended the estimate be prepared in accordance with the provisions of §336.1125(c).

As discussed in the previous response, the final rule in §331.143(b)(1) has been revised to remove the term "most expensive," and to require that the estimate take into account all costs related to plugging and abandonment and aquifer restoration, respectively. The commission agrees that any updates made regarding financial assurance should be noted in the annual report required under §331.85(a). However, the commission does not agree that any such update can be delayed until submission of the annual report. No changes were made in response to this comment.

TMRA and URI commented that the proposed language at §331.143, which requires the "most expensive" analysis for aquifer restoration, is entirely subjective and inconsistent with the TCEQ rules in §331.107. TMRA and URI noted that historically, the industry must restore groundwater to a quality that is consistent with baseline, and that the current rule at §331.107(f) provides for a number of considerations to determine if a restoration table should be amended that would provide the endpoint for future effort including the cost of further restoration efforts. TMRA and URI expressed the opinion that any cost estimate for aquifer restoration that was based on a consideration of when such restoration would be most expensive would be nonsensical because the owner or operator would exercise his or her right to amend the restoration table and end restoration according to the nine criteria provided for in §331.107.

As discussed in the previous response, the final rule in §331.143(b)(1) has been revised to remove the term "most expensive," and to require that the estimate take into account all costs related to plugging and abandonment.

TMRA and URI commented that for the cost of aquifer restoration, proposed revisions to §331.143 rely on a cost analysis for each production area authorization, but that the proposed language omits the requirement that the calculation be made using the information in the annual report. TMRA emphasized that as they stated in previous comments, the annual report is the only reasonable spot to include both an updated calculation of plugging and abandonment for Class III wells and aquifer restoration.

The requirements for the annual report and the required cost estimates are used in conjunction with each other. Section 331.85 requires the submission of an annual report to the executive director that includes updated cost estimates for well closure and aquifer restoration. Section 331.143 provides additional details for deriving the cost estimates for well closure and aquifer restoration.

TMRA commented that the December 31 and January 31 anniversary dates in proposed new §331.143(d) regarding updates to the cost estimates for plugging and abandonment and for aquifer restoration, and submission of these cost estimates, respectively, may create peak workloads that could be performed more efficiently by fewer employees if the work were spread out by selecting different due dates for different permittees. TMRA suggested the December 31 and January 31 dates should be changed to mitigate the problem.

The commission does not anticipate a workload problem regarding new §331.143(d). Although the commission appreciates TMRA's suggestion to stagger submission of annual reports, the commission cannot readily impose different requirements on different companies, at least not regarding submission of reports. No changes were made in response to this comment.

Mesteña recommended that proposed new §331.143(d), regarding updating of cost estimates for plugging and abandonment and aquifer restoration, be revised to require updates of both the cost estimate for plugging and abandonment and the cost estimate for aquifer restoration, rather than just updated cost estimates for plugging and abandonment.

The commission agrees with this recommended revision, and §331.143(d) has been revised accordingly.

Requirements for Existing Wells Used for Development of Class III UIC Well Applications

KHH commented that in the commission's Section by Section discussion, the explanation of proposed new Subchapter M to Chapter 331 is not entirely accurate. KHH is concerned that in the Section by Section discussion, the commission stated that once an exploration well is cased, jurisdiction of that hole is transferred from the RRC to the TCEQ through an informal agreement between the RRC and the TCEQ. KHH emphasized that certain cased exploration wells are used as rig supply wells and others are used to gather data necessary for a Class III injection well area permit, and that prior to the passage of HB 3837 and HB 3838 during the 80th Legislature, 2007, jurisdiction of these

cased wells did not automatically transfer from the RRC to the TCEQ.

The commission reviewed correspondence between the RRC and the TCEQ regarding this matter, and based on that review, agrees with the comment. The cased wells referenced in this correspondence were wells within the area of a Class III injection well area permit.

TMRA commented that proposed new §331.221(a) is implemented to comply with a new statute, but as presented, compliance with the subsection is difficult to regulate. TMRA expressed the opinion that the trigger for necessitating registration is not black and white, and by the time triggered, the timeframe may be later than 30 days following completion. TMRA also asked with what agency must a well be registered? Also, TMRA commented that the decision to proceed with a permit application may not have been made until well after 30 days following completion of a well, and that a more effective means to regulate the registration is register with the TCEQ prior to submission of a permit application to the TCEQ. At that point, the wells are either registered or not, and in violation if they are not registered. Otherwise, compliance is based on a phantom condition that the applicant cannot substantiate or the TCEQ prove to the contrary, or a post 30-day timeframe that makes compliance impossible.

The commission agrees that there are some difficulties regarding the "triggering" of when a well must be registered, as the applicable statute at TWC, §27.023(a) appears to be silent on the exact timing of when a well should be registered, other than to require registration with the TCEQ of any well used during the development of an application to obtain required pre-mining geologic, hydrologic, and water quality information. The commission included the 30-day requirement on the assumption that by this time a potential applicant would have made a decision regarding the use of that well for the development of an application. The commission notes that wells that may be used to obtain information for an application for the most part will be exploration wells drilled under an exploration permit issued by the RRC. Once completed, such wells must be plugged and abandoned almost immediately; they cannot be left open for any extended length of time unless they are cased. Exploration wells generally are cased for two reasons: to provide water for drilling operations, in which case they remain under RRC jurisdiction; or to be used to obtain information to develop a permit application. In the second case, jurisdiction of the well transfers from the RRC to the TCEQ. The commission agrees that the rule needs to specify with what agency a well must be registered. Based on TMRA's comments, new §331.221(a) is revised to require a well that is to be used to obtain information for the development of a permit application to be registered with the commission 30 days after completion of casing and development of the well. The commission can determine compliance with this requirement through a review of the information required at new §331.221(b).

TMRA commented that under proposed new §331.221(d), the criterion "immediately" is not effective in a regulatory sense. What is the definition of "immediately?" TMRA suggested that a superior performance standard is "as soon as reasonably possible," but even that is not particularly meaningful. TMRA recommended that the regulation be limited to submission of plugging and abandonment reports to TCEQ within 30 days of permit authorization, as this is a clear regulatory benchmark on which to base compliance. Of course, with any regulatory requirement, the concept of prosecutorial discretion should be practiced by the TCEQ to allow extensions for situations outside the reasonable control of the permittee (e.g., recent Hurricane Ike).

The commission notes that the intent of the requirement for immediate plugging and abandonment of any registered well that was not subsequently included in a Class III injection well area was to avoid the situation where a registered well was within the area of a Class III injection well area permit, but was not authorized under that permit, as different regulatory requirements apply to wells authorized under a permit than apply to a registered well. However, the commission appreciates that plugging and abandonment of any well takes time. Therefore, the commission agrees with TMRA's recommendation for an allowance of 30 days for plugging and abandonment of such wells, with a consideration of a time extension approved by the executive director, and has revised new §331.221(d) accordingly.

KHH commented that the commission stated in the section by section discussion regarding proposed new §331.222, Conversion of Registered Wells to Class III Wells, that once a registered well is authorized under a Class III injection well area permit, the registration status of that well ceases and the well is subject to all applicable commission rules including those regarding permitting, public notice, and hearing requests. KHH expressed the opinion that the registration status of a well ceases when that well is included in an application for a Class III injection well area permit, and it is at that time the well becomes subject to all applicable commission rules including those regarding permitting, public notice, and hearing requests.

The commission agrees with this comment in part. A registered well that is included in a permit application is subject to all of the requirements of the application. However, once a permit is issued, the well is authorized under the permit and the registration ceases under TWC, §27.023(c). The Section by Section discussion has been revised accordingly.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§331.2, 331.7, 331.13

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments are also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendments implement Senate Bill 1604 and House Bill 3838, 80th Legislature, 2007, and TWC, §27.023 and §27.0513.

§331.2. Definitions.

General definitions can be found in Chapter 3 of this title (relating to Definitions). The following words and terms, when used in this chapter, have the following meanings.

(1) Abandoned well--A well which has been permanently discontinued from use or a well for which, after appropriate review and evaluation by the commission, there is no reasonable expectation of a return to service.

(2) Activity--The construction or operation of any of the following:

(A) an injection well for disposal of waste;

(B) an injection or production well for the recovery of minerals;

(C) a monitor well at a Class III injection well site;

(D) pre-injection units for processing or storage of waste; or

(E) any other class of injection well regulated by the commission.

(3) Affected person--Any person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the proposed injection operation for which a permit is sought.

(4) Annulus--The space in the wellbore between the injection tubing and the long string casing and/or liner.

(5) Annulus pressure differential--The difference between the annulus pressure and the injection pressure in an injection well.

(6) Aquifer--A geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

(7) Aquifer restoration--The process used to achieve or exceed water quality levels established by the commission for a permit/production area.

(8) Aquifer storage well--A Class V injection well used for the injection of water into a geologic formation, group of formations, or part of a formation that is capable of underground storage of water for later retrieval and beneficial use.

(9) Area of review--The area surrounding an injection well described according to the criteria set forth in §331.42 of this title (relating to Area of Review) or in the case of an area permit, the project area plus a circumscribing area the width of which is either 1/4 mile or a number calculated according to the criteria set forth in §331.42 of this title.

(10) Area permit--A permit that authorizes the construction and operation of two or more similar injection, production, or monitoring wells used in operations associated with Class III well activities within a specified area.

(11) Artificial liner--The impermeable lining of a pit, lagoon, pond, reservoir, or other impoundment, that is made of a synthetic material such as butyl rubber, chlorosulfonated polyethylene, elasticized polyolefin, polyvinyl chloride (PVC), other manmade materials, or similar materials.

(12) Baseline quality--The parameters and their concentrations that describe the local groundwater quality of an aquifer prior to the beginning of injection operations

(13) Baseline well--A well from which groundwater is analyzed to define baseline quality in the permit area (regional baseline well) or in the production area (production area baseline well).

(14) Buffer area--The area between any mine area boundary and the permit area boundary.

(15) Caprock--A geologic formation typically overlying the crest and sides of a salt stock. The caprock consists of a complex assemblage of minerals including calcite ($CaCO_3$), anhydrite ($CaSO_4$), and accessory minerals. Caprocks often contain lost circulation zones characterized by rock layers of high porosity and permeability.

(16) Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(17) Casing--Material lining used to seal off strata at and below the earth's surface.

(18) Cement--A substance generally introduced as a slurry into a wellbore which sets up and hardens between the casing and borehole and/or between casing strings to prevent movement of fluids within or adjacent to a borehole, or a similar substance used in plugging a well.

(19) Cementing--The operation whereby cement is introduced into a wellbore and/or forced behind the casing.

(20) Cesspool--A drywell that receives untreated sanitary waste containing human excreta, and which sometimes has an open bottom and/or perforated sides.

(21) Commercial facility--A Class I permitted facility, where one or more commercial wells are operated.

(22) Commercial underground injection control (UIC) Class I well facility--Any waste management facility that accepts, for a charge, hazardous or nonhazardous industrial solid waste for disposal in a UIC Class I injection well, except a captured facility or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(23) Commercial well--An underground injection control Class I injection well which disposes of hazardous or nonhazardous industrial solid wastes, for a charge, except for a captured facility or a facility that accepts waste only from facilities owned or effectively controlled by the same person.

(24) Conductor casing or conductor pipe--A short string of large-diameter casing used to keep the top of the wellbore open during drilling operations.

(25) Cone of influence--The potentiometric surface area around the injection well within which increased injection zone pressures caused by injection of wastes would be sufficient to drive fluids into an underground source of drinking water or freshwater aquifer.

(26) Confining zone--A part of a formation, a formation, or group of formations between the injection zone and the lowermost underground source of drinking water or freshwater aquifer that acts as a barrier to the movement of fluids out of the injection zone.

(27) Contaminant--Any physical, biological, chemical, or radiological substance or matter in water.

(28) Control parameter--Any physical parameter or chemical constituent of groundwater monitored on a routine basis used to detect or confirm the presence of mining solutions in a designated monitor well. Monitoring includes measurement with field instrumentation or sample collection and laboratory analysis.

(29) Desalination brine--The waste stream produced by a desalination operation containing concentrated salt water, other naturally occurring impurities, and additives used in the operation and maintenance of a desalination operation.

(30) Desalination concentrate--Same as desalination brine.

(31) Desalination operation--A process which produces water of usable quality by desalination.

(32) Disposal well--A well that is used for the disposal of waste into a subsurface stratum.

(33) Disturbed salt zone--Zone of salt enveloping a salt cavern, typified by increased values of permeability or other induced anomalous conditions relative to undisturbed salt which lies more distant from the salt cavern, and is the result of mining activities during salt cavern development and which may vary in extent through all phases of a cavern including the post-closure phase.

(34) Drilling mud--A heavy suspension used in drilling an injection well, introduced down the drill pipe and through the drill bit.

(35) Drinking water treatment residuals--Materials generated, concentrated or produced as a result of treating water for human consumption.

(36) Drywell--A well, other than an improved sinkhole or subsurface fluid distribution system, completed above the water table so that its bottom and sides are typically dry except when receiving fluids.

(37) Enhanced oil recovery project (EOR)--The use of any process for the displacement of oil from the reservoir other than primary recovery and includes the use of an immiscible, miscible, chemical, thermal, or biological process. This term does not include pressure maintenance or water disposal projects.

(38) Excursion--The movement of mining solutions, as determined by analysis for control parameters, into a designated monitor well.

(39) Existing injection well--A Class I well which was authorized by an approved state or United States Environmental Protection Agency-administered program before August 25, 1988, or a well which has become a Class I well as a result of a change in the definition of the injected waste which would render the waste hazardous under §335.1 of this title (relating to Definitions).

(40) Fluid--Material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

(41) Formation--A body of rock characterized by a degree of lithologic homogeneity which is prevailingly, but not necessarily, tabular and is mappable on the earth's surface or traceable in the subsurface.

(42) Formation fluid--Fluid present in a formation under natural conditions.

(43) Fresh water--Water having bacteriological, physical, and chemical properties which make it suitable and feasible for beneficial use for any lawful purpose.

(A) For the purposes of this subchapter, it will be presumed that water is suitable and feasible for beneficial use for any lawful purpose only if:

(i) it is used as drinking water for human consumption; or

(ii) the groundwater contains fewer than 10,000 milligrams per liter (mg/L) total dissolved solids; and

(iii) it is not an exempted aquifer.

(B) This presumption may be rebutted upon a showing by the executive director or an affected person that water containing greater than or equal to 10,000 mg/L total dissolved solids can be put to a beneficial use.

(44) General permit--A permit issued under the provisions of this chapter authorizing the disposal of nonhazardous desalination concentrate and nonhazardous drinking water treatment residuals as provided by Texas Water Code, §27.023.

(45) Groundwater--Water below the land surface in a zone of saturation.

(46) Groundwater protection area--A geographic area (delineated by the state under Safe Drinking Water Act, 42 United States Code, §300j-13) near and/or surrounding community and non-transient, non-community water systems that use groundwater as a source of drinking water.

(47) Hazardous waste--Hazardous waste as defined in §335.1 of this title.

(48) Improved sinkhole--A naturally occurring karst depression or other natural crevice found in carbonate rocks, volcanic terrain, and other geologic settings which has been modified by man for the purpose of directing and emplacing fluids into the subsurface.

(49) Individual permit--A permit, as defined in the Texas Water Code (TWC), §27.011 and §27.021, issued by the commission or the executive director to a specific person or persons in accordance with the procedures prescribed in the TWC, Chapter 27 (other than TWC, §27.023).

(50) Injection interval--That part of the injection zone in which the well is authorized to be screened, perforated, or in which the waste is otherwise authorized to be directly emplaced.

(51) Injection operations--The subsurface emplacement of fluids occurring in connection with an injection well or wells, other than that occurring solely for construction or initial testing.

(52) Injection well--A well into which fluids are being injected. Components of an injection well annulus monitoring system are considered to be a part of the injection well.

(53) Injection zone--A formation, a group of formations, or part of a formation that receives fluid through a well.

(54) In service--The operational status when an authorized injection well is capable of injecting fluids, including times when the well is shut-in and on standby status.

(55) Intermediate casing--A string of casing with diameter intermediate between that of the surface casing and that of the smaller long-string or production casing, and which is set and cemented in a well after installation of the surface casing and prior to installation of the long-string or production casing.

(56) Large capacity cesspool--A cesspool that is designed for a flow of greater than 5,000 gallons per day.

(57) Large capacity septic system--A septic system that is designed for a flow of greater than 5,000 gallons per day.

(58) Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(59) Liner--An additional casing string typically set and cemented inside the long string casing and occasionally used to extend from base of the long string casing to or through the injection zone.

(60) Long string casing or production casing--A string of casing that is set inside the surface casing and that usually extends to or through the injection zone.

(61) Lost circulation zone--A term applicable to rotary drilling of wells to indicate a subsurface zone which is penetrated by a wellbore, and which is characterized by rock of high porosity and permeability, into which drilling fluids flow from the wellbore to the degree that the circulation of drilling fluids from the bit back to ground surface is disrupted or "lost."

(62) Mine area--The area defined by a line through the ring of designated monitor wells installed to monitor the production zone.

(63) Mine plan--A plan for operations at a mine, consisting of:

(A) a map of the permit area identifying the location and extent of existing and proposed production areas; and

(B) an estimated schedule indicating the sequence and timetable for mining and any required aquifer restoration.

(64) Monitor well--Any well used for the sampling or measurement with field instrumentation of any chemical or physical property of subsurface strata or their contained fluids. The term "monitor well" shall have the same meaning as the term "monitoring well" as defined in TWC, §27.002.

(A) Designated monitor wells are those listed in the production area authorization for which routine water quality sampling or measurement with field instrumentation is required.

(B) Secondary monitor wells are those wells in addition to designated monitor wells, used to delineate the horizontal and vertical extent of mining solutions.

(C) Pond monitor wells are wells used in the subsurface surveillance system near ponds or other pre-injection units.

(65) Motor vehicle waste disposal well--A well used for the disposal of fluids from vehicular repair or maintenance activities including, but not limited to, repair and maintenance facilities for cars, trucks, motorcycles, boats, railroad locomotives, and airplanes.

(66) New injection well--Any well, or group of wells, not an existing injection well.

(67) New waste stream--A waste stream not permitted.

(68) Non-commercial facility--A Class I permitted facility which operates only non-commercial wells.

(69) Non-commercial underground injection control (UIC) Class I well facility--A UIC Class I permitted facility where only non-commercial wells are operated.

(70) Non-commercial well--An underground injection control Class I injection well which disposes of wastes that are generated on-site, at a captured facility or from other facilities owned or effectively controlled by the same person.

(71) Notice of change (NOC)--A written submittal to the executive director from a permittee authorized under a general permit providing changes to information previously provided to the agency, or any changes with respect to the nature or operations of the facility, or the characteristics of the waste to be injected.

(72) Notice of intent (NOI)--A written submittal to the executive director requesting coverage under the terms of a general permit.

(73) Off-site--Property which cannot be characterized as on-site.

(74) On-site--The same or geographically contiguous property which may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which the owner controls and to which the public does not have access, is also considered on-site property.

(75) Out of service--The operational status when a well is not authorized to inject fluids, or the well itself is incapable of injecting fluids for mechanical reasons, maintenance operations, or well workovers or when injection is prohibited due to the well's inability to comply with the in-service operating standards of this chapter.

(76) Permit area--The area owned or under lease by the permittee which may include buffer areas, mine areas, and production areas.

(77) Plugging--The act or process of stopping the flow of water, oil, or gas into or out of a formation through a borehole or well penetrating that formation.

(78) Point of injection--For a Class V well, the last accessible sampling point prior to fluids being released into the subsurface environment.

(79) Pollution--The contamination of water or the alteration of the physical, chemical, or biological quality of water:

(A) that makes it harmful, detrimental, or injurious:

(i) to humans, animal life, vegetation, or property; or

(ii) to public health, safety, or welfare; or

(B) that impairs the usefulness or the public enjoyment of the water for any lawful and reasonable purpose.

(80) Pre-injection units--The on-site above-ground appurtenances, structures, equipment, and other fixtures including the injection pumps, filters, tanks, surface impoundments, and piping for wastewater transmission between any such facilities and the well that are or will be used for storage or processing of waste to be injected, or in conjunction with an injection operation.

(81) Production area--The area defined by a line generally through the outer perimeter of injection and recovery wells used for mining.

(82) Production area authorization--An authorization, issued under the terms of a Class III injection well area permit, approving the initiation of mining activities in a specified production area within a permit area, and setting specific conditions for production and restoration in each production area within an area permit.

(83) Production well--A well used to recover uranium through in situ solution recovery, including an injection well used to recover uranium. The term does not include a well used to inject waste.

(84) Production zone--The stratigraphic interval extending vertically from the shallowest to the deepest stratum into which mining solutions are authorized to be introduced.

(85) Public water system--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances as defined in §290.38(47) of this title (relating to Definitions).

(86) Radioactive waste--Any waste which contains radioactive material in concentrations which exceed those listed in 10 Code of Federal Regulations Part 20, Appendix B, Table II, Column 2, and as amended.

(87) Registered Well--A well registered in accordance with the requirements of §331.221 of this title (relating to Registration of Wells).

(88) Restoration demonstration--A test or tests conducted by a permittee to simulate production and restoration conditions and verify or modify the fluid handling values submitted in the permit application.

(89) Restored aquifer--An aquifer whose local groundwater quality, within a production area, has, by natural or artificial processes, returned to the restoration table values established in accordance with the requirements of §331.107 of this title (relating to Restoration).

(90) Salt cavern--A hollowed-out void space that has been purposefully constructed within a salt stock, typically by means of solution mining by circulation of water from a well or wells connected to the surface.

(91) Salt cavern confining zone--A zone between the salt cavern injection zone and all underground sources of drinking water and freshwater aquifers, that acts as a barrier to movement of waste out of a salt cavern injection zone, and consists of the entirety of the salt stock excluding any portion of the salt stock designated as an underground injection control (UIC) Class I salt cavern injection zone or any portion of the salt stock occupied by a UIC Class II or Class III salt cavern or its disturbed salt zone.

(92) Salt cavern injection interval--That part of a salt cavern injection zone consisting of the void space of the salt cavern into which waste is stored or disposed of, or which is capable of receiving waste for storage or disposal.

(93) Salt cavern injection zone--The void space of a salt cavern that receives waste through a well, plus that portion of the salt stock enveloping the salt cavern, and extending from the boundaries of the cavern void outward a sufficient thickness to contain the disturbed salt zone, and an additional thickness of undisturbed salt sufficient to ensure that adequate separation exists between the outer limits of the injection zone and any other activities in the domal area.

(94) Salt cavern solid waste disposal well or salt cavern disposal well--For the purposes of this chapter, regulations of the commission, and not to underground injection control (UIC) Class II or UIC Class III wells in salt caverns regulated by the Texas Railroad Commission, a salt cavern disposal well is a type of UIC Class I injection well used:

(A) to solution mine a waste storage or disposal cavern in naturally occurring salt; and/or

(B) to inject hazardous, industrial, or municipal waste into a salt cavern for the purpose of storage or disposal of the waste.

(95) Salt dome--A geologic structure that includes the caprock, salt stock, and deformed strata surrounding the salt stock.

(96) Salt stock--A geologic formation consisting of a relatively homogeneous mixture of evaporite minerals dominated by halite (NaCl) that has migrated from originally tabular beds into a vertical orientation.

(97) Sanitary waste--Liquid or solid waste originating solely from humans and human activities, such as wastes collected from toilets, showers, wash basins, sinks used for cleaning domestic areas, sinks used for food preparation, clothes washing operations, and sinks or washing machines where food and beverage serving dishes, glasses, and utensils are cleaned.

(98) Septic system--A well that is used to emplace sanitary waste below the surface, and is typically composed of a septic tank and subsurface fluid distribution system or disposal system.

(99) Stratum--A sedimentary bed or layer, regardless of thickness, that consists of generally the same kind of rock or material.

(100) Subsurface fluid distribution system--An assemblage of perforated pipes, drain tiles, or other similar mechanisms intended to distribute fluids below the surface of the ground. This definition includes subsurface area drip dispersal systems as defined in §222.5 of this title (relating to Definitions).

(101) Surface casing--The first string of casing (after the conductor casing, if any) that is set in a well.

(102) Temporary injection point--A method of Class V injection that uses push point technology (injection probes pushed into the ground) for the one-time injection of fluids into or above an underground source of drinking water.

(103) Total dissolved solids--The total dissolved (filterable) solids as determined by use of the method specified in 40 Code of Federal Regulations Part 136, as amended.

(104) Transmissive fault or fracture--A fault or fracture that has sufficient permeability and vertical extent to allow fluids to move between formations.

(105) Underground injection--The subsurface emplacement of fluids through a well.

(106) Underground injection control--The program under the federal Safe Drinking Water Act, Part C, including the approved Texas state program.

(107) Underground source of drinking water--An "aquifer" or its portions:

(A) which supplies drinking water for human consumption; or

(B) in which the groundwater contains fewer than l0,000 milligrams per liter total dissolved solids; and

(C) which is not an exempted aquifer.

(108) Upper limit--A parameter value established by the commission in a permit/production area authorization which when exceeded indicates mining solutions may be present in designated monitor wells.

(109) Verifying analysis--A second sampling and analysis or measurement with instrumentation of control parameters for the purpose of confirming a routine sample analysis or measurement which indicated an increase in any control parameter to a level exceeding the upper limit. Mining solutions are assumed to be present in a designated monitor well if a verifying analysis confirms that any control parameter in a designated monitor well is present in concentration equal to or greater than the upper limit value.

(110) Well--A bored, drilled, or driven shaft whose depth is greater than the largest surface dimension, a dug hole whose depth is greater than the largest surface dimension, an improved sinkhole, or a subsurface fluid distribution system but does not include any surface pit, surface excavation, or natural depression.

(111) Well injection--The subsurface emplacement of fluids through a well.

(112) Well monitoring--The measurement by on-site instruments or laboratory methods of any chemical, physical, radiolog-

ical, or biological property of the subsurface strata or their contained fluids penetrated by the wellbore.

(113) Well stimulation--Several processes used to clean the well bore, enlarge channels, and increase pore space in the interval to be injected thus making it possible for wastewater to move more readily into the formation including, but not limited to, surging, jetting, blasting, acidizing, and hydraulic fracturing.

(114) Workover--An operation in which a down-hole component of a well is repaired, the engineering design of the well is changed, or the mechanical integrity of the well is compromised. Workovers include operations such as sidetracking, the addition of perforations within the permitted injection interval, and the addition of liners or patches. For the purposes of this chapter, workovers do not include well stimulation operations.

§331.7. Permit Required.

(a) Except as provided in §331.9 of this title (relating to Injection Authorized by Rule) and by subsections (d) - (f) of this section, all injection wells and activities must be authorized by an individual permit.

(b) For Class III in situ uranium solution mining wells, Frasch sulfur wells, and other Class III operations under commission jurisdiction, an area permit authorizing more than one well may be issued for a defined permit area in which wells of similar design and operation are proposed. The wells must be operated by a single owner or operator. Before commencing operation of those wells, the permittee may be required to obtain a production area authorization for separate production or mining areas within the permit area.

(c) The owner or operator of a large capacity septic system, a septic system which accepts industrial waste, or a subsurface area drip dispersal system, as defined in §222.5 of this title (relating to Definitions) must obtain a wastewater discharge permit in accordance with Texas Water Code, Chapter 26 or Chapters 26 and 32, and Chapter 305 of this title (relating to Consolidated Permits), and must submit the inventory information required under §331.10 of this title (relating to Inventory of Wells Authorized by Rule).

(d) Pre-injection units for Class I nonhazardous, noncommercial injection wells and Class V injection wells permitted for the disposal of nonhazardous waste must be either authorized by a permit issued by the commission or registered in accordance with §331.17 of this title (relating to Pre-Injection Units Registration). The option of registration provided by this subsection shall not apply to pre-injection units for Class I injection wells used for the disposal of byproduct material, as that term is defined in Chapter 336 of this title (relating to Radioactive Substance Rules). Pre-injection units for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals are not subject to authorization by registration but are subject to authorization by an individual permit or under the general permit issued under Subchapter L of this chapter (relating to General Permit Authorizing Use of a Class I Injection Well to Inject Nonhazardous Desalination Concentrate or Nonhazardous Drinking Water Treatment Residuals).

(e) The commission may issue a general permit under Subchapter L of this chapter. The commission may determine that an injection well and the injection activities are more appropriately regulated under an individual permit than under a general permit based on findings that the general permit will not protect ground and surface fresh water from pollution due to site-specific conditions.

(f) Notwithstanding subsection (a) of this section, an injection well authorized by the Railroad Commission of Texas to use nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes does not require a permit from the commission. The use or disposal of radioactive material under this subsection is subject to the applicable requirements of Chapter 336 of this title.

(g) Permits issued before September 1, 2007 for Class III wells for uranium mining will expire on September 1, 2012 unless the permit holder submits an application for permit renewal under §305.65 of this title (relating to Renewal) before September 1, 2012. Any holders of permits for Class III wells for uranium mining issued before September 1, 2007 who allow those permits to expire by not submitting a permit renewal application by September 1, 2012 are not relieved from the obligations under the expired permit or applicable rules, including obligations to restore groundwater and to plug and abandon wells in accordance with the requirements of the permit and applicable 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.

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SUBCHAPTER C. GENERAL STANDARDS AND METHODS

30 TAC §331.45, §331.46

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments are also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendments implement Senate Bill 1604 and House Bill 3838, 80th Legislature, 2007; and TWC, §27.023 and §27.0513.

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SUBCHAPTER E. STANDARDS FOR CLASS III WELLS

30 TAC §§331.82, 331.84 - 331.87

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments and new section are also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendments and new section implement Senate Bill 1604 and House Bill 3838, 80th Legislature, 2007; and TWC, §27.023 and §27.0513.

§331.82. Construction Requirements.

(a) Casing and cementing. All new Class III wells, baseline wells, and monitor wells associated with the mining operations shall be cased, cemented from the bottom of the casing to the surface, and capped to prevent the migration of fluids which may cause the pollution of underground sources of drinking water (USDWs) and maintained in that condition throughout the life of the well. In addition, existing wells in areas where there is the potential for contamination and other harmful or foreign matter to enter groundwater through an open well, shall also be cemented to the surface and capped. The casing and cement used in the construction of each well shall be designed for the life expectancy of the well. In determining and specifying casing and cementing requirements, the following factors shall be considered:

(1) depth to the injection zone;

(2) injection pressure, external pressure, internal pressure, axial loading, etc.;

(3) hole size;

(4) size and grade of all casing strings (wall thickness, diameter, nominal weight, length, joint specification, and construction material);

(5) corrosiveness of injected fluids and formation fluids;

(6) lithology of injection and confining zones; and

(7) type and grade of cement.

(b) Alterations to construction plans. Any proposed changes or alterations to construction plans after permit issuance shall be submitted to the executive director and written approval obtained before incorporating such changes.

(c) Logs and tests. Appropriate logs and other tests shall be conducted during the drilling and construction of all new Class III wells and after an existing well has been repaired. A descriptive report interpreting the results of those logs and tests shall be prepared by a knowledgeable log analyst and submitted to the executive director. The logs and tests appropriate to each type of Class III well shall be determined based on the intended function, depth, construction, and other characteristics of the well, availability of similar data in the area of the drilling site, and the need for additional information that may arise from time to time as the construction of the well progresses.

(1) During the drilling and construction of Class III wells, appropriate deviation checks shall be conducted on holes, where pilot holes and reaming are used, at sufficiently frequent intervals to assure that vertical avenues for fluid migration in the form of diverging holes are not created during drilling.

(2) Mechanical integrity, as described in §331.43 of this title (relating to Mechanical Integrity Standards), shall be demonstrated both following construction of the well, and prior to production or injection. For Class III uranium solution mining wells, a pressure test shall also be conducted each time a tool that could affect mechanical integrity is placed into the well.

(A) Except as provided by subparagraph (B) of this paragraph, the following tests shall be used to evaluate the mechanical integrity of the injection well:

(i) to test for significant leaks under §331.43(a)(1) of this title, monitoring of annulus pressure, or pressure test with liquid or gas, or radioactive tracer survey. For Class III uranium solution mining wells only, a single point resistivity survey in conjunction with a pressure test can be used to detect any leaks in the casing, tubing, or packer; and

(ii) to test for significant fluid movement under §331.43(a)(2) of this title, temperature log, noise log, radioactive tracer survey, cement bond log, oxygen activation log. For Class III uranium solution mining wells only, cement records that demonstrate the absence of significant fluid movement can be used where other tests are not suitable. For Class III wells where the cement records are used to demonstrate the absence of significant fluid movement, the monitoring program prescribed by §331.84 of this title (relating to Monitoring Requirements) shall be designed to verify the absence of significant fluid movement.

(B) The executive director may allow the use of a test to demonstrate mechanical integrity other than those listed in subparagraph (A) of this paragraph with the written approval of the administrator of the United States Environmental Protection Agency (EPA) or his authorized representative. To obtain approval, the executive director shall submit a written request to the EPA administrator, which shall set forth the proposed test and all technical data supporting its use. The EPA administrator shall approve the request if it will reliably demonstrate the mechanical integrity of wells for which its use is proposed. Any alternate method approved by the EPA administrator shall be published in the *Federal Register* and may be used unless its use is restricted at the time of approval by the EPA administrator.

(3) Additional logs and tests may be required by the executive director when appropriate.

(d) Construction and testing supervision. All phases of well construction and testing shall be supervised by a person who is knowledgeable and experienced in practical drilling engineering and who is familiar with the special conditions and requirements of injection well construction.

(e) Injection zone characteristics - water bearing formation. Where the injection zone is a water bearing formation, the following information concerning the injection zone shall be determined or calculated:

(1) fluid pressure;

(2) temperature;

(3) fracture pressure;

(4) other physical and chemical characteristics of the injection zone;

(5) physical and chemical characteristics of the formation fluids; and

(6) compatibility of injected fluids with formation fluids.

(f) Injection zone characteristics - non-water bearing formations. Where the injection formation is not a water bearing formation, the fracture pressure shall be determined or calculated.

(g) Monitor well location. Where injection is into a formation which contains water with less than 10,000 mg/L TDS, monitoring wells shall be completed into the injection zone and into any USDW above the injection zone which could be affected by the mining operation. These wells shall be located to detect any excursion of injection fluids, production fluids, process by-products, or formation fluids outside the mining area or zone. If the operation may be affected by subsidence or catastrophic collapse, the monitoring wells shall be located so that they will not be physically affected. Designated monitoring wells shall be installed at least 100 feet inside any permit area boundary, unless excepted by written authorization from the executive director.

(h) Subsidence or catastrophic collapse. Where the injection wells penetrate a USDW in an area subject to subsidence or catastrophic collapse an adequate number of monitor wells shall be completed into the USDW to detect any movement of injected fluids, process by-products or formation fluids into the USDW. The monitor wells shall be located outside the physical influence of the subsidence or catastrophic collapse.

(i) Monitor well criteria. In determining the number, location, construction, and frequency of monitoring of the monitor wells the following criteria shall be considered:

(1) the population relying on the USDW affected or potentially affected by the injection operation;

(2) the proximity of the injection operation to points of withdrawal of drinking water;

(3) the local geology and hydrology;

(4) the operating pressures and whether a negative pressure gradient is being maintained;

(5) the chemistry and volume of the injected fluid, the formation water, and the process by-products; and

(6) the injection well density.

§331.84. Monitoring Requirements.

(a) Injection fluid shall be analyzed for physical and chemical characteristics with sufficient frequency to yield representative data on its characteristics. Whenever the injection fluid is modified to the extent that the analysis is incorrect or incomplete, a new analysis shall be submitted to the executive director.

(b) The injection pressure, the injection volume, and the production volume shall be recorded.

(c) Fluid level when required by permit and the parameters chosen to measure water quality in monitor wells completed in the injection zone shall be monitored twice a month. For a given calendar month, the second sample shall be collected 15 days after the first sample is collected.

(d) Specified wells within 1/4 mile of the injection site shall be monitored at least once every three months to detect any migration from the injection zone into fresh water.

(e) All Class III wells may be monitored on a field or project basis rather than on an individual well basis by manifold monitoring. Manifold monitoring may be used in cases of facilities consisting of more than one injection well operating with a common manifold. Separate monitoring systems for each well are not required, provided the owner/operator demonstrates that manifold monitoring is comparable to individual well monitoring.

(f) Quarterly monitoring of wells required by §331.82(h) of this title (relating to Construction Requirements).

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SUBCHAPTER F. STANDARDS FOR CLASS III WELL PRODUCTION AREA DEVELOPMENT

30 TAC §§331.103 - 331.109

STATUTORY AUTHORITY

The amendments and new sections are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments and new sections are also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendments and new sections implement Senate Bill 1604 and House Bill 3838, 80th Legislature, 2007; and TWC, §27.023 and §27.0513.

§331.103. Production Area Monitor Wells.

(a) Production zone monitoring. Designated production zone monitor wells shall be spaced no greater than 400 feet from the production area, as determined by exploratory drilling. The distance between adjacent mine area monitor wells shall be no greater than 400 feet. The angle formed by lines drawn from any production well to the two nearest monitor wells will not be greater than 75 degrees. Changes or adjustments in designated production zone monitor well locations may be authorized by the executive director so as to assure adequate containment. These wells shall be subject to the sampling, corrective action, and reporting requirements in §331.105 of this title (relating to Monitoring Standards) and §331.106 of this title (relating to Remedial Action for Excursion).

(b) Nonproduction zone monitoring. At a minimum, designated nonproduction zone monitor wells shall be completed in the production area in any freshwater aquifer overlying the production zone. These wells shall be located not more than 50 feet on either side of a line through the center of the production area with a minimum of one per every four acres of production area for wells completed in the first overlying freshwater aquifer and one per every eight acres for wells completed in any additional overlying freshwater aquifers. Changes or adjustments in designated nonproduction zone monitor well locations may be authorized by the executive director so as to assure adequate containment. Those wells completed in the first overlying freshwater aquifer shall be subject to sampling, remedial action, and reporting requirements of §331.105 of this title (relating to Monitoring Standards) and §331.106 of this title. Monitor wells completed in any additional overlying freshwater aquifers shall be subject to monitoring, remedial action, and reporting requirements specified in the permit.

§331.104. Establishment of Baseline and Control Parameters for Excursion Detection.

(a) Independent and representative water samples shall be collected from each of the following:

(1) mine area monitor wells completed in the production zone;

(2) mine area monitor wells completed in nonproduction zones; and

(3) baseline wells completed in the production zone within the production area.

(b) All baseline wells must be completed in the production zone within the production area. The owner or operator shall analyze all groundwater samples from the baseline wells for the following parameters. This suite of parameters shall be the basis for the aquifer restoration required under §331.107 of this title (relating to Restoration). With the exception of uranium and radium-226, any of these parameters may be removed from the list of restoration parameters if an applicant or permittee can demonstrate that a parameter or parameters is not a suitable restoration parameter. An applicant or permittee also can demonstrate that a parameter should be added to the list of restoration parameters. The executive director may require an applicant or operator to establish baseline parameters additional to the above list as appropriate, based on site-specific information. In evaluating a demonstration regarding removing or adding parameters to the list of parameters, the executive director may consider the following:
Figure: 30 TAC §331.104(b)

(1) all parameters that occur in the groundwater within the production zone prior to in situ recovery;

(2) all parameters that are in the solutions injected into the production zone;

(3) all parameters that may be dissolved from the aquifer material of the production zone into the groundwater during in situ recovery; or

(4) any other applicable information provided by the applicant or permittee.

(c) A minimum of five baseline wells, or one baseline well for every four acres of production area, whichever is greater, shall be completed in the production zone within the production area. All baseline wells shall be sampled in accordance with subsection (a) of this section and analyzed in accordance with subsection (d) of this section. All valid analytical measurements shall be used to determine the suite of restoration parameters required under subsection (b) of this section.

(d) All samples shall be collected, preserved, analyzed, and controlled according to accepted methods as stated in the permit and in accordance with the TCEQ Quality Assurance Project Plan (QAPP).

(e) The permittee shall propose for subsequent approval by the commission control parameters for detection of excursions in production and nonproduction wells. Control parameters shall be those constituents in the groundwater that will provide timely and reliable detection of the presence of mining solutions in production and nonproduction wells. Control parameter upper limits for production zone monitor wells shall be determined from pre-mining groundwater sample data from production zone monitor wells, and control parameter upper limits for nonproduction zone monitor wells shall be determined from pre-mining groundwater sample data from nonproduction zone monitor wells. Determination of the presence of an excursion shall be based on a statistical method proposed by the owner or operator and approved by the executive director.

(f) If a previously mined permit or production area is to be re-entered for additional in situ mining before completion of restoration under §331.107 of this title or completion of closure under §331.83 of this title (relating to Closure), baseline water quality values for determination of control parameter upper limits and aquifer restoration requirements for the area to be re-entered for mining shall be as originally required by the existing production area authorization or as modified by any amendments to the authorization pursuant to this section and §331.107 of this title.

(g) If a previously mined and restored area is to be re-entered for additional in situ uranium mining, baseline water quality values for determination of control parameter upper limits and aquifer restoration requirements for the area to be re-entered for mining shall be determined as required by subsections (a) - (d) of this section.

§331.105. Monitoring Standards.

The following shall be accomplished to detect mining solutions in designated monitor wells:

(1) Routine monitoring. Water samples and, if applicable, field instrument measurements, shall be conducted in accordance with the requirements of §331.84(c) of this title (relating to Monitoring Requirements) from all monitor wells for permit/production area(s) in which mining solutions have been introduced. Monitoring results for the control parameters shall be completed by the second working day and reported as required in §331.85(e) of this title (relating to Reporting Requirements). The determined values shall be entered on appropriate forms within three working days after analysis or instrument measurement. These data shall be kept readily available on site for review by commission representatives.

(2) Monitoring duration. The program of monitoring detailed in paragraph (1) of this subsection shall be continued in each permit/mine area until the executive director is officially notified that restoration has commenced. Further monitoring as required by permit shall continue until aquifer restoration and stabilization in that particular permit/mine area has been achieved in compliance with §331.107 of this title (relating to Restoration).

(3) Verifying analysis. If the results of a routine sample analysis or instrument measurement show that the value of any control parameter in designated monitor wells is equal to or above the upper limit established for that permit/mine area, the operator shall complete a verifying analysis of samples taken from each apparently affected well within two days.

(4) Excursion monitoring. During the period of time when mining solutions are present in a designated monitor well, water samples or measurements will be taken at least two times per week and

monitoring results for all control parameters shall be completed by the second day after the sample or measurement is taken.

§331.106. Remedial Action for Excursion.

If the verifying analysis indicates the existence of an excursion in a designated monitor well, the operator shall take the following actions:

(1) notification--notify the commission regional office by the next working day by telephone and notify the executive director by letter postmarked within 48 hours of identification of the excursion. The notification must identify the affected monitor well and the control parameter concentrations.

(2) analysis--complete a groundwater analysis report for each affected well on forms provided by the executive director (including accuracy checks and stiff diagram) for the following: pH, calcium, magnesium, sodium, potassium, carbonate, bicarbonate, sulfate, chloride, silica, total dissolved solids (180 degrees Celsius), specific conductance and dilute conductance, uranium, radium-226 and any other specified constituents. Results shall be reported in accordance with §331.85(f) of this title (relating to Reporting Requirements).

(A) The permittee will clean up all designated monitor wells, all zones outside of the production zone, and the production zone outside of the mine area that contain mining solutions. The permittee may use any method judged necessary and prudent to define the extent of the mining solutions and to effect this clean-up in an expeditious and practical manner. Well clean-up is deemed to be accomplished when the water quality in the affected monitor well(s) has been restored to current local baseline water quality as confirmed by three consecutive daily samples for the control parameters.

(B) The executive director may determine that cleanup is not necessary if the permittee can demonstrate that the change in water quality is not due to the presence of mining solutions or fluids from other mining activities.

§331.107. Restoration.

(a) Aquifer restoration. Groundwater in the production zone within the production area must be restored when mining is complete. Each Class III permit or production area authorization shall contain a description of the method for determining that groundwater has been restored in the production zone within the production area. Restoration must be achieved for all values in the restoration table of all parameters in the suite established in accordance with the requirements of §331.104(b) of this title (relating to Establishment of Baseline and Control Parameters for Excursion Detection).

(1) Restoration table. Each permit or production area authorization shall contain a restoration table for all parameters in the suite established in accordance with the requirements of §331.104(b) of this title. A restoration table value for a parameter shall be established by:

(A) The mean concentration or value for that parameter based on all measurements from groundwater samples collected from baseline wells prior to mining activities; or

(B) A statistical analysis of baseline well information proposed by the owner or operator and approved by the executive director that demonstrates that the restoration table value is representative of baseline quality.

(2) Achievement of restoration. Achievement of restoration shall be determined using one of the following methods:

(A) When all sample measurements from groundwater samples from all baseline wells for a restoration parameter are equal to or below (or, in the case of pH, within an established range) the restoration table value for that parameter, then restoration for that parameter will be assumed to have occurred. Complete restoration will be assumed to have occurred when the measurements from all samples from all baseline wells for all restoration parameters are equal to or below (or, in the case of pH, within an established range) each respective restoration table value; or

(B) A statistical analysis of information from groundwater samples from baseline wells proposed by the owner or operator and approved by the executive director that demonstrates that the groundwater quality is representative of the restoration table values.

(b) Mining completion. When the mining of a permit or production area is completed, the permittee shall notify the appropriate commission regional office and the executive director and shall proceed to reestablish groundwater quality in the affected permit or production area aquifers in accordance with the requirements of subsection (a) of this section. Restoration efforts shall begin as soon as practicable but no later than 30 days after mining is completed in a particular production area. The executive director, subject to commission approval, may grant a variance from the 30-day period for good cause shown.

(c) Timetable. Aquifer restoration, for each permit or production area, shall be accomplished in accordance with the timetable specified in the currently approved mine plan, unless otherwise authorized by the commission. Authorization for expansion of mining into new production areas may be contingent upon achieving restoration progress in previously mined production areas within the schedule set forth in the mine plan. The commission may amend the permit to allow an extension of the time to complete restoration after considering the following factors:

(1) efforts made to achieve restoration by the original date in the mine plan;

(2) technology available to restore groundwater for particular parameters;

(3) the ability of existing technology to restore groundwater to baseline quality in the area;

(4) the cost of achieving restoration by a particular method;

(5) the amount of water which would be used or has been used to achieve restoration;

(6) the need to make use of the affected aquifer; and

(7) complaints from persons affected by the permitted activity.

(d) Reports. Beginning six months after the date of initiation of restoration of a permit or production area, as defined in the mine plan, the operator shall provide to the executive director semi-annual restoration progress reports until restoration is accomplished for the production area. This report shall contain the following information:

(1) all analytical data generated during the previous six months;

(2) graphs of analysis for each restoration parameter for each baseline well;

(3) the volume of fluids injected and produced;

(4) the volume of fluids disposed;

(5) water level measurements for all baseline and monitor wells, and for any other wells being monitored;

(6) a potentiometric map for the area of the production area authorization, based on the most recent water level measurements; and

(7) a summary of the progress achieved towards aquifer restoration.

(e) Restoration table values achieved. When the permittee determines that constituents in the aquifer have been restored to the values in the Restoration Table, the restoration shall be demonstrated by stability sampling in accordance with subsection (f) of this section.

(f) Stability sampling. The permittee shall obtain stability samples and complete an analysis for certain parameters listed in the restoration table from all production area baseline wells. Stability samples shall be conducted at a minimum of 30-day intervals for a minimum of three sample sets and reported to the executive director. The permittee shall notify the executive director at least two weeks in advance of sample dates to provide the opportunity for splitting samples and for selecting additional wells for sampling, if desired. To insure water quality has stabilized, a period of one calendar year must elapse between cessation of restoration operations and the final set of stability samples. Upon acknowledgment in writing by the executive director confirming achievement of final restoration, the permittee shall accomplish closure of the area in accordance with §331.86 of this title (relating to Closure).

(g) Amendment of restoration table values. After an appropriate effort has been made to achieve restoration in accordance with the requirements of subsection (a) of this section, the permittee may cease restoration operations, reduce bleed and request that the restoration table be amended. With the request for amendment, the permittee shall submit the results of three consecutive sample sets taken at a minimum of 30-day intervals from all production area baseline wells used in determining the restoration table to verify current water quality. Stabilization sampling may commence 60 days after cessation of restoration operations. The permittee shall notify the executive director of his or her intent to cease restoration operations and reduce the bleed 30 days prior to implementing these steps. The permittee shall submit an application for an amendment to the restoration table within 120 days of receipt of authorization from the executive director to cease restoration operations and reduce the bleed.

(1) In determining whether the restoration table should be amended, the commission will consider the following items addressed in the request:

(A) uses for which the groundwater in the production area was suitable at baseline water quality levels;

(B) actual existing use of groundwater in the production area prior to and during mining;

(C) potential future use of groundwater of baseline quality and of proposed restoration quality;

(D) the effort made by the permittee to restore the groundwater to baseline;

(E) technology available to restore groundwater for particular parameters;

(F) the ability of existing technology to restore groundwater to baseline quality in the area under consideration;

(G) the cost of further restoration efforts;

(H) the consumption of groundwater resources during further restoration; and

(I) the harmful effects of levels of particular parameter.

(2) The commission may amend the restoration table if it finds that:

(A) reasonable restoration efforts have been undertaken, giving consideration to the factors listed in paragraph (1) of this subsection;

(B) the values for the parameters describing water quality have stabilized for a period of one year;

(C) the formation water present in the exempted portion of the aquifer would be suitable for any use to which it was reasonably suited prior to mining; and

(D) further restoration efforts would consume energy, water, or other natural resources of the state without providing a corresponding benefit to the state.

(3) If the restoration table is amended, restoration sampling shall commence and proceed as described in subsection (f) of this section, except the stability period shall be for a period of two years unless the owner or operator can demonstrate through modeling or other means that a period of less than two years is appropriate for a demonstration of stability.

(4) If the request for an amendment of the restoration table values is not granted, the permittee shall restart restoration efforts.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Martinez
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Texas Commission on Environmental Quality
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SUBCHAPTER I. FINANCIAL RESPONSIBILITY

30 TAC §331.143

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendment implements Senate Bill 1604 and House Bill 3838, 80th Legislature, 2007; and TWC, §27.023 and §27.0513.

§331.143. Cost Estimate for Plugging and Abandonment and Aquifer Restoration.

(a) The owner or operator must prepare a written estimate, in current dollars, of the cost of:

(1) plugging the well(s) in accordance with the plugging and abandonment plan as specified in this chapter; and

(2) aquifer restoration for each production area authorization.

(b) Cost Estimates.

(1) The cost estimates required under subsection (a)(1) of this section must take into account all costs related to plugging and abandonment in accordance with the applicable requirements of §331.46 of this title (relating Closure Standards) and the requirements of §331.86 of this title (relating to Closure).

(2) The cost estimate required under subsection (a)(2) of this section must take into account all costs related to aquifer restoration.

(c) During the operating life of the facility, the owner or operator must keep at the facility the latest cost estimates for plugging and abandonment and for aquifer restoration prepared in accordance with subsection (a) of this section.

(d) On or before December 31st of each year, the owner or operator shall review and update as necessary the written estimate of the cost of plugging all wells and the cost of aquifer restoration to account for changes in costs exclusive of the inflation adjustment required under §37.131 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates). This update shall be submitted to the executive director no later than January 31st of each year.

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. REQUIREMENTS FOR EXISTING WELLS USED FOR DEVELOPMENT OF CLASS III UIC WELL APPLICATIONS

30 TAC §§331.220 - 331.225

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The new sections are also adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted new sections implement Senate Bill 1604 and House Bill 3838, 80th Legislature, 2007; and TWC, §27.023 and §27.0513.

§331.221. Registration of Wells.

(a) All wells described in §331.220 of this title (relating to Applicability) that are completed prior to submission of an application for a Class III injection well area permit must be registered with the Texas Commission on Environmental Quality within 30 days of completion of casing and development of the well and prior to submission of such an application. All wells described in §331.220 of this title that are completed after submission of such an application must be registered within 30 days of well completion.

(b) Registration of wells described in §331.220 of this title shall be completed on forms provided by the executive director. The owner or operator of any well to be registered shall provide the following information for each well:

(1) a unique, site-specific, designation for the well;

(2) the location of the well on a map;

(3) latitude and longitude of the well, with datum specified;

(4) the depth of the well;

(5) construction, completion and casing information on the well;

(6) the identification of the operator of the well;

(7) the identification of the landowner for the property on which the well is located;

(8) water level data; and

(9) identification of the groundwater conservation district in which the well is located, if applicable.

(c) The owner or operator of a well registered under this subchapter must maintain mechanical integrity of the well. A well registered under this subchapter shall be cased and cemented so as to not cause or allow the movement of fluid that would result in the pollution of an underground source of drinking water or fresh water. No injection may be authorized into a well registered under this subchapter.

(d) Any well, registered in accordance with the requirements of this subchapter, that is not subsequently authorized under a Class III injection well area permit in accordance with §331.222 of this title (relating to Conversion of Registered Wells to Class III Wells), shall be plugged and abandoned in a manner that prohibits the movement of fluids into underground sources of drinking water or fresh water. Within 30 days of permit issuance, the permittee shall submit a certification to the executive director that the well has been plugged and abandoned in accordance with the requirements of this subsection. A permitee may submit a request to the executive director for an extension of time for completion of plugging and abandonment required under this subsection. Any request for an extension under this subsection must provide reasonable justification for the extension.

(e) The registration of a well under this subchapter is not subject to the commission permitting, public notice, and hearing requirements, until such time as it is converted to a Class III well in accordance with §331.222 of this title.

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 336. RADIOACTIVE SUBSTANCE RULES

The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts amended §§336.1, 336.101, 336.103, 336.105, 336.107, 336.1105, 336.1109, 336.1113, 336.1125, and 336.1235. The commission adopts new §§336.114, 336.208, 336.210, 336.1301, 336.1303, 336.1305, 336.1307, 336.1309, 336.1311, 336.1313, 336.1315, and 336.1317.

Sections 336.1, 336.210, 336.1105, 336.1125, 336.1235, 336.1303, 336.1305, 336.1307, 336.1309, 336.1311, 336.1315, and 336.1317 are adopted *with changes* to the proposed text and will be republished. Sections 336.101, 336.103, 336.105, 336.107, 336.114, 336.208, 336.1109, 336.1113, 336.1301, and 336.1313 are adopted *without changes* to the proposed text as published in the September 5, 2008, issue of the *Texas Register* (33 TexReg 7487) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The changes adopted to this chapter are part of a larger adoption to revise the commission's radiation control and underground injection control (UIC) rules. The purpose of this rulemaking is to implement the remaining portions of Senate Bill (SB) 1604, 80th Legislature, 2007, its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)), and House Bill (HB) 3838, 80th Legislature, 2007. This rulemaking incorporates new provisions for notice and contested case hearing opportunities related to Production Area Authorizations and UIC Area Permits, financial assurance requirements, and new state fees on gross receipts associated with the radioactive waste disposal. HB 3838 specifically addresses the period between uranium exploration, which is regulated by the Railroad Commission of Texas (RRC), and permitting of injection wells for in situ uranium mining, which is regulated by TCEQ. HB 3838 requires TCEQ to establish a registration program for exploration wells permitted by the RRC that are used for development of the UIC area permit application. In response to a previous petition for rulemaking, the commission has also directed staff to review, seek stakeholder input on, and recommend revision of commission rules related to in situ uranium recovery. The adopted amendments to Chapter 336 establish the qualifications and duties of the radiation safety officer (RSO) and establish requirements for emergency plans for responding to radioactive material releases; establish financial assurance requirements for licensees for source material recovery, by-product material disposal, and radioactive waste storage and processing; establish application fees for radioactive materials licenses; establish fees for the disposal of low-level radioactive waste; and clarify requirements that apply to source material recovery and by-product material disposal.

The commission specifically invited public comments on new Subchapter N for the establishment of rates to be charged for low-level radioactive waste disposal fees, and regarding whether the opportunity for a contested case hearing before the State Office of Administrative Hearings should be available to provide a proposal for decision to be considered by the commission to establish the maximum disposal rates by rule. The commission received many comments in response to these issues and they are addressed in the RESPONSE TO COMMENTS section of the preamble.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapters 37, 39, 55, 305, and 331.

SECTION BY SECTION DISCUSSION

The commission adopts the amendment to §336.1, Scope and General Provisions, to correct typographical errors. In particular, Texas Mining and Reclamation Association (TMRA) noted that the abbreviation for picocuries per gram is "pCi/g" and not "PCi/G" as shown in §336.1(f)(3), and this was corrected in the adopted amendments.

The commission adopts the amendment to §336.101(a) to include fees for commercial disposal of radioactive material, including fees for compact waste disposal as provided in THSC, §401.245. The commission also adopts the amendment to §336.101(b)(2) to spell out the acronym CFR (Code of Federal Regulations).

The commission adopts the amendment to establish various application fees for amendment and renewal of licenses under Chapter 336. The current rules do not address the applicable fee for all types of applications under Chapter 336. Under THSC, §401.301 and §401.412, the commission may assess and collect a fee for each application in an amount sufficient to recover reasonable costs to administer its authority under THSC, Chapter 401.

The commission adopts §336.103(d) to establish an application fee of $50,000 for a major amendment of a license issued under Chapter 336, Subchapter H, Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste. The commission determined that this application fee amount was sufficient to recover the cost to administer a major amendment of a license under Subchapter H.

The commission adopts §336.103(e) to establish an application fee of $300,000 for renewal of a license issued under Subchapter H. The commission determined that this application fee amount was sufficient to recover the cost to administer the renewal of a license under Subchapter H.

The commission adopts §336.103(f) to implement THSC, §401.2445, which requires a compact waste disposal facility license holder to remit to the commission 5% of the gross receipts from compact waste received at the compact waste disposal facility and any federal facility waste received at the federal facility waste disposal facility. Payments should be made within 30 days of the end of each quarter.

The commission adopts §336.103(g) to implement THSC, §401.244, which requires compact waste disposal facility license holders to remit directly to the host county 5% of the gross receipts from compact waste received at the compact waste disposal facility and any federal facility waste received at

the federal facility waste disposal facility. Payments should be made within 30 days of the end of each quarter.

The commission adopts the amendment to §336.105(c) to establish an application fee of $10,000 for major amendment of a license issued under Chapter 336, Subchapter L, Licensing of Source Material Recovery and By-Product Material Disposal Facilities, and Subchapter M, Licensing of Radioactive Substances Processing and Storage Facilities. The commission determined that this application fee amount was sufficient to recover the cost to administer a major amendment of a license under Subchapter L.

The commission adopts the amendment to §336.105(d) to establish an application fee of $35,000 for renewal of a license issued under Subchapters L and M. The commission determined that this application fee amount was sufficient to recover the cost to administer the renewal of a license under Subchapters L and M.

The commission adopts the amendment to §336.105(e) to reference the applicable fee schedules for holders of licenses issued under Subchapters L and M, upon permanent cessation of all disposal activities and approval of the final decommissioning plan. The commission determined that the current applicable fee schedules were appropriate for those licenses under Subchapters L and M to recover the administrative cost.

The commission adopts the amendment to §336.105(f) to implement THSC, §401.301(f) to provide for cost recovery for any application for a license issued under Chapter 336.

The commission adopts §336.105(h) to provide an additional 5% annual fee assessed under §336.105(b) to be deposited to the perpetual care account, a dedicated general revenue fund. This provision is adopted to implement THSC, §401.301(d).

The commission adopts §336.105(i) to implement THSC, §401.271(1), which requires the holder of a license authorizing disposal of a radioactive substance from other persons to remit to the commission 5% of the holder's gross receipts received from disposal operations under a license. The Comptroller's office requested the commission collect the 5% of the holder's gross receipts and deposit it into the General Revenue account. Section 336.105(i) does not apply to the disposal of low-level radioactive waste, neither compact waste nor federal facility waste.

The commission adopts §336.105(j) to implement THSC, §401.271(2), which requires the holder of a license authorizing disposal of a radioactive substance from other persons to remit directly to the host county 5% of the gross receipts. The remission to the host county under this subsection does not apply to disposal of low-level radioactive waste, neither compact waste nor federal facility waste.

The commission adopts the amendment to §336.107(a) to require that payment for annual fees shall be due on or before October 31st of each year. Section 336.107(b) is adopted as amended to provide that annual fees may be prorated for a period less than 12 months to accommodate the due date established in §336.107(a).

The commission adopts new §336.114, Fee For Fixed Nuclear Facilities, to implement THSC, §401.302, which requires an annual fee from the operator of each nuclear reactor or other fixed nuclear facility in the state that uses special nuclear material. The amount of fees collected may not exceed the actual expenses that arise from emergency planning and implementation and environmental surveillance activities.

The commission adopts new §336.208, Radiation Safety Officer, to include requirements for RSO qualifications and duties. This rule language is taken from 25 TAC §289.202 and was inadvertently left out in the SB 1604 Implementation Phase I Rulemaking (Rule Project Number 2007-028-336-PR). New §336.208 establishes the minimum qualifications for an RSO for all licenses under Chapter 336.

The commission adopts new §336.210, Emergency Plan for Responding to a Release, to include requirements for emergency plans. This rule language is taken from 25 TAC §289.202 and was inadvertently left out in the SB 1604 Implementation Phase I Rulemaking. New §336.210 establishes the requirements for emergency planning for all licenses under Chapter 336.

The commission adopts the amendment to §336.1105, Definitions, by clarifying the definitions of "Surface Impoundments" and "Uranium Recovery"; adding definitions for "By-Product Material Disposal Cell," "By-Product Material Pond," "In situ leach," and "In situ recovery"; modifying and adding language to the definition of "Operation"; and adding definitions for "Reclamation" and "Restoration." These changes are made in an effort to clearly differentiate between conventional and in situ uranium recovery and to specify that reclamation and restoration are decommissioning activities. In response to comments from TMRA and Mesteña Uranium, L.L.C., the proposed definition for "closure" was modified so that it could be used for either by-product material production alone or in combination with by-product material disposal. The definition for "reclamation plan" was expanded to include in situ recovery facilities and by-product material disposal facilities. A definition for "decommissioning plan" was added to clarify its meaning and to link it to the definition of "decommission" in §336.2(30). Finally, the definition for "Uranium Recovery" was modified to demonstrate the equivalency of the term "uranium milling" used by the United States Nuclear Regulatory Commission (NRC) by dropping the phrase "source material recovery" and adding the phrase "and as it pertains to uranium ore only." Definitions were also renumbered due to the addition of the new definition.

The commission adopts the amendment to §336.1109, General Requirements for the Issuance of Specific Licenses, to eliminate the language for RSO qualifications and refer to §336.208 for that information. This allows the consolidation of RSO requirements to one section in the rules that apply to all licenses under Chapter 336.

The commission adopts the amendment to §336.1113, Specific Terms and Conditions of Licenses, by adding new paragraph (4) to require submission of written reports after certain spills or releases. This change ensures that the licensee reports on a spill and includes information about location, cause, corrective steps, and schedule for remediation.

The commission adopts the amendment to §336.1125, Financial Assurance Requirements, by replacing the terms "financial security" to "financial assurance," and "security arrangements" to "financial assurance mechanism." These adopted changes would ensure that they are consistent with the terminology used in Chapter 37, Financial Assurance. The commission also adopts the amendment to §336.1125 by adding the phrase, "injection operations into a production area" to the actions that are prohibited before the establishment of financial assurance mechanism and adding language that would require the licensee or applicant to calculate restoration financial assurance amount using certain data. This adopted change would ensure that financial assurance is provided prior to any injection operations

and that the licensee uses the correct data when calculating financial assurance for restoration.

The commission adopts §336.1125(d) - (i) to establish requirements for financial assurance. The commission adopts these new subsections to provide that financial assurance mechanisms submitted to comply with the requirements of Subchapter L must meet the requirements of Chapter 37, Subchapter T. The commission's financial assurance requirements are consolidated in Chapter 37 and establish specific requirements for the type of financial assurance mechanisms and the wording for specific financial assurance instruments. Clarifying language has been added since proposal in order to distinguish between certain financial assurance mechanisms that have been submitted to the Department of State Health Services. Due to the complexity of changing the financial assurance that was provided to the Department of State Health Services complicated by the tightening of credit markets that would likely provide financial assurance mechanisms, additional time has been given to those licensees currently using performance bonds since they will not be acceptable under Chapter 37, Subchapter T and will ultimately need to be converted to another mechanism. Chapter 37, Subchapter T allows the use of payment bonds but does not allow performance bonds. Licensees using financial assurance mechanisms other than performance bonds will have until June 1, 2009 to provide mechanisms that meet all requirements of Chapter 37, Subchapter T. Adopted subsection (i) provides that existing licensees currently using performance bonds who do not choose to provide a new financial assurance mechanism meeting the requirements of Chapter 37, Subchapter T must make certain changes to those performance bonds by June 1, 2009 relating to the change in regulatory authority from the Department of State Health Services to TCEQ. Additionally, they must replace performance bonds with mechanisms meeting the requirements of Chapter 37, Subchapter T by March 31, 2010. The commission believes that this provides a suitable amount of time for licensees to make arrangements for submission of financial assurance mechanisms that are in compliance with commission requirements. In response to comments, §336.1125(e) was revised to be consistent with THSC, §401.305(b).

The commission adopts the amendment to §336.1235, Financial Assurance for Storage and Processing, to establish financial assurance requirements for facilities licensed under Subchapter M. Decommissioning and financial assurance for facilities licensed under Subchapter M are required under the provisions of Chapter 336, Subchapter G, Decommissioning Standards. Financial assurance mechanisms must be provided in accordance with Chapter 37, Subchapter T, Financial Assurance for Radioactive Substances and Aquifer Restoration. New licensees must provide acceptable financial assurance 60 days prior to receipt or possession of radioactive substances. Existing licensees must provide acceptable financial assurance meeting the requirements of Chapter 37, Subchapter T by June 1, 2009. In addition, once financial assurance is established, a licensee must provide a cost estimate report annually to allow review of cost estimates for decommissioning and submit additional financial assurance to reflect any increase in the cost estimate. In response to comment, the proposed provision prohibiting the use of "self-insurance" has been deleted to eliminate confusion about the use of a parent company guarantee or financial test. Under Chapter 37, Subchapter T, a license for the storage and processing of radioactive waste authorized under Chapter 336, Subchapter M may use a parent company guarantee or financial test. And, all financial assurance required under Chapter 336, Subchapter M must comply with the requirements of Chapter 37.

The commission adopts new Subchapter N to establish fees for low-level radioactive waste disposal. The primary purpose of the rulemaking is to implement HB 1567, 78th Legislature, 2003, SB 1604, 80th Legislature, 2007, and its amendments to THSC, Chapter 401, also known as the TRCA. THSC, §401.245 requires the commission to adopt and periodically revise rules for compact waste disposal fees according to a schedule based on the projected volume of waste received, the projected annual volume of waste, the relative hazard presented by types of waste, and various costs associated with the operating, maintaining and closing of the waste disposal facility. Subchapter N of these rules sets up the process for the submission of a rate application by the licensee to establish maximum disposal rates for low-level radioactive waste disposal. Under this process, the licensee submits a rate application to the executive director for review. The executive director reviews the rate application and recommends a final rate to the commission. In evaluating a proposed rate, the commission uses methods used by the Public Utility Commission of Texas (PUC) under Texas Utilities Code, §§36.051, 36.052, and 36.053, to the extent practicable. The application process is subject to review and participation by the rate payers, the generators of low-level radioactive waste subject to the Texas compact. A waste generator may request an opportunity for a contested case hearing on the maximum disposal rate. After the conclusion of a hearing on a rate, the commission would consider a proposal for decision and establish the maximum rates that would be the basis of an expedited commission rulemaking setting the final rate schedule in rule. If the rate application is uncontested, the executive director would use the recommended rate as the basis for setting the final rate schedule in a rule adopted by the commission. The process provided in Subchapter N provides an application process, with an opportunity for a contested case hearing, followed by an expedited rulemaking.

The commission adopts new §336.1301, Purpose and Scope, to establish the procedures the commission will use to determine the disposal rate component subject to waste disposed under the provisions of the Texas Low-Level Radioactive Waste Disposal Compact. This disposal rate component does not include any surcharges, importation fees, or any other fees that may be assessed to waste from other entities that is contracted for disposal under the provisions of the Texas Low-Level Radioactive Waste Disposal Compact.

The commission adopts new §336.1303, Definitions, to establish definitions for Subchapter N. Section 336.1303 implements THSC, §401.246(b). These definitions are consistent with the terms used by the PUC under Texas Utilities Code, §§36.051, 36.052, and 36.053. In response to public comments, the commission adds one new definition - "allowable expenses" to clarify which expenses can be added to invested capital. In addition, the commission renames the proposed "capital investment" to "invested capital" in response to comment and to be consistent with terms used in the PUC rules, and adds additional language to "reasonable rate of return" to clarify that the calculation is based on an after-tax amount. In addition, concerning the term "generator," the commission has clarified that the Compact Commission has the authority to accept other states' low-level radioactive waste, as provided in THSC, Chapter 403.

The commission adopts new §336.1305, Commission Powers, to implement the commission's jurisdiction to establish rates charged by the compact waste disposal license holder in accordance with THSC, §401.245(b). The commission adopts new §336.1305(a) to provide that in establishing the rates, the commission ensures they are fair, just, reasonable, and sufficient. The commission adopts new §336.1305(b) to provide methods by which the commission may arrive at the objective of prescribing and authorizing fair, just, reasonable, and sufficient rates. In response to public comments, the commission adds and adopts a new §336.1305(c) to provide that the licensee bears the burden of proof in showing that a proposed rate is just and reasonable. Due to the addition of this subsection, the commission renumbers the remaining subsections, accordingly. The commission adopts new §336.1305(d) to provide that the commission may refer a request for a contested case hearing to the State Office of Administrative Hearings on the establishment of a rate under Subchapter N. The commission adopts new §336.1305(e) to provide that the commission holds audit authority over the licensee in pursuant to THSC, §401.272. The commission adopts new §336.1305(f) to provide that the commission shall establish, by rule, the maximum disposal rate and schedule. The commission adopts new §336.1305(g) to provide that the commission may delegate the authority to establish the rate under Subchapter N to the executive director if the application is not contested. On an uncontested rate matter, the executive director uses the recommended rate as the basis for setting the final rate schedule in a rule adopted by the commission. The commission adopts new §336.1305(h) to provide that the executive director may initiate revision to the maximum disposal rate when there is good cause, subject to notice and opportunity for a contested case hearing. In response to public comments, the commission added and adopts new §336.1305(h) to provide that a waste generator may request the executive director initiate a revision to the maximum disposal rate under new §336.1305(h).

The commission adopts new §336.1307, Factors Considered for Maximum Disposal Rates, which provides factors that must be considered in establishing maximum disposal rates. In response to public comments, the commission revises and adopts new §336.1307(1), which provides that the maximum disposal rate should be sufficient to allow the licensee to recover only allowable expenses. This provision is adopted to implement THSC, §401.246(a)(1). In response to public comments, the commission eliminates the proposed new §336.1307(2) and renumbers the remaining subsections accordingly. The elimination of this subsection was made as a result of the changes made in new §336.1307(1) and the expanded definition of "Allowable expenses." The commission adopts new §336.1307(2) to establish that the maximum disposal rate is sufficient to provide for an amount to fund local public projects as required under THSC, §401.244. This provision is adopted to implement THSC, §401.246(a)(3). The commission adopts new §336.1307(3) to establish that the maximum disposal rate is sufficient to provide for a reasonable rate of return to invested capital in the compact waste disposal facility. This provision is adopted to implement THSC, §401.246(a)(4). In response to public comments, the commission adds additional language to clarify which classes of capital shall be considered to determine the reasonable rate of return on invested capital. New §336.1307(4) establishes that the maximum disposal rate is sufficient to provide for an amount necessary to pay the fees required by rule or statute, financial assurance for the facility, and reimburse the commission for the resident inspectors as required under THSC, §401.206. This provision is adopted to implement THSC, §401.246(a)(5).

The commission adopts new §336.1309, Initial Determination of Rates and Fees, to establish the procedures for filing a rate application package by the licensee. The commission adopts new §336.1309(a) to provide that the licensee shall file an application with the commission to establish an initial maximum disposal rate. The application for the initial maximum disposal rate will include all the required documents, and the licensee's revenue requirements. The application will consider all five factors as specified in §336.1307. In response to public comments, the commission adds language that the licensee shall also file with the application a proposed reasonable rate of return on invested capital. New §336.1309(a)(1) provides that the licensee shall submit a rate filing application package in accordance with the application prescribed by the executive director. New §336.1309(a)(2) provides that the executive director shall review the application and recommend a maximum disposal rate to the commission for approval. The rule will also allow the executive director to request additional information during the review process. New §336.1309(a)(3) provides that the licensee shall notify all known customers that will ship or deliver waste to the disposal facility that will submit an application for the initial maximum disposal rate. The notice will be provided by any method directed by the executive director. New §336.1309(a)(4) provides that the executive director shall maintain a website available to the public to monitor the status of the application. In addition, the executive director shall provide notice by publication in the *Texas Register*.

The commission adopts new §336.1309(b) to provide that the commission will establish the initial maximum disposal rate after the notices in §336.1309(c) of this section and the opportunity for a contested case hearing have been made. This will ensure that the waste generators and those affected by this subchapter are given an opportunity to request a contested case hearing. In response to public comments, the commission adds additional language to clarify that only the executive director, licensee or a waste generator has a right to a contested case hearing. After establishing the initial maximum disposal rates under this section, the commission set the rates by rule as provided in new §336.1305(f). In response to public comments, the commission adds and adopts new §336.1309(c), which provides that a waste generator that requested a contested case hearing must provide certain information from each signatory generator. In response to public comments, the commission adds and adopts new §336.1309(d), which provides that waste generators may initiate a request for contested case hearing by filing individually rather than by joint requests. Due to the addition of §336.1309(c) and (d), the commission renumbers the remaining subsections, accordingly. The commission adopts new §336.1309(e), which provides that the commission shall determine the factors necessary to calculate the inflation, volume, and extraordinary volume adjustments. In response to public comments, the commission adds and adopts new §336.1309(f), which provides a true-up mechanism for the licensee to determine whether the initial interim rates were sufficient to cover the actual cost of the waste disposal. New §336.1309(g) is added since proposal to clarify that the maximum disposal rates determined by the commission under Subchapter N provide the basis for the rate schedule that is adopted by rule.

The commission adopts new §336.1311, Revisions to Maximum Disposal Rates, to establish the procedures for determining maximum disposal rates to comply with THSC, §§401.245, 401.246 and 401.247 and to be consistent, to the extent practicable, with

the process used by the PUC under the Texas Utilities Code, §§36.051, 36.052, and 36.053. The commission adopts new §336.1311(a), which provides the procedure for determining the maximum disposal rates that a licensee may charge waste generators. The commission adopts new §336.1311(b), which establishes that initially, the maximum disposal rate shall be the initial rates established pursuant to §336.1309. The commission adopts new §336.1311(c), which provides the maximum disposal rates shall be adjusted in January of each year. The commission adopts new §336.1311(d), which establishes procedures for the licensee to file for revisions to the maximum disposal rates. In response to public comments, the commission adds the term "application" to the subsection for clarification. In addition, the commission adds language to clarify that the licensee may file for a revision to the maximum disposal rates due to changes in the licensee's revenue requirements. An application for a revision is subject to the same process and opportunities for contested case hearing as an application for the initial disposal rates. The commission adopts new §336.1311(e), which establishes that an application for revisions to the maximum disposal rate must comply with the requirements of §336.1309(a) and (b) of Subchapter N. In response to public comments, the commission adds language for clarification that when considering revisions to maximum disposal rates allowable expenses will only include the licensee's known and measurable test year expenses. The commission adopts new §336.1311(f), which establishes that a licensee must provide notice to its customers concurrent with the filing of an application, as consistent with §336.1309(a)(3), for revisions to the maximum disposal rate, including inflation and volume adjustments.

The commission adopts new §336.1313, Extraordinary Volume Adjustment, to establish the procedures for determining an extraordinary volume adjustment to be considered for disposal of non-routine, large volumes of waste, such as components of a nuclear power reactor. The commission adopts new §336.1313(a) to provide a method for establishing the extraordinary volume adjustment. The commission adopts new §336.1313(b) to provide a method for subsequent calculation of the volume adjustment.

The commission adopts new §336.1315, Revenue Statements and Consideration of Payment to Affiliate, to establish the procedures for revenue statements and fees to implement THSC, §§401.245, 401.246, and 401.247 and to establish the criteria for consideration of payments to affiliates. The commission adopts new §336.1315(a) for the licensee of a compact waste facility to file the audited financial statement showing its gross operating revenue for the preceding calendar year for determination of the waste disposal fee. The commission determined that an audited financial statement showing gross operating revenue is required to calculate the waste disposal fee as described in THSC, §401.246(a). The licensee shall also include a validation of payments made in §336.103(f) and (g) of Subchapter B. In response to public comments, the month of March was changed to April to provide the licensee sufficient time to complete the audited financial statements. In addition, the commission adds new language that the licensee shall provide a statement to reflect the licensee's revenues and allowable expenses for the previous year.

The commission adopts new §336.1315(b) to establish the acceptable form of an audited financial statement. It must be prepared in accordance with Generally Accepted Accounting Principles (GAAP) and audited by a Certified Public Accounting (CPA) firm. The licensee will also include the Auditor's Report from the CPA indicating an "unqualified" opinion of the licensee's financial statements. In response to public comments, the commission adds and adopts new §336.1315(c) for the licensee to provide an audited cost statement of all investment and operating cost for the preceding calendar year. In response to public comments, the commission adds and adopts new §336.1315(d) for the licensee to provide all revenues and costs upon request by the executive director to evaluate whether revision of the disposal rates under §336.1305 may be necessary.

In response to public comments, the commission adds and adopts new §336.1315(e) - (i) to establish the criteria for consideration of payments to affiliates. The new subsections are consistent with PUC under Texas Utilities Code, §36.058, (Consideration of Payment to Affiliate). The commission adds and adopts new §336.1315(e) to establish the allowable expenses and capital cost acceptable for payment to affiliates of the licensee. The commission adds and adopts new §336.1315(f) to establish that the commission must issue a finding as to what extent the payments to affiliates are deemed as reasonable and necessary for each item or class of items. The commission adds and adopts new §336.1315(g) to provide that a finding must include a specific finding of the reasonableness and necessity of each item or class of item allowed and that a price charged to the licensee is not higher than prices charged by the supplying affiliate for the same item or class of items to others. The commission adds and adopts new §336.1315(h) to provide for the commission to determine whether the affiliate transaction based on the conditions and circumstances are reasonably comparable to quantity, terms, date of contract, and place of delivery, and allow for appropriate differences based on that determination. The commission adds and adopts new §336.1315(i) to provide the commission the ability to determine a reasonable level of the affiliate expense if it finds that an affiliate expense for the test period is unreasonable.

The commission adopts new §336.1317, Contracted Disposal Rates, to establish the procedures for determining contracted disposal rates. The commission adopts new §336.1317(a) to allow the licensee to contract with any person to provide a contract disposal rate that is lower than the maximum disposal rate. The commission adopts new §336.1317(b) to provide a mechanism for commission approval of a contract or contract amendment. In response to public comments, the commission adds the word "unreasonable" to this section to clarify that a contract disposal rate must not result in unreasonable discrimination between generators for the same services provided by the licensee.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission adopts the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of "a major environmental rule" as defined in the statute. "A major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking amends Chapter 336 for the regulation of radioactive materials. The rulemaking to Chapter 336 establishes the qualifications and duties of the RSO and radiation safety committee, establishes requirements for emergency plans for responding to releases, establishes application fees for radioactive materials licenses, establishes fees for the disposal of low-level radioac-

tive waste, and clarifies requirements that apply to source material recovery and by-product disposal. The rulemaking does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rules for the RSO, radiation safety committee, and emergency plans are requirements that already applied to the licensing programs at the Department of State Health Services, but were inadvertently omitted from the rules transferred from the department during the Phase 1 rulemaking implementing SB 1604. Additional amendments clarify requirements in Subchapter L that apply to source material recovery or by-product disposal. While these rules do address application fees and waste disposal fees, the commission does not anticipate that the new fees will adversely affect in a material way the economy, productivity, competition, or jobs because costs associated with license application fees or waste disposal fees would be passed on to the various customers of the licensee or waste generators. The rulemaking action also amends application requirements for these licensing programs in Chapter 305, amends technical requirements for injection wells and other wells for in situ uranium recovery in Chapter 331, amends financial assurance requirements in Chapter 37, amends public notice requirements in Chapter 39, and amends public participation requirements in Chapter 55.

Furthermore, the rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

THSC, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, the State of Texas is an "Agreement State" authorized by the NRC to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The adopted rules are compatible with federal law.

The adopted rules do not exceed an express requirement of state law. THSC, Chapter 401, establishes general requirements, including requirements for fees, for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. THSC, §401.245 requires the commission to adopt compact waste disposal fees by rule. The purpose of the rulemaking is to implement statutory requirements consistent with recent amendments to THSC, Chapter 401, as provided in SB 1604 and HB 1567.

The adopted rules are compatible with a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The adopted rules are compatible with the NRC requirements and the requirements for retaining status as an "Agreement State."

These rules are adopted under specific authority of the THSC, Chapter 401. THSC, §§401.051, 401.103, 401.104, 401.245, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. The commission invited public comment on the Draft Regulatory Impact Analysis Determination. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed a preliminary assessment under the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007. The commission's preliminary assessment is that implementation of these adopted rules would not constitute a taking of real property.

The purpose of these rules is to implement changes to the TRCA required by SB 1604, 80th Legislature, 2007 and HB 1567, 78th Legislature, 2003 for the licensing of by-product material, recovery of source material, commercial radioactive substances processing and storage, and low-level radioactive waste disposal; as well as fee setting for the disposal of low-level radioactive waste. The adopted rules to Chapter 336 would substantially advance this purpose by establishing the requirements for the licenses that are subject to the transfer of jurisdiction under SB 1604 or changes in HB 1567 and establishing the rate-setting process for the assessment of fees for the disposal of low-level radioactive waste under HB 1567.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The adopted rules address licensing and fee requirements and do not affect real property. The adopted rules would affect those who choose to conduct licensed radioactive materials activities under Chapter 336 or those who generate and dispose low-level radioactive. Therefore, the adopted rules do not affect real property in a manner that is different than would have been affected without these revisions.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on September 16, 2008. The public comment period closed on October 6, 2008. The commission received comments from Advocates for Responsible Disposal in Texas (ARDT), Entergy, Mesteña Uranium, LLC (Mesteña), Lone Star Chapter of the Sierra Club (Sierra Club), South Texas Project (STP), Texas Mining and Reclamation Association (TMRA), URI, Inc. (URI), Hance Scarborough, LLP on behalf of Waste Control Specialists LLC (WCS), and one individual.

RESPONSE TO COMMENTS

General

TMRA commented on §336.1(f)(3) pointing out that the abbreviation for picocuries per gram is "pCi/g" and not "PCi/G."

The radioactivity concentration units shown in the proposed rules have been revised to reflect the correct abbreviations for picocuries per gram.

Radioactive Substance Fees

Mesteña and TMRA commented on §336.105(a)(4), which relates to the amounts of various fees involved with new applications, stating that fees should be justified and equal the cost to conduct a review and appear to be excessive.

The commission assumes this comment refers to §336.105(b)(4) rather than §336.105(a)(4). No changes were proposed to the application fees in §336.105(a)(4) or §336.105(b)(4) as part of this rulemaking. Section 336.105(b)(4) was part of the SB 1604 Implementation Phase I and became effective on February 28, 2008. The application fees reflect the anticipated costs for commission action on a new application. No changes were made in response to this comment.

Mesteña and TMRA commented on §336.105(a)(7) asking for clarification on the word "noncontiguous."

The commission assumes this comment refers to §336.105(b)(7) since there is no §336.105(a)(7). The meaning of noncontiguous is the same as the Webster dictionary definition - (1) not being in actual contact; (2) not touching along a boundary or a point. No changes were proposed to §336.105(b)(7) as part of this rulemaking. Section 336.105(b)(7) was part of the SB 1604 Implementation Phase I and became effective on February 28, 2008. Source material licenses with noncontiguous facilities such as uranium mines in two different locations are subject to a higher annual fee. No changes were made in response to this comment.

Mesteña and TMRA commented on §336.105(a)(9) which relates to the fees proposed in §336.105(a)(7) and the commenter's perception of "double-dipping."

The commission assumes this comment refers to §336.105(b)(9) since there is no §336.105(a)(9). No changes were proposed to §336.105(b)(9) as part of this rulemaking. Section §336.105(b)(9) was part of the SB 1604 Implementation Phase I and became effective on February 28, 2008. Section 336.105(b)(4) lists the annual fees charged for facilities regulated under Subchapter L. Section 336.105(b)(7) identifies two classes of noncontiguous facilities added to a license for which the annual fee is increased by 25%. This 25% increase would cover the additional annual administrative costs to the agency for review and regulation of a larger licensed uranium recovery operation. Section 336.105(b)(9) adds a one-time fee of $28,658 for an in situ wellfield on noncontiguous property to cover the one-time license amendment review costs. No changes were made in response to this comment.

Sierra Club suggested higher fees for a major amendment for Subchapter L or Subchapter M, since they could involve very complicated analysis given the nature of the waste. Sierra Club suggested adding language which would state that an application for a major amendment of a license issued under Subchapter L or M of Chapter 336 be accompanied by an application fee of $25,000.

The commission does not agree with this comment. The commission believes that an application fee of $10,000 is appropriate to recover the commission's cost for a major amendment. Additionally, a provision already exists in §336.105(f) which allows the commission to assess and collect additional fees from the applicant to recover costs such as costs that exceed the $10,000 application fee. No changes were made in response to this comment.

General Licensing

Mesteña and TMRA commented on §336.208(a)(2) which relates to the experience requirement for a RSO. Both commenters suggested that an additional phrase be added to §336.208(a)(2) that would read "working with radiation detection and measurement equipment and have an understanding of the uranium recovery process" consistent with NRC Regulatory Guide 8.30.

The commission does not agree with this comment. Section 336.208(a)(2) is written to describe general requirements for all RSOs for TCEQ radioactive material licenses, not just RSOs at uranium recovery facilities. The commission agrees that an RSO should have specific knowledge and expertise related to the activity actually authorized in a radioactive material license. It is presumed that the one year of relevant experience working under the direct supervision of the RSO at a uranium or mineral extraction/recovery, radioactive waste processing, or radioactive waste or by-product material disposal facility would include the use of radiation detection and measurement equipment, among other radiologically related activities involved with such work. If specific training requirements warrant identification based on the type of activities authorized in a license, the commission will, and has, listed additional requirements for an RSO in individual licenses. Thus, it was not considered necessary to list in rule all activities that would comprise the desired suite of work experience (e.g., air sampling, both occupational and environmental; bioassay program; radiation survey/detection program in operational areas and at restricted or controlled area boundaries; conduct of a personnel dosimetry program; radon monitoring program; records management; determination of committed effective dose equivalent from monitoring data; calculation of total effective dose equivalent for workers; etc.). No changes were made in response to this comment.

Licensing of Source Material Recovery and By-Product Material Disposal Facilities

Mesteña and TMRA commented on §336.1105 which relates to definitions for the terms "closure," "closure plan," "reclamation," "reclamation plan," restoration," and "decommissioning plan," which is not defined. The commenters suggested that the definitions of the listed terms are internally inconsistent. For instance, "reclamation" appears consistent with "closure," but "reclamation plan" appears to pertain only to disposal areas. TMRA commented that the definition of closure in Chapter 37 is broader in scope. TMRA also commented that "restoration"

is limited to groundwater cleanup which is excluded from any financial assurance requirements as proposed in §37.9040.

The definitions for "closure" and "reclamation plan" in §336.1105 have been modified to clarify the differences between in situ recovery and by-product material disposal facilities. An "/or" has been added to the definition of "closure" to indicate the use of the term for either by-product material production alone or in combination with by-product disposal. The definition for "reclamation plan" has been expanded to include the use of reclamation plan for in situ recovery facilities as well as by-product material disposal facilities. A definition for "decommissioning plan" has been added in §336.1105 to clarify its meaning and to link it to the definition of "decommission" in §336.2(29). The definition of closure in Chapter 37, Subchapter T is broader than the definition in Chapter 336, Subchapter L, because Chapter 37, Subchapter T covers financial assurance requirements for various closure activities for various Chapter 336 licensed activities requiring financial assurance, and not just closure as required under Subchapter L of Chapter 336.

Mesteña and TMRA commented about the need to include "thorium" in the definition of uranium recovery in §336.1105(36).

The commission does not agree with this comment. This definition is meant specifically and narrowly for "Uranium Recovery" and to demonstrate the equivalency of the term "uranium milling" used by the NRC. For that purpose, the phrase "source material recovery" was dropped from the definition and the phrase ". . . and as it pertains to uranium ore only . . ." was added to the first sentence in the definition.

Mesteña, TMRA, and URI commented about aquifer restoration and financial security as explained in §336.1125(a)(3), and how it is inconsistent with §37.9040.

The commenters may have reviewed an earlier version of the proposed rules in Chapter 37 prior to *Texas Register* publication as the proposed rule in §37.9040, as published, did not exclude aquifer restoration. Section 336.1125(a)(3) as proposed is consistent with Subchapter L for uranium recovery. Aquifer restoration of in situ uranium recovery facility is a component of closure, and financial assurance for closure, including aquifer restoration is required. No changes were made in response to this comment.

TMRA and URI commented that in §336.1125(a)(3) the TCEQ should avoid using the issuance of a production area authorization as the occasion to set or approve the form or amount of financial assurance to be provided by a permittee. TMRA and URI suggested revising §336.1125(a)(3) to remove reference to the production area.

The commission does not agree with this comment. The commission notes that in accordance with proposed new §305.49(b)(6), Additional Contents of Application for an Injection Well Permit, an application for a production area authorization shall be submitted with and contain a cost estimate for aquifer restoration and well plugging and abandonment. The commission intends that the cost estimate for aquifer restoration be included as part of an application for a production area authorization under Chapter 331. The requirement to maintain financial assurance for aquifer restoration based on those cost estimates is required under the radioactive material licensing rules in Subchapter L of Chapter 336. As part of preparing an application for a production area authorization, the owner or operator has completed detailed work on delineating the ore-body to be mined (both in terms of depth and area), installed required monitor wells, and investigated and identified the aquifer characteristics of the production zone for determination of Class III well spacing, at least on an initial basis. Thus, the development of the production area authorization application is the appropriate time to determine the cost estimates for aquifer restoration of the proposed production area. Furthermore, any decision to pursue mining (and obtaining the necessary production area authorization) is based on economic considerations, and the cost required for plugging and abandonment of all wells and for aquifer restoration certainly must be included in any economic analysis. The commission realizes that these cost estimates will be adjusted over time. Submission of these estimates in an application for a production area authorization provides the commission the opportunity to review and comment on the factors taken into consideration to estimate these costs as part of the application process. For example, factors such as required pore volumes, flare factors, effective porosity of the production zone, pumping and electrical costs, water treatment and disposal costs, and laboratory analytical costs all are factors to be considered regarding the cost of aquifer restoration. If a permittee believes that it will be too difficult to establish a cost estimate for restoring an entire production area up front as part of the application of the production area authorization, the permittee should consider reducing the size of the production area. In any case, as required under proposed new §305.49(b)(6), these estimates must be included in an application for a production area authorization. In addition, as part of an application, these cost estimates would be available for review by the public and subject to public comment.

TMRA further commented that the term "injection operations" be used as opposed to "injection of mining fluid" to more fully describe the subsurface emplacement of fluids and therefore harmonize with §331.2(51).

The commission agrees with this comment and has changed the reference from "injection of mining fluid" to "injection operations" for consistency with other rule provisions. Therefore, §336.1125(a) has been revised to reflect this change.

Mesteña, TMRA, and URI commented on a conflict between §336.1125(d), which requires a licensee to take into account total costs resulting from the hiring of a third-party contractor to perform decommissioning work in establishing financial assurance mechanisms, and §331.143, which requires an owner or operator to prepare a financial assurance estimate for well plugging based on the point in the facility's operating life when plugging and abandonment is the most expensive.

The commission does not agree with this comment. Responsibility for financial assurance for plugging and abandonment of wells is required for an UIC control permit under Chapter 331 and is not a radioactive material licensing requirement under Chapter 336. Because the NRC considers aquifer restoration as part of the closure and decommissioning of an in situ uranium recovery facility, financial assurance for aquifer restoration must be included as part of the licensing requirements to maintain compatibility with the NRC. Financial assurance for aquifer restoration is a requirement for a radioactive material license for in situ recovery of uranium under Subchapter L of Chapter 336. However, the initial cost estimate for aquifer restoration of an individual production area will be included as part of an application for a production area authorization. Subsequent annual review of the financial assurance and cost estimates is required for the radioactive material license under §336.1125(f). No changes were made in response to this comment.

Mesteña, TMRA, and URI commented that financial assurance in §336.1125(e) should be payable to the State of Texas, not the State of Texas Perpetual Care Account.

The commission agrees in part with this comment. THSC, §401.305(b), states, in part, that money received by the commission shall be deposited to the credit of the perpetual care account. Therefore, §336.1125(e) has been revised to be consistent with the statute.

TMRA and URI supported the scope of the proposed §336.1125(f) annual review. The term "performance" includes and is preferable to the term "completion" to describe the legal obligation. The text should make clear that the amount of financial assurance required at any given time does not exceed that required to pay for third-party performance of the outstanding closure obligations under the license under the closure plan at any given time. TMRA and URI further commented that §336.1125(f) should be revised as follows: "The licensee's financial assurance mechanism and the underlying cost estimates will be reviewed annually by the agency to assure that sufficient funds are available for performance of the licensee's outstanding decommissioning and reclamation obligations under the license in the manner set out in the plan if the work had to be performed by an independent contractor. . . ."

The commission does not agree with the comment. Financial assurance in an amount sufficient to complete the closure of the facilities is required. The financial assurance and underlying cost estimates should be reviewed annually to determine if the amount continues to be sufficient to complete the closure based on an assumption that the closure work is performed by an independent contractor. No changes were made in response to the comment.

Licensing of Radioactive Substances Processing and Storage Facilities

WCS commented that proposed §336.1235 would restrict the ability to use "self-insurance, or any arrangement that essentially constitutes self-insurance" in satisfaction of financial assurance requirements. This restriction implements an NRC financial assurance requirement found at 40 CFR §61.62(g) established for the disposal of radioactive waste. This restrictive requirement should not be imposed in the commission's licensing programs where the use of financial test and corporate guarantee mechanisms is expressly permitted. This language may create ambiguity, even though it is clear that financial test and corporate guarantee mechanisms are available for licensees in the commission's storage and processing programs. Proposed §336.1235(d) may wrongly be interpreted to limit the use of such beneficial arrangements with the government and impose additional unwarranted public costs. For these reasons, WCS suggested §336.1235(d) be deleted or at a minimum clarified.

The commission agrees in part and disagrees in part with this comment. Section 336.1235(d) has been deleted to avoid confusion about the use of a parent company guarantee or financial test as an acceptable form of financial assurance and the rest of the section has been renumbered. The parent company guarantee or financial test may be used for financial assurance for a radioactive material license for a radioactive waste storage and processing facility authorized under Subchapter M of Chapter 336. The deletion of proposed §336.1235(d) does not mean that other arrangements, such as contracts with a state or federal agency, provide an acceptable form of financial assurance. Under adopted §336.1235(d), financial assurance required for a license under Subchapter M of Chapter 336 must comply with the requirements of Chapter 37, Subchapter T.

Sierra Club commented that §336.1235(f) contains a potential loophole since the Waste Control Specialists by-product material license was issued by TCEQ, not by the Department of State Health Services. Sierra Club suggested clarifying language be added to state licenses with financial assurance mechanisms issued prior to September 1, 2008, including those issued to meet the requirements of the Texas Department of State Health Services, must submit a replacement mechanism(s).

Existing licensees must provide acceptable financial assurance meeting the requirements of Chapter 37, Subchapter T by June 1, 2009. The license issued to Waste Control Specialists for by-product material disposal was under Chapter 336, Subchapter L, not Subchapter M which is for licensing of storage and processing of radioactive waste, and financial assurance for by-product material disposal is addressed in §336.1125(f) and (i). The commission has not issued any new licenses under Subchapter M. The license issued to Waste Control Specialists for storage and processing was issued at the Department of State Health Services under the rules governing them at the time. No changes were made in response to this comment.

Fees for Low-Level Radioactive Waste Disposal

General

ARDT commented that a rate application should be subject to an opportunity for a contested case hearing. Entergy commented that it supports the provisions that allow for the opportunity for a contested case hearing and believes it is very important to provide generators with the ability to conduct discovery and examine witness on a rate application. STP commented that it is important for nuclear facilities subject to the Texas Low-Level Radioactive Waste Disposal Compact to have an opportunity to request a contested case hearing on a rate application. STP commented that an application process subject to opportunity for a contested case hearing is needed to test the veracity of information and assumptions used to establish a rate. Sierra Club was supportive of the nuclear industry's position concerning the right to a contested case hearing when determining the maximum disposal rates. Sierra Club generally supported that the provisions in the PUC's regulations for rate cases should be applied in the TCEQ regulations when establishing the maximum disposal rates.

The commission agrees with the comments. Fairness and transparency of the process dictate that the rate setting be subjected to an application process where the executive director can review submitted information, request additional information, and that the ratepayers have an opportunity for a contested case hearing on the application. THSC, §401.245(b) does require that the commission establish waste disposal fees by rule. The process provided in Subchapter N integrates these necessary components into an application process, with an opportunity for a contested case hearing, followed by an expedited rulemaking. Under the process established in Chapter 336, Subchapter N, the licensee submits an application to establish initial maximum disposal rates. The executive director reviews the application with the ability to seek additional information on the application from the licensee and recommends a rate to the commission. The executive director provides notice with an opportunity for a contested case hearing on the rate. If the rate is uncontested, the executive director would proceed with rulemaking to establish the recommended rate in rule for final adoption by the commission. If the matter is contested, the executive director would

refer the application to the State Office of Administrative Hearing for a hearing on the rate application. At the conclusion of the hearing, the commission would consider the administrative law judge's proposal and the evidentiary record. The commission would order the executive director to initiate an expedited rulemaking on a rate based on the commission's decision on the contested rate application. The rate would be final when adopted by rule by the commission. The same process would be used for any subsequent revision of the rate. No changes were made in response to this comment.

Definitions

ARDT and WCS suggested that a definition of "Allowable expenses" be added to the rules because it is one of the components for determining cost service (or revenue requirements) upon which disposal rates are based. This clarifies that the maximum disposal rates will only be based on the actual costs of disposal. ARDT and WCS stated that the definition should apply to services rendered to "generators" rather than to the "public." WCS further stated that the "allowable expenses" for depreciation, and a cap on other expenses (advertising, contributions and donations) should be defined as stated in the PUC Rule, 16 TAC §25.231(b).

The commission agrees with these comments. The definition of "Allowable expenses," consistent with the PUC's definition of "Allowable expenses" in 16 TAC §25.231(b), has been added to the rule which outlines what components to consider for determining the cost service upon which the disposal rates are based. The definition also defines depreciation to be computed on a straight-line basis with the option that other method of depreciation may be used where it is more equitable to recover the cost of the facility, and the cap of three-tenths of one percent (0.3%) maximum of gross receipts. The commission has added the term "gross receipts" for further clarification in §336.1303(1)(f).

WCS commented that "Allowable expenses" include "reasonable and necessary rate case expenses." However, ARDT did not agree with inclusion of rate case expenses in the proposed definition for "Allowable expense." WCS believed that regulated entities may incur rate-making expenses should there be any disputes to recover those costs. WCS commented that the rate case expenses in a PUC proceeding are recoverable and are amortized over a very short period.

Although the decision was made to not add the specific term "rate case expenses" in the definition of "allowable expenses," there is not an implied prohibition for an applicant to seek reimbursement of rate case expenses in the rate setting proceeding. Rather, specific issues related to allowable expenses are intended to be addressed in the rate setting process. No change was made in response to this comment.

ARDT and WCS recognized the authority under the Texas Low-Level Radioactive Waste Disposal Compact. Therefore, they suggested that the definition of "generator" be clarified to include generators in states other than Texas and Vermont in the event that the Compact Commission allows low-level radioactive waste to be accepted at the compact site from other states. The purpose of the clarification is to ensure that waste generated outside of Texas or Vermont and disposed of at the compact site is subject to the same maximum disposal rates as waste generated in Texas and Vermont, and to ensure that the maximum disposal rates reflect the actual volume of waste.

The definition of "generator" was changed to clarify that the Compact Commission has the authority to accept other states' low-level radioactive waste, as provided in THSC, Chapter 403. Under the terms of the compact, new states can be added as party states to the compact or the Compact Commission can approve a contract for the importation of waste into the host state for disposal. Specifically, the definition was revised to include "and is subject to the compact." These rules establish procedures the commission will use to determine a disposal rate which may only be a component of a Compact Commission disposal rate under the provisions of the Texas Low-Level Radioactive Waste Disposal Compact. The disposal rate subject to these rules does not include any surcharges, importation fees, or any other fees that may be assessed to waste from other entities that is contracted for disposal under the provisions of the Texas Low-Level Radioactive Waste Disposal Compact.

ARDT and WCS suggested that the proposed definition "Capital investment" be changed to "Invested capital" which is consistent with the term most often used in the THSC, Chapter 401. ARDT supports the proposed definition of the term whether it is named "Capital investment" or "Invested capital," as it provides maximum flexibility to determine the costs for inclusion in the disposal rate base.

The commission agrees with the comments. The definition "Capital investment" was renamed as "Invested capital" which is consistent with the THSC, Chapter 401, and 16 TAC §25.231(c)(2). In addition, the commission added the word "accumulated" to depreciation within the definition of "Invested capital," which is consistent with 16 TAC §25.231(c)(2).

WCS commented that the definition "Invested capital" should be expanded to include working capital allowances, certain adjustments for intangible assets (regulatory assets and customer deposits), construction work in progress, self-insurance reserve accounts, permits, and post-test year adjustments for known and measurable rate case additions or decreases. WCS stated that the definition should allow for "known and measurable" adjustments to invested capital to ensure that the maximum disposal rates will be reasonable for the effective period of time. ARDT opposed the expanded definition of "Invested capital" and supported the language originally proposed as "Capital investment."

Although the decision was made to not add the illustrative list in the definition of "invested capital," there is not an implied exclusion of those possible cost components in the rate setting proceeding. Rather, specific issues related to recoverable costs as "invested capital" are intended to be addressed in the rate setting process. No change was made in response to this comment.

An individual suggested that the term "Reasonable rate of return" should include additional language to clarify that the rate of return be on an "after-tax" basis. The individual stated that investors evaluate all investments on an "after-tax" basis and identify all the risk factors to determine which investment provides the biggest return. Therefore, TCEQ should calculate the "reasonable rate of return" on invested capital on an "after-tax" basis. This will ensure that the licensee will have sufficient funds to meet its working capital needs and environmental obligations, such as monitoring, cleanup, and restoration.

The commission agrees with the comment. The definition "Reasonable rate of return" was modified to clarify that the calculation should be on an "after-tax" basis.

ARDT suggested that curies be deleted from the definition of "Relative hazard" in order to limit the ability of the licensee to impose an additional surcharge based on curies. ARDT stated that maximum disposal rates are a more useful measure of hazard

than curies, and measuring hazard by dose rate encompasses the same risk factors. The ability to charge for curies would allow increased costs disproportionably without consideration of the radiotoxicity over the numerous isotopes to be shipped to the compact facility. Thus, maximum disposal rates based on both dose rate and on curies was tantamount to allowing the licensee to charge two or more times for essentially the same risk factor. WCS agreed with the definition of "Relative hazard" as proposed with the distinction that relative hazard be based on curies.

The commission does not agree with revision of the definition of "Relative hazard." The term "Relative hazard" is used in THSC, §401.245 as one of the criteria to establish Compact waste disposal fees. In determining relative hazard, the commission is required to consider the radioactive, physical, and chemical properties of each type of low-level radioactive waste. Dose rate does not necessarily encompass the same risk factors as the total radioactivity of the waste in curies; that is, dose rate and curies are not the same. Limits on the total number of curies are specified in the license because the total radioactivity of the waste impacts the performance assessment of the waste disposal facility. Further, basing the fees solely on dose rate rather than the total radioactivity of the waste as well as dose rate may disproportionately impact some small generators. No changes were made in response to this comment.

ARDT suggested that the proposed definition "Revenue requirement" be modified to include the name change of "Capital investment" to "Invested capital," and "Allowable expenses." WCS agreed with this proposed change.

The commission agrees with the comments. The definition "Revenue requirement" was modified to reflect the new term "Allowable expenses" and the renamed term "Invested capital."

Commission Powers

WCS suggested changing the term "leasehold" to "real property." WCS stated that leasehold is one type of real property interest that a licensee may own. By using the term "real property" instead would be more encompassing which includes all types of real property interest that a licensee may obtain.

The commission agrees with this comment. The term "leasehold" has been changed to "real property" in §336.1305(a).

ARDT supported the proposed language of §336.1305(b) where the "commission may use any standard, formula, method, or theory of valuation reasonably calculated to arrive at the objective of prescribing and authorizing fair, just, reasonable, and sufficient rates." WCS suggested deleting the proposed language, as it appears to be in conflict with THSC, §401.246(b), which prescribes that the commission shall use the methods used by the PUC.

The commission partially agrees with the comments. The proposed language is consistent with the general principles of administrative law which prohibit a rate from being arbitrary and capricious. THSC, §401.246(b) requires the commission to use the methods used by the PUC, to the extent practicable, when establishing overall revenues, reasonable return, and invested capital for the purpose of establishing compact waste disposal fees. Because the licensee submits a rate application to the commission, the licensee can propose the standard, method, theory of valuation calculated to arrive at a fair, just, reasonable and sufficient rate. No change was made in response to this comment.

ARDT and WCS commented that §336.1305 should include a new subsection stating that the licensee bears the initial burden of proving that the disposal rates are reasonable if a rate rulemaking is ordered. The language proposed is consistent with the Texas Utilities Code, §36.006.

The commission agrees with the comments. New §336.1305(c) was added to require that the licensee bears the burden of proving that the disposal rates are reasonable in a contested case hearing on a rate application.

ARDT suggested that §336.1305 include a mechanism to allow for a "true-up proceeding" after the initial rate determination. The maximum disposal rates should be based on actual costs of a test year as opposed to projected costs. Testing the validity of projected costs may be futile and could result in rates that do not reflect true costs of services, thus requiring subsequent corrective action to align charged rates with actual costs of service. In a test year, rates are based on actual costs instead of projected costs, and the rate adopted at the end of the test year may be adjusted over time based on known and measurable changes.

The commission agrees with the comment. Section 336.1305(h) was amended to include a "true-up proceeding" for revising an existing disposal rate. This change will allow a mechanism to determine the true cost for the disposal of waste if there is shortfall or overage in money collected. In addition, the licensee may submit an application for a rate revision under §336.1311.

ARDT proposed that §336.1305 should include a new subsection that allows the generator the opportunity to initiate a revision to the maximum disposal rates if a generator can demonstrate to the executive director that good cause exists. Without this opportunity, the rules could be interpreted to allow only a rate revision if requested by the licensee or if the executive director determined a rate revision should be initiated.

The commission agrees with the comment. The commission has added §336.1305(i) to allow a generator the opportunity to initiate a revision to the maximum disposal rates if they can demonstrate that good cause exists.

Factors Considered for Maximum Disposal Rates

ARDT commented that §336.1307 include the ratemaking concept from Texas Utilities Code, §36.201 as a factor in determining the maximum disposal rates, which does not allow a rate which is automatically adjusted and passes through a change in costs.

The commission agrees with this comment. THSC, §401.246(b) requires the commission to use the methods used by the PUC, to the extent practicable, when establishing overall revenues, reasonable return, and invested capital for the purpose of establishing compact waste disposal fees. The ratemaking concepts as described in the Texas Utilities Code, §36.201 for the most part were incorporated into the various sections of the subchapter.

ARDT and WCS suggested that the language as previously commented on the "Allowable expenses" be used in lieu of §336.1307(1) and (2). The new language should include specific expenses that are not allowed as "Allowable expenses."

The commission agrees with the comments. The definition "Allowable expenses" was added to the definition section in §336.1303, and §336.1307 was revised to include all the disallowable expenses that would not be considered for determining the cost service upon which the disposal rates are based. This subsection is consistent with the PUC's rules in 16 TAC §25.231(b)(2).

ARDT and WCS suggested that this §336.1307 include more details regarding the proper criteria for establishing a reasonable

rate of return on invested capital, similar to the language found in 16 TAC §25.231(c). WCS further stated that adding the details would assist the investor to determine whether the return on equity for a low-level radioactive waste disposal facility was reasonable in terms of the financial risk. This would allow WCS to attract venture capital for financing.

The commission agrees with the comments. The PUC's requirements in 16 TAC §25.231(c) does provide sufficiently detailed language to establish proper criteria to determine a reasonable rate of return on invested capital. Section 336.1307(3) was revised to include similar language that pertains to reasonable rate of return on invested capital.

Initial Determination of Rates and Fees

An individual suggested that additional language be added to the list of items that would be submitted with an application to establish the initial waste disposal rate. The individual suggested that "a proposed reasonable rate of return on investment" be identified as basis for the determination of the waste disposal rate.

The commission agrees with the comment. Section 336.1309(a) was modified to include "a proposed reasonable rate of return on investment."

ARDT suggested modifying and adding rule language in §336.1309 to provide that generators also have a right to a contested case hearing on the licensee's rate filing application. However, WCS commented that the proposed language in §336.1309 was not consistent with THSC, §§401.245 - 401.247, where it requires the commission to establish the disposal rate through the rulemaking process and not through the contested case hearing process.

The commission agrees with the comments to allow for an opportunity for a contested case hearing on a rate application. However, the final rate schedule will be established by rule as required by THSC, §401.245(b). Section 336.1309(b) was modified and new §336.1309(c) was added in response to the comment to allow the generator, licensee or executive director the opportunity for a contested case hearing on the application. The executive director reviews the application with the ability to seek additional information on the application from the licensee and recommends a rate to the commission. The executive director provides notice with an opportunity for a contested case hearing on the rate. New §336.1309(d) was added to clarify that requests for contested case hearings must be filed by individual generators and cannot be filed jointly. If the rate is uncontested, the executive director would proceed to the initiation of a rulemaking to establish the recommended rate in rule for final adoption by the commission. After considering the record in a contested rate application, the commission would determine the maximum disposal rates and direct the executive director to initiate rulemaking to establish the rates in a schedule set out by rule as described in new §336.1309(g).

ARDT supported rates charged during the test year which are temporary or interim rates established by rule of the commission that will remain in effect until a final rate is established. However, ARDT recommended that the commission require a "true-up proceeding." It would require the licensee to either refund to the generators, who paid interim rates, money collected under interim rates that is in excess of the rates finally adopted, or authorize the licensee to bill the generator a surcharge for the shortfall. In both situations, interest would be collected on the refund or billed amount at a rate determined by the commission. This "true-up proceeding" is consistent with Texas Utilities Code, §36.155, relating to Interim Order Establishing Temporary Rates.

The commission partially agrees with this comment. Section 336.1309(f) was amended to include the "true-up proceeding," except for the interest collection, in response to the comment. This change will allow the licensee a mechanism to determine the true cost for the disposal of waste if there is shortfall or refund in money collected.

Revisions to Maximum Disposal Rates

An individual suggested that additional language be added to §336.1311(c). The individual suggested that "any adjustment shall include a review and updated calculation of reasonable rate of return on investment after taxes, and shall be based on audited financial statements as required by §336.1315(d)."

The commission does not agree with the comment. Section 336.1311(c) allows the commission to adopt a rate schedule with automatic adjustments for inflation and extraordinary volume. If revision of rates are needed because of an updated calculation of reasonable rate of return after taxes or because of new information provided in audited financial statements, the executor director may initiate a rate revision under §336.1305 or the licensee may submit an application to revise the rate under §336.1311. No change has been made in response to this comment.

ARDT suggested adding a new subsection to §336.1311 to allow the licensee to request revisions to the maximum disposal rates based on factors other than the factors enumerated in §336.1311(d) as proposed.

The commission agrees with this comment. New §336.1311(d)(3) was added to this section which states that "changes in the licensee's revenue requirements or in any of the other factors in §336.1307 of this title (relating to Factors Considered for Maximum Disposal Rates) that necessitate a change in the licensee's maximum disposal rates."

ARDT suggested modifying §336.1311 to require that an application to revise the maximum disposal rates which comply with §336.1309(b). This modification is to clarify that the generators have a right to request for a contested case hearing on applications to set or revise the initial maximum disposal rate. ARDT also suggest adding new language to this section to address that "only the licensee's test year expenses as adjusted for known and measurable changes will be considered" for revisions to maximum disposal rates. This is consistent with the requirements in PUC rules, 16 TAC §25.231(b).

The commission agrees with this comment. A generator should have the same opportunities to participate on an application for an initial rate and any subsequent rate revision. The executive director reviews the application with the ability to seek additional information on the application from the licensee and recommends a rate to the commission. The executive director provides notice with an opportunity for a contested case hearing on the rate. If the rate is uncontested, the executive director would proceed to rulemaking to establish the recommended rate in rule for final adoption by the commission. Section 336.1311(e) has been amended in response to this comment.

WCS suggested amending §336.1311 to define "affected generators," include procedures for addressing "affected generators," and the ability to combine the contested case hearing with the rulemaking proceedings. WCS stated that without these suggested changes, the executive director and the licensee would

be subjected to substantial resource demands of processing numerous rate revision requests, and increased cost for a contested case hearing and rulemaking proceedings.

The commission does not agree with this comment. The "affected generators" as defined by WCS is not appropriate in this case. Typically, the 10% threshold is useful when the regulated entity has numerous customers like those of water and wastewater utilities. However in this case, there are only a limited number of waste generators who may use the services of the compact facility. No changes were made in response to this comment.

Extraordinary Volume Adjustment

ARDT supported the proposed language for "Extraordinary Volume Adjustment" in §336.1313. ARDT stated that it would allow for an extraordinary volume of waste received to be factored into the maximum disposal rates as a rate reduction. However, WCS stated that the TCEQ rules should not include proposed language for extraordinary volume adjustments, as the Texas statutes do not speak to those types of adjustments. WCS suggested changing the proposed language for "Extraordinary Volume Adjustment" to include that any revisions to the maximum disposal rates for future years be calculated without any revenues or cost associated to the extraordinary volume adjustments in a prior year. The proposed changes would still provide for the generators to receive a lower price for their disposal of their extraordinary volume, while WCS would benefit by not having that volume used in any calculation of a revision of the maximum disposal rates.

The commission agrees with the comments to include an extraordinary volume adjustment. THSC, §401.245(b) states that "the commission by rule shall adopt and periodically revise compact waste disposal fees according to a schedule that is based on the projected annual volume of low-level radioactive waste received. . . ." Even though Texas statutes do not specifically provide for volume discounts, a rate reduction may be appropriate and necessary for large volume shipments. No changes were made in response to these comments.

Revenue Statements

ARDT and WCS suggested some changes to the proposed language for §336.1315 by adding language that the "executive director prescribe a reporting form to adequately reflect the licensee's revenues and allowable expenses." This would ensure that the interested parties receive the information they need (gross receipts and expenses) to review whether WCS' rates are reasonable. In addition, they suggested changing the filing date from March to April to ensure that WCS has time to prepare an accurate report, and correcting the name of the guidance document - "Generally Accepted Accounting Principles."

The commission agrees with the comments. The additional language for a prescribed reporting form will provide additional confidence that executive director will be able to ascertain the correct dollar amounts as required under the THSC, Chapter 401 and §336.103(f) and (g), where certain dollar amounts are allocated to the host county of the compact waste facility and to the Texas Comptroller of Public Accounts, for deposit. Section 336.1315 has been amended to reflect the changes as requested, the filing dates and the spelling correction.

An individual suggested that additional language be added to §336.1315. The individual suggested that "the licensee shall provide an audited cost statement that provides all investment and operating costs for the preceding calendar year." In addition, he suggested that "all revenues and costs shall be provided by the licensee for the commission's annual evaluation of any adjustment in rates as required by §336.1311(c)."

The commission agrees with the comment. New §336.1315(c) and (d) was added in response to the comment. In addition to the required information submitted under §336.1315, the licensee must provide any information on revenues and costs when requested by the executive director to determine if revision to the disposal rates may be necessary.

Consideration of Payment to Affiliate

ARDT and WCS suggested adding a new section which would govern payments to affiliates of the licensee. The suggested language is from the Texas Utility Code, §36.058 (relating to Consideration of Payment to Affiliate), which governs the recovery of payments made to affiliates by an electric utility. They stated that having this language in the TCEQ rules would eliminate the possibility of TCEQ following the same path that PUC had dealing with recovery of payments to affiliates where they had a great deal of litigation for decades.

The commission agrees with the comment with one exception. Because the compact waste disposal license applicant has a parent company that may request payment for their services from the applicant, special consideration of payments to affiliates may be necessary. However, one of the provisions proposed in the comment allows the licensee to include the affiliate payments in the charges to the generators if there is a mechanism for making the affiliate charges subject to refund pending the commission's finding. In the case of the disposal rates in question, this is not appropriate. The commission does not allow the licensee to charge the generators an interim disposal rate until the commission determines the final maximum disposal rate as provided in the ratemaking process. In response to the comment, the commission has added new subsections to §336.1315 which includes similar language found in Texas Utilities Code, §36.058 that are consistent with this subchapter and ratemaking process.

Contracted Disposal Rates

ARDT and WCS suggested adding the word "unreasonable" to the filing requirement that a contract with a generator does not result in "discrimination between generators receiving like and contemporaneous service under substantially similar circumstances and provides for the recovery of all costs associated with the provision of service." They have indicated this is consistent with PUC's practices and with Texas Utilities Code, §36.003 (Just and Reasonable Rates).

The commission agrees with the comment. The word "unreasonable" was added before the word "discrimination" in §336.1317(b). The general language of the section is consistent with PUC's requirements under the Texas Utilities Code, §36.003, which provided additional clarification.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §336.1

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioac-

tive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendment implements SB 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

§336.1. Scope and General Provisions.

(a) Except as otherwise specifically provided, the rules in this chapter apply to all persons who dispose of radioactive substances; all persons who recover or process source material; and all persons who receive radioactive substances from other persons for storage or processing.

(1) However, nothing in these rules shall apply to any person to the extent that person is subject to regulation by the United States Nuclear Regulatory Commission (NRC) or to radioactive material in the possession of federal agencies.

(2) Any United States Department of Energy contractor or subcontractor or any NRC contractor or subcontractor of the following categories operating within the state, is exempt from the rules in this chapter, with the exception of any applicable fee set forth in Subchapter B of this chapter (relating to Radioactive Substance Fees), to the extent that such contractor or subcontractor under his contract receives, possesses, uses, transfers, or acquires sources of radiation:

(A) prime contractors performing work for the United States Department of Energy at a United States government-owned or controlled site, including the transportation of radioactive material to or from the site and the performance of contract services during temporary interruptions of transportation;

(B) prime contractors of the United States Department of Energy performing research in or development, manufacture, storage, testing, or transportation of atomic weapons or components thereof;

(C) prime contractors of the United States Department of Energy using or operating nuclear reactors or other nuclear devices in a United States government-owned vehicle or vessel; and

(D) any other prime contractor or subcontractor of the United States Department of Energy or the NRC when the state and the NRC jointly determine that:

(i) the exemption of the prime contractor or subcontractor is authorized by law; and

(ii) under the terms of the contract or subcontract, there is adequate assurance that the work thereunder can be accomplished without undue risk to the public health and safety or the environment.

(3) Radioactive material that is physically received from the federal government by a non-federal facility is subject to state jurisdiction except as provided in paragraph (2) of this subsection.

(4) The rules of this chapter do not apply to transportation of radioactive materials. This provision does not exempt a transporter from other applicable requirements.

(5) The rules in this chapter do not apply to the disposal of radiation machines as defined in this subchapter or electronic devices that produce non-ionizing radiation.

(b) Regulation by the State of Texas of source material, by-product material, and special nuclear material in quantities not sufficient to form a critical mass is subject to the provisions of the agreement between the State of Texas and the NRC and to 10 Code of Federal Regulations Part 150 (10 CFR Part 150) (Exemptions and Continued Regulatory Authority in Agreement States and in Offshore Waters Under Section 274). (A copy of the Texas agreement, "Articles of Agreement between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended" (Agreement), may be obtained from this commission.) Under the Agreement and 10 CFR Part 150, the NRC retains certain regulatory authorities over source material, by-product material, and special nuclear material in the State of Texas. Persons in the State of Texas are not exempt from the regulatory requirements of the NRC with respect to these retained authorities.

(c) No person may receive, possess, use, transfer, or dispose of radioactive material, which is subject to the rules in this chapter, in such a manner that the standards for protection against radiation prescribed in these rules are exceeded.

(d) Each person licensed by the commission under this chapter shall confine possession, use, and disposal of licensed radioactive material to the locations and purposes authorized in the license.

(e) No person may cause or allow the release of radioactive material, which is subject to the rules in this chapter, to the environment in violation of this chapter or of any rule, license, or order of the Texas Commission on Environmental Quality (commission).

(f) No person shall:

(1) dispose of low-level radioactive waste on site, except as authorized under §336.501(b) of this title (relating to Scope and General Provisions);

(2) receive low-level radioactive waste from other persons for the purpose of disposal, except for a person specifically licensed for the disposal of low-level radioactive waste;

(3) dispose of radioactive materials other than low-level radioactive waste, except for diffuse naturally occurring radioactive material waste having concentrations of less than 2,000 picocuries per gram (pCi/g) radium-226 or radium-228;

(4) dispose of radioactive materials from other persons other than low-level radioactive waste, except for naturally occurring radioactive material waste in accordance with Subchapter K of this

chapter (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste from Public Water Systems);

(5) recover or process source material, except in accordance with Subchapter L of this chapter (relating to Licensing of Source Material Recovery and By-Product Material Disposal Facilities);

(6) store, process, or dispose of by-product material, except in accordance with Subchapter L of this chapter; or

(7) receive radioactive substances from other persons for storage or processing, except in accordance with Subchapter M of this chapter (relating to Licensing of Radioactive Substances Processing and Storage Facilities).

(g) For the purpose of this chapter, any time the term "low-level radioactive waste" is used, the provision also applies to accelerator-produced radioactive 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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Texas Commission on Environmental Quality
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SUBCHAPTER B. RADIOACTIVE SUBSTANCE FEES

30 TAC §§336.101, 336.103, 336.105, 336.107, 336.114

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments and new section are also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendments and new section implement SB 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

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. GENERAL LICENSING REQUIREMENTS

30 TAC §336.208, §336.210

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The new sections are also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted new sections implement SB 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

§336.210. Emergency Plan for Responding to a Release.

(a) A new or renewal application for each specific license to possess radioactive materials in unsealed form, on foils or plated sources, or sealed in glass in excess of the quantities in subsection (e) of this section shall contain either:

(1) an evaluation showing that the maximum dose to a person off-site due to a release of radioactive material would not exceed 1 rem effective dose equivalent or 5 rems to the thyroid; or

(2) an emergency plan for responding to a release of radioactive material.

(b) One or more of the following factors may be used to support an evaluation submitted in accordance with subsection (a)(1) of this section:

(1) the radioactive material is physically separated so that only a portion could be involved in an accident;

(2) all or part of the radioactive material is not subject to release during an accident because of the way it is stored or packaged;

(3) the release fraction in the respirable size range would be lower than the release fraction in subsection (e) of this section due to the chemical or physical form of the material;

(4) the solubility of the radioactive material would reduce the dose received;

(5) facility design or engineered safety features in the facility would cause the release fraction to be lower than that in subsection (e) of this section;

(6) operating restrictions or procedures would prevent a release fraction as large as that in subsection (e) of this section; or

(7) other factors appropriate for the specific facility.

(c) An emergency plan for responding to a release of radioactive material submitted in accordance with subsection (a)(1) of this section shall include the following information.

(1) Facility description. A brief description of the licensee's facility and area near the site.

(2) Types of accidents. An identification of each type of radioactive materials accident for which protective actions may be needed.

(3) Classification of accidents. A classification system for classifying accidents as alerts or site area emergencies.

(4) Detection of accidents. Identification of the means of detecting each type of accident in a timely manner.

(5) Mitigation of consequences. A brief description of the means and equipment for mitigating the consequences of each type of accident, including those provided to protect workers onsite, and a description of the program for maintaining the equipment.

(6) Assessment of releases. A brief description of the methods and equipment to assess releases of radioactive materials.

(7) Responsibilities. A brief description of the responsibilities of licensee personnel should an accident occur, including identification of personnel responsible for promptly notifying off-site response organizations and the agency; also, responsibilities for developing, maintaining, and updating the plan.

(8) Notification and coordination. A commitment to and a brief description of the means to promptly notify off-site response organizations and request off-site assistance, including medical assistance for the treatment of contaminated injured onsite workers when appropriate. A control point shall be established. The notification and coordination shall be planned so that unavailability of some personnel, parts of the facility, and some equipment will not prevent the notification and coordination. The licensee shall also commit to notify the agency immediately after notification of the appropriate off-site response organizations and not later than one hour after the licensee declares an emergency. These reporting requirements do not supersede or release licensees from complying with the requirements in accordance with the Emergency Planning and Community Right-to-Know-Act of 1986, Title III, Publication L. 99-499 or other state or federal reporting requirements.

(9) Information to be communicated. A brief description of the types of information on facility status, radioactive releases, and recommended protective actions, if necessary, to be given to off-site response organizations and to the agency.

(10) Training. A brief description of the frequency, performance objectives, and plans for the training that the licensee will provide workers on how to respond to an emergency, including any special instructions and orientation tours the licensee would offer to fire, police, medical, and other emergency personnel. The training shall familiarize personnel with site-specific emergency procedures. Also, the training shall thoroughly prepare site personnel for their responsibilities in the event of accident scenarios postulated as most probable for the specific site, including the use of team training for such scenarios.

(11) Safe shutdown. A brief description of the means of restoring the facility to a safe condition after an accident.

(12) Exercises. Provisions for conducting quarterly communications checks with off-site response organizations at intervals not to exceed three months and biennial onsite exercises to test response to simulated emergencies. Communications checks with off-site response organizations shall include the check and update of all necessary telephone numbers. The licensee shall invite off-site response organizations to participate in the biennial exercises. Participation of off-site response organizations in biennial exercises, although recommended, is not required. Exercises shall use accident scenarios postulated as most probable for the specific site and the scenarios shall not be known to most exercise participants. The licensee shall critique each exercise using individuals not having direct implementation responsibility for the plan. Critiques of exercises shall evaluate the appropriateness of the plan, emergency procedures, facilities, equipment, training of personnel, and overall effectiveness of the response. Deficiencies found by the critiques shall be corrected.

(13) Hazardous chemicals. A certification that the applicant has met its responsibilities in accordance with the Emergency Planning and Community Right-to-Know Act of 1986, Title III, Publication L. 99-499, if applicable to the applicant's activities at the proposed place of use of the radioactive material.

(d) The licensee shall allow the off-site response organizations expected to respond in case of an accident 60 days to comment on the licensee's emergency plan before submitting it to the agency. The licensee shall provide any comments received within the 60 days to the agency with the emergency plan.

(e) The following indicates release fractions for radioactive material.

Figure: 30 TAC §336.210(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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SUBCHAPTER L. LICENSING OF SOURCE MATERIAL RECOVERY AND BY-PRODUCT MATERIAL DISPOSAL FACILITIES

30 TAC §§336.1105, 336.1109, 336.1113, 336.1125

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments are also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendments implement SB 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

§336.1105. Definitions.

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

(1) Aquifer--A geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs. Any saturated zone created by uranium or thorium recovery operations would not be considered an aquifer unless the zone is or potentially is:

(A) hydraulically interconnected to a natural aquifer;

(B) capable of discharge to surface water; or

(C) reasonably accessible because of migration beyond the vertical projection of the boundary of the land transferred for long-term government ownership and care in accordance with §336.1131 of this title (relating to Land Ownership of By-Product Material Disposal Sites).

(2) As expeditiously as practicable considering technological feasibility--As quickly as possible considering the physical characteristics of the by-product material and the site, the limits of "available technology" (as defined in this section), the need for consistency with mandatory requirements of other regulatory programs, and "factors beyond the control of the licensee" (as defined in this section). The phrase permits consideration of the cost of compliance only to the extent specifically provided for by use of the term "Available technology."

(3) Available technology--Technologies and methods for emplacing a final radon barrier on by-product material piles or impoundments. This term must not be construed to include extraordinary measures or techniques that would impose costs that are grossly excessive as measured by practice within the industry (or one that is reasonably analogous), (for example, by way of illustration only, unreasonable overtime, staffing, or transportation requirements, etc., considering normal practice in the industry; laser fusion of soils; etc.), provided there is reasonable progress toward emplacement of the final radon barrier. To determine grossly excessive costs, the relevant baseline against which costs must be compared is the cost estimate for tailings impoundment closure contained in the licensee's approved reclamation plan, but costs beyond these estimates shall not automatically be considered grossly excessive.

(4) By-product material--Tailings or wastes produced by or resulting from the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes. Underground ore bodies depleted by such solution extraction operations do not constitute "by-product material" within this definition.

(5) By-product material disposal cell--A man-made excavation and/or construction designed, sited, and built in accordance with the requirements of §336.1129 of this title (relating to Technical Requirements) for the purpose of disposal of by-product material.

(6) By-product material pond--A man-made excavation designed, constructed, and sited in accordance with the requirements of §336.1129 of this title (relating to Technical Requirements).

(7) Capable fault--As used in this section, "Capable fault" has the same meaning as defined in Section III(g) of Appendix A of Title 10 Code of Federal Regulations (CFR) Part 100.

(8) Closure--The post-operational activities to decontaminate and decommission the buildings and site used to produce by-product materials and/or reclaim the tailings or disposal area, including groundwater restoration, if needed.

(9) Closure plan--The plan approved by the agency to accomplish closure. The closure plan consists of a decommissioning plan and may also include a reclamation plan.

(10) Commencement of construction--Any clearing of land, excavation, or other substantial action that would adversely affect

the environment of a site, but does not include changes desirable for the temporary use of the land for public recreational uses, necessary borings to determine site characteristics or other preconstruction monitoring to establish background information related to the suitability of a site, or to the protection of the environment.

(11) Compliance period--The period of time that begins when the agency sets secondary groundwater protection standards and ends when the owner or operator's license is terminated and the site is transferred to the state or federal government for long-term care, if applicable.

(12) Decommissioning plan--The plan approved by the agency to accomplish decommissioning. Decommission is defined in §336.2(29) of this title (relating to Definitions).

(13) Dike--An embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(14) Disposal area--The area containing by-product materials to which the requirements of §336.1129(p) - (aa) of this title (relating to Technical Requirements) apply.

(15) Existing portion--As used in §336.1129(i)(1) of this title (relating to Technical Requirements), "existing portion" is that land surface area of an existing surface impoundment on which significant quantities of uranium or thorium by-product materials had been placed prior to September 30, 1983.

(16) Factors beyond the control of the licensee--Factors proximately causing delay in meeting the schedule in the applicable reclamation plan for the timely emplacement of the final radon barrier notwithstanding the good faith efforts of the licensee to complete the barrier in compliance with §336.1129(x) of this title (relating to Technical Requirements). These factors may include, but are not limited to:

(A) physical conditions at the site;

(B) inclement weather or climatic conditions;

(C) an act of God;

(D) an act of war;

(E) a judicial or administrative order or decision, or change to the statutory, regulatory, or other legal requirements applicable to the licensee's facility that would preclude or delay the performance of activities required for compliance;

(F) labor disturbances;

(G) any modifications, cessation or delay ordered by state, federal, or local agencies;

(H) delays beyond the time reasonably required in obtaining necessary government permits, licenses, approvals, or consent for activities described in the reclamation plan proposed by the licensee that result from government agency failure to take final action after the licensee has made a good faith, timely effort to submit legally sufficient applications, responses to requests (including relevant data requested by the agencies), or other information, including approval of the reclamation plan; and

(I) an act or omission of any third party over whom the licensee has no control.

(17) Final radon barrier--The earthen cover (or approved alternative cover) over by-product material constructed to comply with §336.1129(p) - (aa) of this title (relating to Technical Requirements) (excluding erosion protection features).

(18) Groundwater--Water below the land surface in a zone of saturation. For purposes of this subchapter, groundwater is the water contained within an aquifer as defined in this section.

(19) Hazardous constituent--Subject to §336.1129(j)(5) of this title (relating to Technical Requirements), "hazardous constituent" is a constituent that meets all three of the following tests:

(A) the constituent is reasonably expected to be in or derived from the by-product material in the disposal area;

(B) the constituent has been detected in the groundwater in the uppermost aquifer; and

(C) the constituent is listed in 10 Code of Federal Regulations Part 40, Appendix A, Criterion 13.

(20) In situ leach--Refers to the actual oxidation and dissolution of uranium in an underground formation.

(21) In situ recovery--Refers to the process of stripping, precipitating, de-watering, and drying uranium in a surface processing plant.

(22) Leachate--Any liquid, including any suspended or dissolved components in the liquid, that has percolated through or drained from the by-product material.

(23) Licensed site--The area contained within the boundary of a location under the control of persons generating or storing by-product materials under a license.

(24) Liner--A continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment that restricts the downward or lateral escape of by-product material, hazardous constituents, or leachate.

(25) Maximum credible earthquake--That earthquake that would cause the maximum vibratory ground motion based upon an evaluation of earthquake potential considering the regional and local geology and seismology and specific characteristics of local subsurface material.

(26) Milestone--An action or event that is required to occur by an enforceable date.

(27) Operation--

(A) The period of time during which a by-product material disposal area is being used for the continued placement of by-product material or is in standby status for such placement. A disposal area is in operation from the day that by-product material is first placed in it until the day final closure begins; and

(B) The period of time during which an in situ leach uranium recovery operation is actively leaching or recovering uranium.

(28) Point of compliance--The site-specific location in the uppermost aquifer where the groundwater protection standard shall be met. The objective in selecting the point of compliance is to provide the earliest practicable warning that an impoundment is releasing hazardous constituents to the groundwater. The point of compliance is selected to provide prompt indication of groundwater contamination on the hydraulically downgradient edge of the disposal area.

(29) Principal activities--Activities authorized by the license that are essential to achieving the purpose(s) for which the license is issued or amended. Storage during which no licensed material is accessed for use or disposal and activities incidental to decontamination or decommissioning are not principal activities.

(30) Reclamation--Those activities at a uranium recovery licensed facility that work towards achieving the criteria under this sub-

chapter for release of equipment, facilities and/or the site (including land) to unrestricted use or termination of the license.

(31) Reclamation plan--

(A) For the purposes of paragraph (21) of this section and §336.1115 of this title (relating to In situ recovery and Expiration and Termination of Licenses; Decommissioning of Sites; Separate Buildings or Outdoor Areas, respectively), "reclamation plan" is the plan detailing activities to accomplish reclamation of the licensed site (land surface) where in situ recovery and related activities are licensed to occur. The reclamation plan shall include a schedule for reclamation milestones that are key to the clean-up of the in situ recovery plant location, well fields, and any by-product waste storage location; or

(B) For the purposes of §336.1129(p) - (aa) of this title (relating to Technical Requirements), "reclamation plan" is the plan detailing activities to accomplish reclamation of the by-product material disposal area in accordance with the technical criteria of this section. The reclamation plan shall include a schedule for reclamation milestones that are key to the completion of the final radon barrier, including as appropriate, but not limited to, windblown tailings retrieval and placement on the pile, interim stabilization (including dewatering or the removal of freestanding liquids and recontouring), and final radon barrier construction. Reclamation of by-product material shall also be addressed in the closure plan. The detailed reclamation plan may be incorporated into the closure plan.

(32) Restoration--Those activities that seek to return the groundwater at an underground injection control permitted site to restoration levels established by permit.

(33) Security--This term has the same meaning as financial assurance.

(34) Surface impoundment--A natural topographic depression, man-made excavation, or diked area at a conventional uranium mill, which is designed to receive waste from the milling process which may contain liquid wastes or wastes containing free liquids, solid wastes, mill site demolition materials and debris, and other by-product materials from the milling site.

(35) Unrefined and unprocessed ore--Ore in its natural form before any processing, such as grinding, roasting, beneficiating, or refining.

(36) Uppermost aquifer--The geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected with this aquifer within the facility's property boundary.

(37) Uranium recovery--Any uranium extraction or concentration activity that results in the production of "by-product material" as it is defined in this chapter and as it pertains to uranium ore only. As used in this definition, "Uranium recovery" has the same meaning as "uranium milling" in 10 Code of Federal Regulations §40.4.

§336.1125. Financial Assurance Requirements.

(a) Financial assurance for decontamination, decommissioning, reclamation, restoration, disposal, and any other requirements of the agency shall be established by each licensee 60 days prior to the initial receipt, production, or possession of radioactive substances, or injection operations in a production area to assure that sufficient funds will be available to carry out the decontamination and decommissioning of buildings and the site and for the reclamation of any by-product material disposal areas. The amount of funds to be ensured by such financial assurance mechanism shall be based on agency-approved cost estimates in an agency-approved closure plan for:

(1) decontamination and decommissioning of buildings and the site to levels that allow unrestricted use of these areas upon decommissioning; and

(2) the reclamation of by-product material disposal areas in accordance with technical criteria delineated in §336.1129 of this title (relating to Technical Requirements); or

(3) the aquifer restoration which is based on the physical characteristics of the mining aquifer; the costs of equipment, labor, and administration; and any other data required under Chapter 331 of this title (relating to Underground Injection Control) for a production area authorization application.

(b) The licensee shall submit this closure plan in conjunction with an environmental report that addresses the expected environmental impacts of the licensee's operation, decommissioning and reclamation, and evaluates alternatives for mitigating these impacts.

(c) The financial assurance shall also cover the payment of the charge for long-term surveillance and control for by-product material disposal areas required by §336.1127(c) of this title (relating to Long-Term Care and Maintenance Requirements).

(d) The licensee's cost estimates must take into account total costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work in establishing specific financial assurance mechanisms. The agency may accept financial assurance mechanisms that have been consolidated with financial or security arrangements established to meet requirements of other federal or state agencies and/or local governing bodies for such decommissioning, decontamination, reclamation, and long-term site surveillance and control, provided such arrangements are considered adequate to satisfy these requirements and that the portion of the security that covers the decommissioning and reclamation of the buildings, site, and by-product material disposal areas, and the long-term funding charge is clearly identified and committed for use in accomplishing these activities.

(e) The financial assurance mechanism shall be continuous for the term of the license and shall be payable to the State of Texas and deposited to the credit of the perpetual care account.

(f) The licensee's financial assurance mechanism and the underlying cost estimates will be reviewed annually by the agency to assure that sufficient funds are available for completion of the decommissioning and reclamation plan if the work had to be performed by an independent contractor. The amount of financial assurance must be adjusted to recognize any increases resulting from inflation, changes in engineering plans, activities performed, and any other conditions affecting costs. A licensee must submit a cost estimate report annually for decommissioning and reclamation of the facility in accordance with the decommissioning and reclamation plans by no later than an anniversary date as determined by the executive director. The licensee must provide any increase in the amount of financial assurance within 60 days of a determination of the cost estimate by the executive director.

(g) Except as provided in subsection (i) of this section, financial assurance required under this subchapter must meet the requirements specified in Chapter 37, Subchapter T of this title (relating to Financial Assurance for Radioactive Substances and Aquifer Restoration) by June 1, 2009. Regardless of whether reclamation is phased through the life of the operation or takes place at the end of operations, an appropriate portion of financial assurance amount as determined by the executive director shall be retained until final compliance with the reclamation plan is determined. This will yield a financial assurance mechanism that is at least sufficient at all times to cover the costs of

decommissioning and reclamation of the areas that are expected to be disturbed before the next license renewal.

(h) Self-insurance, or any arrangement that essentially constitutes self-insurance (for example, a contract with a state or federal agency), will not satisfy the financial assurance requirement since this provides no additional assurance other than that which already exists through license requirements.

(i) A licensee with a performance bond mechanism(s) issued in favor of Texas Department of State Health Services and submitted to Texas Department of State Health Services or its predecessor with an original effective date prior to June 15, 2007 that does not provide a new mechanism(s) under subsection (g) of this section must:

(1) amend the performance bond by June 1, 2009 to:

(A) reflect Texas Commission on Environmental Quality as the beneficiary;

(B) reflect the current total penal sum; and

(C) correct regulatory citations and Texas Commission on Environmental Quality license number.

(2) provide replacement financial assurance mechanism(s) that meets the requirements specified in Chapter 37, Subchapter T of this title by March 31, 2010.

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. LICENSING OF RADIOACTIVE SUBSTANCES PROCESSING AND STORAGE FACILITIES

30 TAC §336.1235

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendment implements SB 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

§336.1235. Financial Assurance for Storage and Processing.

(a) A licensee must establish financial assurance for decommissioning and any other requirements of this subchapter 60 days prior to the initial possession of radioactive substances.

(b) In establishing financial assurance, the licensee's cost estimates must take into account total costs that would be incurred if an independent contractor were hired to perform the decommissioning. The amount of financial assurance must be in an amount approved by the agency.

(c) The licensee's financial assurance mechanism and the underlying cost estimates will be reviewed annually by the agency to assure that sufficient funds are available for completion of decommissioning. The amount of financial assurance must be adjusted to recognize any increases resulting from inflation, changes in engineering plans, activities performed, and any other conditions affecting costs. A licensee must submit a cost estimate report annually for decommissioning the facility in accordance with the decommissioning plan by no later than an anniversary date as determined by the executive director. The licensee must provide any increase in the amount of financial assurance within 60 days of a determination of the cost estimate by the executive director.

(d) Financial assurance required under this subchapter must meet the requirements specified in Chapter 37, Subchapter T of this title (relating to Financial Assurance for Radioactive Substances and Aquifer Restoration) by June 1, 2009. Regardless of whether reclamation is phased through the life of the operation or takes place at the end of operations, an appropriate portion of financial assurance amount as determined by the executive director shall be retained until final compliance with the reclamation plan is determined. This will yield a financial assurance mechanism that is at least sufficient at all times to cover the costs of decommissioning and reclamation of the areas that are expected to be disturbed before the next license renewal.

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SUBCHAPTER N. FEES FOR LOW-LEVEL RADIOACTIVE WASTE DISPOSAL

30 TAC §§336.1301, 336.1303, 336.1305, 336.1307, 336.1309, 336.1311, 336.1313, 336.1315, 336.1317

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The new sections are also adopted under Texas Health and Safety Code (THSC), Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.245, concerning Compact Waste Disposal Fees; §401.246, concerning Waste Disposal Fee Criteria; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances; and §401.2625, concerning Licensing Authority.

The adopted new sections implement House Bill 1567, 78th Legislature, 2003; Senate Bill 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.245, 401.246, 401.262, 401.412, and 401.2625.

§336.1303. Definitions.

Terms used in this subchapter are defined in §336.2 of this title (relating to Definitions). Additional terms used in this subchapter have the following definitions.

(1) Allowable expenses--Only those expenses which are reasonable and necessary to provide service to the public shall be included in allowable expenses. Allowable expenses to the extent they are reasonable and necessary, may include but are not limited to the following general categories:

(A) operation and maintenance expense incurred in providing normal compact waste disposal facility services and in maintaining compact waste disposal facility used and useful to the licensee in providing such services. Payments to affiliated interests shall be allowed as described in §336.1317 of this title (relating to Consideration of Payment to Affiliate);

(B) expense to meet future costs of decommissioning, closing, and post closure maintenance and surveillance of the compact waste disposal facility;

(C) depreciation expense based on original cost and computed on a straight-line basis as approved by the commission. Other methods of depreciation may be used when it is determined that such depreciation methodology is a more equitable means of recovering the cost of the facility;

(D) assessments and taxes other than income taxes;

(E) federal income tax on a normalized basis;

(F) expenses for advertising, contributions, and donations may be allowed as a cost of service provided that the total sum of all such items allowed in the cost of service shall not exceed three-tenths of one percent (0.3%) maximum of the gross receipts; and

(G) accruals credited to reserve accounts for self-insurance under a plan requested by a licensee and approved by the commission. The commission shall consider approval of a self-insurance plan in a rate case in which expenses or rate base treatments are requested for such a plan. For the purposes of this section, a self-insurance plan is a plan providing for accruals to be credited to reserve accounts. The reserve accounts are to be charged with property and liability losses which occur, and which could not have been reasonably anticipated and included in operating and maintenance expenses, and are not paid or reimbursed by commercial insurance. The commission will approve a selfinsurance plan to the extent it finds it to be in the public interest.

(2) Compact--The Texas Low-Level Radioactive Waste Disposal Compact established under Texas Health and Safety Code, §403.006 and Texas Low-Level Radioactive Waste Disposal Compact Consent Act, Public Law Number 105-236 (1998).

(3) Compact waste--Low-level radioactive waste that:

(A) is generated in a host state or a party state; or

(B) is not generated in a host state or a party state, but has been approved for importation to this state by the compact commission under §3.05 of the Texas Low-Level Radioactive Waste Disposal Compact established under Texas Health and Safety Code, §403.006.

(4) Compact waste disposal facility--The low-level radioactive waste land disposal facility licensed by the commission under Subchapter H of this chapter (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) for the disposal of compact waste.

(5) Extraordinary volume--Volumes of low-level radioactive waste delivered to a site caused by nonrecurring events, outside normal operations of a generator, that are in excess of 20,000 cubic feet or 20% of the preceding year's total volume at such site, whichever is less.

(6) Extraordinary volume adjustment--A mechanism that allocates the potential rate reduction benefits of an extraordinary volume between all generators and the generator responsible for such extraordinary volume as described in §336.1313 of this title (relating to Extraordinary Volume Adjustment).

(7) Generator--A person, partnership, association, corporation, or any other entity whatsoever that, as a part of its activities, produces low-level radioactive waste and is subject to the Compact.

(8) Gross receipts--Includes, with respect to an entity or affiliated members, owners, shareholders, or limited or general partners, all receipts from the entity's disposal operations in Texas licensed under this chapter including any bonus, commission, or similar payment received by the entity from a customer, contractor, subcontractor, or other person doing business with the entity or affiliated members, owners, shareholders, or limited or general partners. This term does not include receipts from the entity's operations in Texas, or affiliated members, owners, shareholders, or limited or general partners, for capital reimbursements, bona fide storage, treatment, and processing, and federal or state taxes or fees on waste received uniquely required to meet the specifications of a license or contract.

(9) Inflation adjustment--A mechanism that adjusts the maximum disposal rate by a percentage equal to the change in price levels in the preceding period. The adjustment shall be made using an inflation factor derived from the most recent annual Implicit Price Deflator for Gross National Product published by the United States Department of Commerce in its Survey of Current Business.

(10) Invested capital--The original cost, less accumulated depreciation, of property used by and useful to the licensee in providing service. The original cost of property shall be determined at the time the property is dedicated to public use, whether by the licensee that is the present owner or by a predecessor. In this subchapter, "original cost" means the actual money cost, or the actual money value of any consideration paid other than money.

(11) Licensee--The holder of the license authorizing the compact waste disposal facility license issued by the commission under this chapter.

(12) Maximum disposal rate--The rate described in §336.1311 of this title (relating to Revisions to Maximum Disposal Rates).

(13) Reasonable rate of return--The return on invested capital based on calculations of revenue and operating costs on an after-tax basis which may include the following applicable factors:

(A) the efforts and achievements of the licensee in conserving resources;

(B) the quality of the licensee's services;

(C) the efficiency of the licensee's operations; and

(D) the quality of the licensee's management.

(14) Relative hazard--The properties of a waste stream for disposal that may present a particular hazard or danger for safe management based on the radioactivity in curies and dose rate as well as special handling requirements due to size, shape, or configuration.

(15) Revenue requirement--Based on a formula which is the invested capital multiplied by the rate of return on invested capital, plus the allowable expenses, where all amounts are only those used and useful for the compact facility.

(16) Volume adjustment--A mechanism that adjusts the maximum disposal rate in response to material changes in volumes of waste deposited at the site during the preceding period so as to provide a level of total revenues sufficient to recover the costs to operate and maintain the site.

§336.1305. Commission Powers.

(a) The commission shall establish rates to be charged by the licensee. In establishing the rates, the commission shall ensure that they are fair, just, reasonable, and sufficient considering the value of the licensee's real property and license interests, the unique nature of its business operations, the licensee's liability associated with the site, its investment incurred over the term of its operations, and the reasonable rate of return equivalent to that earned by comparable enterprises.

(b) The commission may use any standard, formula, method, or theory of valuation reasonably calculated to arrive at the objective of prescribing and authorizing fair, just, reasonable, and sufficient rates.

(c) In any proceeding involving an initial or a change of rate, the burden of proof shall be on the licensee to show that the proposed rate, if proposed by the licensee, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable. In any other matters or proceedings, the burden of proof is on the moving party.

(d) The commission may refer a request for a contested case hearing to the State Office of Administrative Hearings on the establishment of a rate under this subchapter.

(e) The commission may audit a licensee's financial records and waste manifest information to ensure that the fees imposed under this chapter are accurately charged and paid. The licensee shall comply with the commission's audit-related requests for information.

(1) To achieve the purposes, proper administration, and enforcement of this chapter, the executive director may conduct audits or investigations of waste disposal rates, payments and fees authorized by Texas Health and Safety Code, Chapter 401, and the veracity of information submitted to the commission.

(2) Each person subject to or involved with an audit or investigation under subsection (a) of this section shall cooperate fully with the audit or investigation by the executive director.

(f) After consideration of initial rate application or revision, the commission shall establish, by rule, the maximum disposal rate and schedule.

(g) The authority to establish the rates under this subchapter maybe delegated to the executive director if the application is not contested.

(h) Initiation of rate revision by the executive director.

(1) If good cause exists, the executive director may initiate revisions to the maximum disposal rates established under this subchapter which may include a true-up proceeding, subject to notice and opportunity for a contested case hearing. No revision to the maximum disposal rate is final until approved in the commission's rules establishing the maximum disposal rate. Good cause includes, but is not limited to:

(A) there are material and substantial changes in the information used to establish the maximum disposal rates;

(B) information, not available at the time the maximum rates were established, is received by the executive director, justifying a rate revision; or

(C) the rules or statutes on which the maximum disposal rates were based have been changed by statute, rule, or judicial decision after the establishment of the maximum disposal rates.

(2) One or more generators may petition the executive director to initiate a revision to the maximum disposal rate under the requirements of this subsection. The generator must provide a copy of the petition to the licensee at the time the petition is submitted to the executive director. The executive shall grant or deny the petition within

90 days of filing, or request more information from the petitioner. The executive director's decision on a petition filed under this paragraph is subject to a motion to overturn filed with the commission under Chapter 50 of this title (relating to Actions on Applications and Other Authorizations).

§336.1307. Factors Considered for Maximum Disposal Rates. Maximum disposal rates adopted by the commission shall consider the following factors and be sufficient to:

(1) allow the licensee to recover allowable expenses. Allowable expenses shall never include: legislative advocacy expenses; political expenditures or contributions; expenses in support of or promoting political movements, or political or religious causes; funds expended for membership in or support of social, fraternal, or religious clubs or organizations; costs, including interest expense, of processing a refund or credit ordered by the commission; or any expenditure found by the commission to be unreasonable, unnecessary or against public interest, including but not limited to, executive salaries, legal expenses, penalties, fines, or costs not used or useful for the provision of compact waste disposal finality services;

(2) provide an amount to fund local public projects under Texas Health and Safety Code, §401.244;

(3) provide a reasonable opportunity to earn a reasonable rate of return on invested capital in the facilities used for management, disposal, processing, or treatment of compact waste at the compact waste disposal facility, which rate of return is expressed as a percentage of invested capital. In addition to the factors set forth in §336.1303(13) of this title (relating to Definitions), the rate of return should be reasonably sufficient to assure confidence in the financial soundness of the licensee and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low because of changes affecting opportunities for investment, the money market, and business conditions generally. The commission may, in addition, consider inflation, deflation, and the need for the licensee to attract new capital. The rate of return must be high enough to attract new capital but need not go beyond that. In each case, the commission shall consider the licensee's cost of capital, which is the weighted average of the costs of the various classes of capital used by the licensee:

(A) Debt capital. The cost of debt capital is the actual cost of the debt at the time of issuance, plus adjustments for premiums, discounts, and refunding and issuance costs.

(B) Equity capital. For companies with ownership expressed in terms of shares of stock, equity capital commonly consists of the following classes of stock:

(i) Common stock capital. The cost of common stock capital shall be based upon a fair return on its market value; or

(ii) Preferred stock capital. The cost of preferred stock capital is the actual cost of preferred stock at the time of issuance, plus an adjustment for premiums, discounts and refunding and issuance costs; and

(4) provide an amount necessary to pay compact waste disposal facility licensing fees, to pay compact waste disposal facility fees set by rule or statute, to provide financial assurance for the compact waste disposal facility as required by the commission under law and commission rules, and to reimburse the commission for the salary and other expenses of two or more resident inspectors employed by the commission pursuant to Texas Health and Safety Code, §401.206.

§336.1309. Initial Determination of Rates and Fees.

(a) The licensee shall file an application with the executive director to establish initial maximum disposal rates that consider the factors identified in §336.1307 of this title (relating to Factors Considered for Maximum Disposal Rates). The application shall include exhibits, workpapers, summaries, annual reports, cost studies, a proposed reasonable rate of return on invested capital, proposed fees, and other information as requested by the executive director to demonstrate rates that meet the requirements of this subchapter. In addition, the application shall include revenue requirements for cost recovery from the compact waste disposal facility.

(1) The licensee shall submit a rate filing application package in accordance with the application prescribed by the executive director.

(2) After receipt of the application, the executive director shall review the application and recommend one or more rates to the commission for approval. In reviewing the application and evaluating the rate information, the executive director may request additional information from the licensee.

(3) The licensee shall provide notice of the application to all known customers that will ship or deliver waste to the compact waste disposal facility and shall provide notice of the application to any person by any method as directed by the executive director.

(4) The executive director shall maintain a Web site to inform the public on the process for consideration of the rate application and shall provide notice by publication in the *Texas Register.*

(b) After notice and the opportunity for a contested case hearing, the commission shall establish the initial maximum disposal rates that may be charged by the licensee. Upon request for a contested case hearing by a waste generator in the Texas Compact, the executive director shall directly refer an application to establish maximum disposal rates to the State Office of Administrative Hearings for a contested case hearing. Only the executive director, the licensee, or a generator has a right to a contested case hearing.

(c) A request for a contested case hearing filed by a generator shall contain the following information for each signatory generator:

(1) a clear and concise statement that the application is a request for a contested case hearing; and

(2) the generator's licensing numbers indicating the location or locations where the compact waste is generated.

(d) Generators must initiate a request for a contested case hearing by filing individual requests rather than joint requests.

(e) In the initial rate proceeding, the commission also shall determine the factors necessary to calculate the inflation adjustment, volume adjustment, extraordinary volume adjustment, and relative hazard.

(f) Initial rates shall be interim rates subject to a true-up in the first revision to maximum disposal rates pursuant to §336.1311 of this title (relating to Revisions to Maximum Disposal Rates). The true-up will measure the differences between projected and actual volumes of cubic feet of waste, allowable expenses, and invested capital for the time period that the interim rates are in effect, based on actual, historical amounts during that time period. The licensee shall refund to the generators who paid interim rates where money collected under the interim rates that is in excess of the adopted rates; or the licensee shall surcharge bills to the generators who paid interim rates to recover the amount by which the money collected under interim rates is less than the money that would have been collected under adopted rates.

(g) After determining the initial maximum disposal rates, inflation adjustment, and volume adjustment under this subchapter, the

commission shall direct the executive director to initiate expedited rulemaking to establish the rate by rule.

§336.1311. Revisions to Maximum Disposal Rates.

(a) The maximum disposal rates that a licensee may charge generators shall be determined in accordance with this section, and §336.1307 of this title (relating to Factors Considered for Maximum Disposal Rates). The rates shall include all charges for disposal services at the site.

(b) Initially, the maximum disposal rates shall be the initial rates established pursuant to §336.1309 of this title (relating to Initial Determination of Rates and Fees).

(c) Subsequently, the maximum disposal rates shall be adjusted in January of each year to incorporate inflation adjustments and volume adjustments. Such adjustments shall take effect unless the commission authorizes that the adjustments take effect according to an alternate schedule.

(d) The licensee may also file an application for revisions to the maximum disposal rates due to:

(1) changes in any governmentally imposed fee, surcharge, or tax assessed on a volume or a gross receipts basis against or collected by the licensee, including site closure fees, perpetual care and maintenance fees, business and occupation taxes, site surveillance fees, commission regulatory fees, taxes, and a tax or payment in lieu of taxes authorized by the state to compensate the county in which a site is located for that county's legitimate costs arising out of the presence of that site within that county;

(2) factors outside the control of the licensee such as a material change in regulatory requirements regarding the physical operation of the site; or

(3) changes in the licensee's revenue requirements or in any of the other factors in §336.1307 of this title that necessitate a change in the licensee's maximum disposal rates.

(e) For revisions to maximum disposal rates, the application must meet the requirements in §336.1309(a) and (b) of this title. In computing allowable expenses for revisions to maximum disposal rates, only the licensee's test year expenses as adjusted for known and measurable changes will be considered.

(f) For any revisions to the maximum disposal rates, including inflation and volume adjustments, the licensee shall provide notice to its customers concurrent with the filing as consistent with §336.1309(a)(3) of this title.

§336.1315. Revenue Statements and Consideration of Payment to Affiliate.

(a) The licensee shall, on or before April 1st of each year, file with the commission:

(1) an audited financial statement showing its gross receipts for the preceding calendar year;

(2) a statement in a form prescribed by the executive director reflecting the licensee's revenues and allowable expenses for the previous calendar year from its low-level radioactive waste disposal activities; and

(3) a validation of payments made in §336.103(f) and (g) of this title (relating to Schedule of Fees for Subchapter H Licenses) must also be included.

(b) The financial statement as specified in subsection (a) of this section shall be prepared in accordance with Generally Accepted Accounting Principles and audited by a Certified Public Accounting (CPA) firm. The audited financial statement shall include an Auditor's Report from the CPA indicating an "unqualified" opinion of the licensee's financial statements.

(c) In addition to the financial statement on gross receipts, the licensee shall provide an audited cost statement that provides all investment and operating costs for the preceding calendar year.

(d) In addition to information submitted under this section, all revenues and costs shall be provided by the licensee upon request by the executive director to consider revision of rates under §336.1305(c) of this title (relating to Commission Powers.)

(e) Except as provided by subsection (f) of this section, the commission may not allow as capital cost or as allowable expenses a payment to an affiliate for:

(1) the cost of service, property, right, or other item; or

(2) interest expense.

(f) The commission may allow a payment described by subsection (e) of this section only to the extent that the commission finds the payment is reasonable and necessary for each item or class of items as determined by the commission.

(g) A finding under subsection (f) of this section must include:

(1) a specific finding of the reasonableness and necessity of each item or class of items allowed; and

(2) a finding that the price charged to the licensee is not higher than the prices charged by the supplying affiliate for the same item or class of items to:

(A) its other affiliates or divisions; or

(B) a nonaffiliated person within the same market area or having the same market conditions.

(h) In making a finding regarding an affiliate transaction, the commission shall:

(1) determine the extent to which the conditions and circumstances of that transaction are reasonably comparable relative to quantity, terms, date of contract, and place of delivery; and

(2) allow for appropriate differences based on that determination.

(i) If the commission finds that an affiliate expense for the test period is unreasonable, the commission shall:

(1) determine the reasonable level of the expense; and

(2) include that expense in determining the licensee's cost of service.

§336.1317. Contracted Disposal Rates.

(a) At any time, a licensee may contract with any person to provide a contract disposal rate that is lower than the maximum disposal rate.

(b) A contract or contract amendment shall be submitted to the executive director for approval at least 30 days before its effective date. If the executive director takes no action within 30 days of filing, the contract or amendment shall go into effect according to its terms. Each contract filing shall be accompanied with documentation to show that the contract does not result in unreasonable discrimination between generators receiving like and contemporaneous service under substantially similar circumstances and provides for the recovery of all costs associated with the provision of the service.

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 February 20, 2009.

TRD-200900745
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: March 12, 2009
Proposal publication date: September 5, 2008
For further information, please call: (512) 239-6090

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS

SUBCHAPTER L. WATER INFRASTRUCTURE FUND

31 TAC §363.1204

The Texas Water Development Board (Board) adopts the repeal of §363.1204 concerning Availability of Funds without changes to the proposal as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10411).

The repeal of §363.1204 removes the requirement that, for each fiscal year, the Board will determine the amount of funds to be available from all sources to the Water Infrastructure Fund (WIF) for financial assistance. In its resolutions, the Board conditions its commitment to provide financial assistance on the availability of funds, so Board staff continually determines the amount of funds on hand and recommends bond sales as necessary to raise funds. Thus, it is not necessary for the Board to make an annual fiscal-year determination of the amount of funds available in the WIF. Section 363.1204 created an unnecessary administrative burden on the Board and is therefore repealed.

No comments were received regarding the proposed repeal.

The adoption of this repeal is authorized pursuant to Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board and §15.977, which authorizes the board to adopt rules necessary to administer Texas Water Code, Chapter 15, Subchapter Q.

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 February 20, 2009.

TRD-200900722
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Effective date: March 12, 2009
Proposal publication date: December 26, 2008
For further information, please call: (512) 463-8061

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CHAPTER 384. RURAL WATER ASSISTANCE FUND

SUBCHAPTER A. INTRODUCTORY PROVISIONS

31 TAC §384.4

The Texas Water Development Board (Board) adopts the repeal of §384.4 concerning Availability of Funds and Distribution of Loans without changes to the proposal as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10411).

The repeal of §384.4 removes the requirement that, for each fiscal year, the Board will determine the amount of funds available from all sources for financial assistance from the Rural Water Assistance Fund (RWAF) for that fiscal year, and will determine the amount of funds available for loans and for other purposes for which the fund may be used. In its resolutions, the Board conditions its commitment to provide financial assistance on the availability of funds, so Board staff continually determines the amount of funds on hand in the RWAF and recommends bond sales as necessary to raise funds. Thus, it is not necessary for the Board to make an annual fiscal-year determination of the amount of funds available in the RWAF. Section 384.4 created an unnecessary administrative burden on the Board and is therefore repealed.

No comments were received regarding the proposed repeal.

The adoption of this repeal is authorized pursuant to Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board and §15.995, which authorizes the board to adopt rules necessary to administer Texas Water Code, Chapter 15, Subchapter R.

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-200900723
Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS

SUBCHAPTER A. RETIREE HEALTH CARE BENEFITS (TRS-CARE)

34 TAC §41.7

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS), as trustee of the health benefits program for TRS retirees (TRS-Care) under the Texas Public School Retired Employees Group Benefits Act (Chapter 1575 of the Insurance Code), adopts amended §41.7, relating to the effective date of coverage for an eligible individual who elects to enroll in TRS-Care. The Board adopts the amended section without changes to the proposed text as published in the January 2, 2009, issue of the *Texas Register* (34 TexReg 37). One of the adopted amendments addresses the effective date of TRS-Care coverage for an eligible surviving spouse or eligible dependent child of a deceased TRS service or disability retiree or deceased active TRS member (together, a Survivor). The other adopted amendment is a non-substantive change that eliminates a redundant explanatory rule reference.

Before §41.7 was amended, the effective date of coverage for a Survivor who was not enrolled in TRS-Care immediately preceding the death of the spouse or parent was the first day of the month following TRS-Care's receipt of a timely submitted enrollment application. As a consequence, a Survivor had to submit his or her enrollment application to TRS-Care before the end of the month in which the spouse or parent died to enroll in TRS-Care and to have coverage become effective on the first day of the immediately following month. In a few situations, a Survivor was not able to submit his or her enrollment application quickly enough to avoid a month's delay in his or her effective date of coverage in TRS-Care. For example, if the active TRS member died in the third week of April, the surviving spouse might not have had enough time to submit the enrollment application before April 30. Consequently, the submission of an enrollment application during the month of May, even though timely under 34 TAC §41.1, relating to initial enrollment periods for TRS-Care, would have resulted in an effective date of coverage of June 1, not May 1. The Board has amended §41.7 to avoid a potential month delay in coverage under TRS-Care.

Subsection (d) of §41.7 is amended to provide that, if the Survivor is not enrolled in TRS-Care immediately preceding the death of the spouse or parent, the Survivor will be allowed to choose an effective date of coverage that is either: (1) the first day of the month following TRS-Care's receipt of an application during the initial enrollment period as described in §41.1; or (2) the first day of the month following the month of the retiree's or member's death, provided TRS-Care receives an application for enrollment in TRS-Care within the initial enrollment period as described in §41.1. Applying the amended rule to the example described in the preceding paragraph, upon the filing of a timely application for enrollment in TRS-Care, the Survivor may elect to have his or her TRS-Care coverage begin on May 1 or on June 1.

In addition, a non-substantive amendment to subsection (c) of §41.7 deletes a repetitive explanatory reference to another rule that already appears in subsection (a) of §41.7.

No comments were received regarding the proposed amendments to §41.7.

Statutory Authority: The Board amends §41.7 under §1575.052 of the Insurance Code, which authorizes TRS to adopt rules reasonably necessary to implement the Texas Public School Retired Employees Group Benefits Act (Chapter 1575 of the Insurance Code), including those relating to periods for enrollment and selection of optional coverage and procedures for enrolling and exercising options under TRS-Care.

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 February 23, 2009.

TRD-200900807
Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Effective date: March 15, 2009
Proposal publication date: January 2, 2009
For further information, please call: (512) 542-6438

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 151. GENERAL PROVISIONS

37 TAC §151.8

The Texas Board of Criminal Justice adopts the amendments to §151.8, Advisory Committees, without changes to the text as published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10299) and will not be republished.

The amendments are necessary to add clarity and conform the rule to the existing organizational structure of the Texas Department of Criminal Justice.

No comments were received.

The amendments are adopted under Texas Government Code §2110.005 and §2110.008.

Cross Reference to Statutes: Texas Government Code Chapter 2110 and §§492.006, 492.013, 493.003, and 510.011 - 510.014 and Texas Health and Safety Code §614.002 and §614.009.

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 February 18, 2009.

TRD-200900675

Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: March 10, 2009
Proposal publication date: December 19, 2008
For further information, please call: (512) 463-9693

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37 TAC §151.75

The Texas Board of Criminal Justice (Board) adopts the amendments to §151.75, Standards of Conduct for Financial Advisors, with changes to the text as published in the December 19, 2008, issue of the*Texas Register* (33 TexReg 10300).

The amendments are necessary to add clarity.

One comment was received from the Office of the General Counsel, which suggested that the name of the rule be amended to include "service providers." The Board agrees and has incorporated the comment.

The amendments are adopted under Texas Government Code, Chapter 2263.

Cross Reference to Statutes: Texas Government Code, Chapters 404, 552 and 2256 and §492.013.

§151.75. Standards of Conduct for Financial Advisors and Service Providers.

(a) Definitions. "Financial Advisor or Service Provider" is a person or business entity who acts as a financial advisor, financial consultant, money manager, investment manager or broker.

(b) Applicability.

(1) This section applies in connection with the management or investment of any state funds managed or invested by the Texas Department of Criminal Justice (TDCJ) under the Texas Constitution or other law, including Chapters 404 and 2256, Texas Government Code, without regard to whether the funds are held in the state treasury.

(2) This section applies to financial advisors or service providers who are not employees of the TDCJ, who provide financial services to or advise the TDCJ in connection with the management or investment of state funds, and who:

(A) May reasonably be expected to receive, directly or indirectly, more than $10,000 in compensation from TDCJ during a fiscal year; or

(B) Render important investment or funds management advice to the TDCJ.

(3) The standards adopted in this rule are intended to identify professional and ethical standards by which all financial advisors or service providers shall abide in addition to the professional and ethical standards that may already be imposed on financial advisors or service providers under any contracts or service agreements with the TDCJ.

(c) Disclosure Requirements.

(1) A financial advisor or service provider shall disclose in writing to the TDCJ and to the State Auditor:

(A) Any relationship the financial advisor or service provider has with any party to a transaction with the TDCJ, other than a relationship necessary to the investment or fund management services that the financial advisor or service provider performs for the TDCJ, if the relationship could reasonably be expected to diminish the financial advisor's or service provider's independence of judgment in the performance of the person's responsibilities to the TDCJ; and

(B) All direct or indirect pecuniary interests the financial advisor or service provider has in any party to a transaction with the TDCJ, if the transaction is connected with any financial advice or service the financial advisor or service provider provides to the TDCJ in connection with the management or investment of state funds.

(2) The financial advisor or service provider shall disclose a relationship described by paragraph (1) of subsection (c) without regard to whether the relationship is a direct, indirect, personal, private, commercial or business relationship.

(3) A financial advisor or service provider shall file annually a statement with the TDCJ and with the State Auditor. The statement shall disclose each relationship and pecuniary interest described by paragraph (1) of this subsection (c) or, if no relationship or pecuniary interest described by subsection (c) existed during the disclosure period, the statement shall affirmatively state that fact.

(4) The annual statement shall be filed no later than April 15 on a form prescribed by the TDCJ. The statement shall cover the reporting period of the previous calendar year.

(5) The financial advisor or service provider shall promptly file a new or amended statement with the TDCJ and with the State Auditor whenever there is new information to report under paragraph (1) of subsection (c).

(d) Standards of Conduct.

(1) Compliance.

(A) These standards are intended to be in addition to, and not in lieu of, a financial advisor's or service provider's obligations under its contract or service agreement with the TDCJ. In the event of a conflict between a financial advisor's or service provider's obligations under these standards and under its contract or services agreement, the standard that imposes a stricter ethics or disclosure requirement controls.

(B) A financial advisor or service provider shall be knowledgeable about these standards, keep current with revisions to these standards and abide by the provisions set forth in these standards.

(C) In all professional activities, a financial advisor or service provider shall perform services in accordance with applicable laws, rules and regulations of governmental agencies and other applicable authorities, including the TDCJ, and in accordance with any established policies of the TDCJ.

(2) Qualification Standards.

(A) A financial advisor or service provider shall render opinions or advice, or perform professional services only in those areas in which the financial advisor or service provider has competence based on education, training or experience. In areas where a financial advisor or service provider is not qualified, the financial advisor or service provider shall seek the counsel of qualified individuals or refer the TDCJ to such persons.

(B) A financial advisor or service provider shall keep informed of developments in the field of financial planning and investments and participate in continuing education throughout the financial advisor's or service provider's relationship with the TDCJ in order to improve professional competence in all areas in which the financial advisor or service provider is engaged.

(3) Integrity.

(A) A financial advisor or service provider has an obligation to observe standards of professional conduct in the course of providing advice, recommendations and other services performed for the TDCJ. A financial advisor or service provider shall perform professional services with honesty, integrity, skill and care. In the course of professional activities, a financial advisor or service provider shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a false or misleading statement to a client, employer, employee, professional colleague, governmental, or other regulatory body or official, or any other person or entity.

(B) A financial advisor's or service provider's relationship with a third party shall not be used to obtain illegal or improper treatment from such third party on behalf of the TDCJ.

(4) Objectivity. A financial advisor or service provider shall maintain objectivity and be free of conflicts of interest in discharging its responsibilities. A financial advisor or service provider shall remain independent in fact and appearance when providing financial planning and investment advisory services to the TDCJ.

(5) Prudence. A financial advisor or service provider shall exercise reasonable and prudent professional judgment in providing professional services to the TDCJ.

(6) Competence. A financial advisor or service provider shall strive to continually improve its competence and the quality of services, and discharge its responsibilities to the best of its ability.

(7) Conflicts of Interest.

(A) If a financial advisor or service provider is aware of any significant conflict between the interests of the TDCJ and the interests of another person, the financial advisor or service provider shall advise the TDCJ of the conflict and shall also include appropriate qualifications or disclosures in any related communication.

(B) A financial advisor or service provider shall not perform professional services involving an actual or potential conflict of interest with the TDCJ unless the financial advisor's or service provider's ability to act fairly is unimpaired, there has been full disclosure of the conflict to the TDCJ, and the TDCJ has expressly agreed in writing to the performance of the services by the financial advisor or service provider.

(8) Confidentiality.

(A) A financial advisor or service provider shall not disclose to another person any confidential information obtained from the TDCJ or regarding the TDCJ's investments unless authorized to do so by the TDCJ in writing or required to do so by law.

(B) For the purposes of this subsection, "confidential information" refers to information not in the public domain of which the financial advisor or service provider becomes aware during the course of rendering professional services to the TDCJ. It may include information of a proprietary nature, information that is excepted from disclosure under the Public Information Act, Chapter 552, Texas Government Code, or information restricted from disclosure under any contract or service agreement with the TDCJ.

(e) Contract Voidable. A contract under which a financial advisor or service provider renders financial services or advice to the TDCJ is voidable by the TDCJ if the financial advisor or service provider violates a standard of conduct outlined in this rule.

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 February 18, 2009.

TRD-200900676
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: March 10, 2009
Proposal publication date: December 19, 2008
For further information, please call: (512) 463-9693

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CHAPTER 161. COMMUNITY JUSTICE ASSISTANCE DIVISION ADMINISTRATION

37 TAC §161.21

The Texas Board of Criminal Justice adopts the amendments to §161.21, Role of the Judicial Advisory Council, without changes to the text as published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10301) and will not be republished.

The amendments are necessary to add clarity.

No comments were received.

The amendments are adopted under Texas Government Code §492.006 and §493.003(b).

Cross Reference to Statutes: Texas Government Code §492.013.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 18, 2009.

TRD-200900677
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: March 10, 2009
Proposal publication date: December 19, 2008
For further information, please call: (512) 463-9693

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CHAPTER 195. PAROLE

37 TAC §195.41

The Texas Board of Criminal Justice adopts new §195.41, Community Residential Facilities, with changes to the text as published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10302).

The purpose of the rule is to set standards for the operation of community residential facilities for offenders on parole or mandatory supervision.

The Texas Register suggested a change in subsection (j)(17)(C) regarding a punctuation error and a grammatical error; that sentence was corrected.

No comments were received.

The new rule is adopted under Texas Government Code, §508.119.

Cross Reference to Statutes: Texas Government Code, §492.013.

§195.41. Community Residential Facilities.

(a) General Administration.

(1) Purpose. Community residential facilities (CRF) that are operated through a contract with the Texas Department of Criminal Justice (TDCJ or Agency) are to provide housing, training, education, rehabilitation and reformation of persons released to parole and mandatory supervision, or whose supervision has been continued or modified. Contractors shall comply with this rule and all contract requirements. This rule does not apply to transitional treatment centers.

(2) Mission Statement. The facility director shall prepare and maintain a mission statement that describes the general purposes and overall goals of the facility's programs.

(b) Building, Safety, Sanitation and Health Codes.

(1) Compliance. The facility director shall ensure that the facility's construction, maintenance and operations complies with all applicable state, federal and local laws, building codes and regulations related to safety, sanitation and health. Records of compliance inspections, audits or written reports by internal and external sources shall be kept on file for examination and review by the TDCJ and other governmental agencies and authorities from program inception forward.

(2) Sanitation. The facility director shall operate the facility in accordance with the sanitation plan described in the Operational Plan.

(3) Physical Plant. The facility's buildings, including the improvements, fixtures, electric and heating and air conditioning, shall conform to all applicable building codes of federal, state and local laws, ordinances and regulations for physical plants and facilities housing residents.

(4) Fires. The facility, its furnishings, fire protection equipment and alarm system shall comply with the regulations of the fire authority having jurisdiction. Fire drills shall be conducted at least monthly. There shall be a written evacuation plan to be used in the event of a fire. The plan is to be certified by an independent qualified governmental agency or department or individual trained in the application of national and state fire safety codes. Such plan shall be reviewed annually, updated if necessary, and reissued to the local fire jurisdiction. Fire safety equipment located at the facility shall be tested as specified by the manufacturer or the fire authority, whichever is more frequent. An annual inspection of the facility shall be conducted by the fire authority having jurisdiction or other qualified person(s).

(5) Emergency Plan. There shall be a written emergency plan for the facility and its operations, which includes an evacuation plan, to be used in the event of a major flood, storm or other emergencies. This plan shall be reviewed annually and updated, if necessary. All facility personnel shall be trained in the implementation of the written emergency plan. The emergency plan shall include the following:

(A) Location of buildings/room floor plan;

(B) Use of exit signs and directional arrows that are easily seen and read; and

(C) Location(s) of publicly posted plan.

(c) Program and Service Areas.

(1) Space and Furnishings. The facility shall have space and furnishings to accommodate activities such as group meetings, private counseling, classroom activities, visitation, recreation and office space for the TDCJ staff.

(2) Housekeeping and Maintenance. The facility director shall ensure the facility is clean and in good repair, and a housekeeping and maintenance plan is in effect.

(3) Other Physical Environment and Facilities Issues. In each facility:

(A) Space shall be provided for janitor closets which are equipped with cleaning implements and kept locked at all times when not in use;

(B) There shall be storage areas in the facility for clothing, bedding and cleaning supplies;

(C) There shall be clean, usable bedding, linens and towels for new residents with provision for exchange or laundering on at least a weekly basis; and

(D) On an emergency or indigent basis, the facility shall provide personal hygiene articles.

(E) There shall be adequate control of vermin and pests;

(F) There shall be timely trash and garbage removal; and

(G) Sanitation and safety inspections of all internal and external areas and equipment shall be performed and documented on a routine basis to protect the health and safety of all residents, staff and visitors.

(d) Supervision.

(1) Operations Manual. An operations manual shall be prepared for and used by each CRF which shall contain information and specify procedures and policies for resident census, contraband, supervision, physical plant inspection and emergency procedures, including detailed implementation instructions. The operations manual shall be accessible to all employees and volunteers. The operations manual shall be submitted to the TDCJ Private Facility Contract Monitoring/Oversight Division (PFCMOD) for review and approval. The facility director shall ensure that the operations manual is reviewed at least every two (2) years, and new or revised policies and procedures are submitted to the PFCMOD for review and approval. The operations manual shall be made available, including all changes, to designated staff and volunteers prior to implementation.

(2) Staffing Availability. The facility director shall ensure that the facility has the staff needed to provide coverage of designated security posts, surveillance of residents and to perform ancillary functions. Each contract shall have a staffing plan approved by the TDCJ prior to offender arrival.

(3) Activity Log. The facility director shall ensure that CRF staff maintain an activity log and prepare shift reports that record, at minimum, emergency situations, unusual situations and incidents and all absences of residents from a facility.

(4) Use of Force. The facility director shall ensure that a CRF has written policies, procedures and practices that restrict the use of physical force to instances of self-protection, protection of residents or others or prevention of property damage. In no event shall the use of physical force against a resident be justifiable as punishment. A written report shall be prepared following all uses of force, and promptly submitted to the PFCMOD and facility director for review and follow-up. The application of restraining devices, aerosol sprays, chemical agents, etc. shall only be accomplished by an individual who is properly trained in the use of such devices and only in an emergency

situation for self-protection, protection of others or other circumstances as described previously.

(5) Access to Facility. The facility shall be secured to prevent unrestricted access by the general public or others without proper authorization.

(6) Control of Contraband/Searches. All facilities shall incorporate into the facility operations manual a list of authorized items offenders are allowed to possess while a resident of the facility. All incoming residents shall receive a copy of this list during the intake/orientation process, along with a written explanation of the provisions of Texas Penal Code, §38.114, which states that any resident found to possess any item not provided by, or authorized by the facility director, or any item authorized or provided by the facility that has been altered to accommodate a use other than the originally intended use, may be charged with a Class C misdemeanor. Any employee or volunteer who provides contraband to a resident of a CRF may be charged with a Class B misdemeanor. There shall also be policies defining facility shakedowns, strip searches and pat searches of residents to control contraband and provide for its disposal.

(7) Levels of Security. The facility director shall ensure that appropriate levels of security are maintained for the population served by the facility at all times. These levels of security shall create, at minimum, a monitored and structured environment in which a resident's interior and exterior movements and activities can be supervised by specific destination and time.

(8) Exterior Movements. At the discretion of the facility director or designee in conjunction with the Parole Division Regional Director or designee, residents of a CRF may be granted exterior movements. Exterior movements include, but are not limited to employment programs, community service restitution, support/treatment programs and programmatic incentives. The following minimum requirements shall be met for all exterior movements:

(A) The facility director or designee in conjunction with the Parole Division Regional Director or designee approves the exterior movement;

(B) A staff member orally advises the resident of the conditions and limitations of the exterior movement;

(C) The resident acknowledges in writing an understanding of the conditions and limitations of the exterior movement; and

(D) Exterior movements involving programmatic incentives may only be granted if the following additional requirements are met:

(i) The resident meets all established requirements for the programmatic incentive, as determined by the supervisor of the program, and submits a written request for the exterior movement;

(ii) The requested absence shall not exceed 24 hours unless there are unusual circumstances;

(iii) The resident provides an itinerary for the absence including method of travel, departure and arrival times and locations during the exterior movement;

(iv) The facility director or designee in conjunction with the Parole Division Regional Director or designee approves the itinerary and establishes the conditions of the exterior movement involving programmatic incentives; and

(v) A staff member shall make random announced or unannounced personal or telephone contacts with the resident to verify the location of the resident during the exterior movement.

(9) Emergency Furloughs. At the discretion of the Parole Division Regional Director or designee, a resident may be granted an emergency furlough for the purpose of allowing a resident to attend a funeral, visit a seriously ill person, obtain medical treatment or attend to other exceptional business. Emergency furloughs may only be granted if the following conditions are met:

(A) The resident submits a written request for the emergency furlough;

(B) The facility director or designee verifies through an independent source including, but not limited to a physician, Red Cross representative, minister, rabbi, priest or other spiritual leader that the presence of the resident is appropriate;

(C) The resident provides a proposed itinerary including method of travel, departure and arrival times and locations during the emergency furlough;

(D) The requested absence shall not exceed 24 hours unless there are unusual circumstances; and

(E) The Parole Division Regional Director or designee approves the itinerary and establishes the conditions of the emergency furlough.

(10) The CRF shall ensure that Spanish language assistance and the translation of selected documents are provided for Spanish-speaking residents who cannot speak or read English.

(e) Resident Abuse, Neglect and Exploitation. The facility shall protect the residents from abuse, neglect and exploitation. In accordance with the Prison Rape Elimination Act of 2003 (Public Law 108-79), all CRFs shall establish a zero tolerance standard for the incidence of sexual assault. Each facility shall make prevention of offender sexual assault a top priority. The CRFs shall have policies and procedures in accordance with any national standards published by the Attorney General of the United States. These policies and procedures shall include, but not be limited to the following:

(1) Detection, prevention, reduction and punishment of offender sexual assault;

(2) Standardized definitions to record accurate data regarding the incidence of offender sexual assault;

(3) A disciplinary process for facility staff who fail to take appropriate action to detect, prevent and reduce sexual assaults, to punish residents guilty of sexual assault and to protect the Eighth Amendment rights of all facility residents; and

(4) Notification to the TDCJ in accordance with AD-16.20, "Reporting Incidents to the Office of the Inspector General" and AD-02.15, "Operations of the Emergency Action Center and Reporting Procedures for Serious or Unusual Incidents."

(f) Rules and Discipline. There shall be documentation of program rule violations and the disciplinary process.

(1) Rules of Conduct. All incoming residents and staff shall receive written rules of conduct which specify acts prohibited within the facility and penalties that can be imposed for various degrees of violation.

(2) Limitations of Corrective Actions. Specific limits on corrective actions and summary punishment shall be established and strictly adhered to in an effort to reduce the potential of staff participating in abusive behavior towards residents. Limits shall include:

(A) Notwithstanding the provisions in subsection (d)(4) of this rule, no physical contact by staff shall be made on a resident;

(B) No profanity, sexual or racial comments shall be directed at residents by staff;

(C) Residents shall not be used to impose corrective actions on other residents;

(D) The severity of the corrective action shall be commensurate with the severity of the infraction; and

(E) The duration of corrective action shall be limited to the minimum time necessary to achieve effectiveness.

(3) Grievance Procedure. A grievance procedure shall be available to all residents in a CRF. The grievance procedure shall include at least one (1) level of appeal and shall be evaluated at least annually to determine its efficiency and effectiveness.

(4) Spanish translations of the disciplinary rules and procedures shall be provided for Spanish-speaking residents who cannot speak or read English.

(g) Incident Notification. The facility director or designee shall notify the TDCJ of all serious or unusual events pertaining to the facility's operations and staff in accordance with directives and/or policies issued by the TDCJ.

(h) Residents' Rights. Residents shall be granted access to courts and any attorney licensed in the United States or a legal aid society (an organization providing legal services to residents or other persons) contacting the resident in order to provide legal services. Such contacts include, but are not limited to: confidential telephone communications, uncensored correspondence and confidential visits.

(i) Food Service. The food preparation and designated dining area shall provide space for meal service based on the population size and need.

(1) Dietary Allowances. Meals shall be approved and reviewed annually by a registered dietician, licensed nutritionist, registered nurse with a minimum of a Bachelor of Science degree in nursing, physician assistant, or physician to ensure that the meals meet the nationally recommended allowances for basic nutrition.

(2) Special Diets. Each facility shall provide special diets as prescribed by appropriate medical or dental personnel.

(3) Food Service Management. Food service operations shall meet all requirements established by the local health authorities and/or the TDCJ policies.

(4) Meal Requirements. The facility director shall ensure that at least three (3) meals are provided during each 24-hour period. Variations may be allowed based on weekend and holiday food service demands, or in the event of emergency or security situations, provided basic nutritional goals are met.

(j) Health Care.

(1) Access to Care.

(A) Residents shall have unimpeded access to health care and to a system for processing complaints regarding health care.

(B) The facility shall have a designated health authority with responsibility for health care pursuant to a written agreement, contract or job description. The health authority may be a physician, health administrator or health agency. In the event that the designated health authority is a free community health clinic (one which provides services to everyone in the community regardless of ability to pay), then the CRF is not required to enter into a written contract or agreement. A copy of the mission statement of the free community health clinic and a copy of the criteria for admission shall be on file in lieu of a contract between the two (2) agencies.

(C) Each CRF shall have a policy defining the level, if any, of financial responsibility to be incurred by the resident who receives the medical or dental services.

(2) Emergency Health Care.

(A) Twenty-four hour emergency health care shall be provided for residents, to include arrangements for the following:

(i) On site emergency first aid and crisis intervention;

(ii) Emergency evacuation of the resident from the facility;

(iii) Use of an emergency vehicle;

(iv) Use of one (1) or more designated hospital emergency rooms or other appropriate health facilities;

(v) Emergency on-call services from a physician, advanced practice nurse or physician assistant, a dentist and a mental health professional when the emergency health facility is not located in a nearby community; and

(vi) Security procedures providing for the immediate transfer of residents, when appropriate.

(B) A training program for direct care personnel shall be established by a recognized health authority in cooperation with the facility director that includes the following:

(i) Signs, symptoms and action required in potential emergency situations;

(ii) Administration of first aid and cardiopulmonary resuscitation (CPR);

(iii) Methods of obtaining assistance;

(iv) Signs and symptoms of mental illness, retardation and chemical dependency; and

(v) Procedures for patient transfers to appropriate medical facilities or health-care providers.

(C) First aid kits shall be available in designated areas of the facility. Contents and locations shall be approved by the health authority.

(3) Serious and Infectious Diseases.

(A) The facility shall provide for the management of serious and infectious diseases.

(B) The CRFs shall have policies and procedures to direct actions to be taken by employees concerning residents who have been diagnosed with human immunodeficiency virus (HIV), including, at minimum, the following:

(i) When and where residents shall be tested;

(ii) Appropriate safeguards for staff and residents;

(iii) Staff and resident training;

(iv) Issues of confidentiality; and

(v) Counseling and support services.

(4) Dental Care. Access to dental care shall be made available to each resident.

(5) Medications--General Guidelines.

(A) Staff who dispense medication shall be properly credentialed and trained. Staff that supervise self-administration of medication shall be appropriately trained to perform the task.

(B) Policy and procedure shall direct the possession and use of controlled substances, prescribed medications, supplies and over-the-counter (OTC) drugs. Prescribed medications shall be dispensed according to the directions of the prescribing physician, advanced practice nurse or physician assistant.

(C) Each residential facility shall have a written policy in place that sets forth required procedural guidelines for the administration, documentation, storage, management, accountability of all resident medication, inventory, disposal of medications, handling medication errors and adverse reactions.

(D) If medications are distributed by facility staff, records shall be maintained and audited monthly and shall include, but not be limited to the date, time, name of the resident receiving the medication and the name of the staff distributing the medication.

(E) Each facility shall ensure that the phone number of a pharmacy and a comprehensive drug reference source is readily available to the staff.

(6) Medication Storage.

(A) Prescription and OTC medications shall be kept in locked storage and accessible only to staff who are authorized to provide medication. Syringes, needles and other medical supplies shall also be kept in locked storage.

(B) All controlled/scheduled drugs shall be stored under double lock and key.

(C) Each facility shall ensure that all medications, syringes and needles are stored in the original container.

(D) Medications labeled as internal and external only shall not be stored together in the same medication box or medication drawer.

(E) Sample prescription medications provided by physicians shall be stored with proper labeling information that includes the name of the medication; name of the prescribing physician, advanced practice nurse or physician assistant; date prescribed; and dosage instructions.

(F) Medications that require refrigeration shall be stored in a refrigerator designated for medications only. A thermometer shall be maintained inside the refrigerator with the temperature checked and recorded daily on a temperature log.

(G) Medications that are discontinued, have expired dates or are no longer in use shall be stored in a separate locked container or drawer until destroyed.

(H) Facilities that allow residents to keep medications in the resident's possession shall have written guidelines specific for keep-on-person (KOP) medications. Staff shall ensure that authorized residents keep medication on their person or safely stored and inaccessible to other residents.

(7) Medication Inventory and Disposal.

(A) Facility staff shall conduct an inventory count of all controlled/scheduled prescription medications daily (at a minimum, once per 24-hour period). The count shall be conducted and witnessed by one (1) other staff member. Documentation of inventory counts shall be maintained for a minimum period of three (3) years.

(B) The facility shall conduct a monthly inventory of all prescription and OTC drugs provided to or purchased by the resident. The monthly audit shall be conducted by a staff person who is not responsible for conducting the daily inventory counts.

(C) A monthly audit shall be conducted of all medication administration records to verify the accuracy of recorded information. The monthly audit of medication administration records shall be conducted by a staff person who is not responsible for the documentation of medication administration records.

(D) When a discrepancy is noted between the medication administration record and the monthly inventory count, documentation explaining the reason for the discrepancy and action taken to correct it shall be recorded. In the event an inventory count reveals unaccounted for controlled/scheduled medication, an investigation shall be conducted and a summary report written detailing the steps taken to resolve the matter. Until the discrepancy is resolved, an inventory count shall be conducted three (3) times daily (after each shift). The summary report shall be maintained for a minimum period of three (3) years. If misapplication, misuse or misappropriation of controlled/scheduled medication leads to an investigation by law enforcement, such information shall be reported pursuant to subsection (g) of this rule.

(E) Discontinued and outdated medications shall be removed from the current medication storage, stored in a separate locked container and disposed of within 30 days. The drugs designated for disposal shall be recorded on a drug disposal form.

(F) Methods used for drug disposal shall prevent medication from being retrieved, salvaged or used in any way. The disposal of drugs shall be conducted, documented and the process witnessed by one (1) other staff member. The documentation shall include:

(i) Name of the resident and date of disposal;

(ii) Name and strength of the medication;

(iii) Prescription number, sample or OTC lot numbers;

(iv) Amount disposed, reason for disposal and the method of disposal; and

(v) Signatures of the two (2) staff members that witnessed the disposal.

(8) Administration of Medication for Non-Medical Model Facilities.

(A) Prescription medications shall be dispensed only by licensed nurses or other staff who are trained and have the appropriate documented medication certification to dispense medications while under the supervision of a physician or registered nurse. Facilities that do not have licensed nurses or other credentialed staff to dispense medications (non-medical model facilities) shall implement the practice of self-administration of medications.

(B) If medications are dispensed through the practice of self-administration in a non-medical model program, staff trained by a qualified health professional to supervise residents in the self-administration of medications shall monitor the residents during the self-administration process.

(C) Each dose of prescription medication received by the resident shall be documented on the prescription medication administration record and maintained in the resident's medical file. The prescription medication record shall include:

(i) Name of the resident receiving the medication;

(ii) Drug allergies or the absence of known drug allergies;

(iii) Name, strength of medication and route of administration;

(iv) Instructions for taking the medication, the amount taken and the route of administration;

(v) Date and time the medication was provided;

(vi) Prescription number (or lot number for sample drugs) and the initial amount of medication received;

(vii) Prescribing physician, advanced practice nurse or physician assistant and the name of the pharmacy;

(viii) Signature of the resident receiving the medication and the staff person supervising the self-administration of medication;

(ix) The remaining amount of medication after each dose dispensed; and

(x) Comment section for recording a variance, discrepancy or change.

(D) Each dose of OTC medication received by the resident shall be documented on the OTC medication administration record and maintained in the resident's medical file. The OTC drugs purchased by the resident or supplied for the resident in quantities larger than single dose packages shall be recorded on the OTC drug record. The OTC drug record shall include:

(i) The resident's name;

(ii) The name and strength of the medication dispensed;

(iii) Drug allergies or the absence of known drug allergies;

(iv) The dosage instructions and route of administration;

(v) The initial amount received, OTC lot number and the expiration date;

(vi) The date and time the medication was dispensed;

(vii) The amount dispensed and the ending count after each dose;

(viii) Comment section for recording reason for OTC drug or other notations; and

(ix) The signature of the resident and the employee who supervised each dose dispensed.

(E) Facility Stock OTC Drugs. Multiple OTC stock drugs supplied in single dose packaging may be recorded on the same form. The medication drug record for facility stock OTC drugs shall include:

(i) The resident's name;

(ii) The name, strength and route of administration;

(iii) Drug allergies or the absence of known drug allergies;

(iv) The date, time, amount dispensed and the lot number on the container;

(v) Comment section to record the reason the OTC drug was requested; and

(vi) The signature of the resident and the employee who supervised each dose dispensed.

(9) Training for Monitoring Self-Administration of Medications. All residential employees responsible for supervising residents in self-administration of medication, who are not credentialed to dispense medication, shall complete required training before performing this task.

(A) The initial training for new employees shall be four (4) hours in length.

(B) Employees shall complete a minimum of two (2) hours of review training annually thereafter.

(C) The training shall be provided by a physician, pharmacist, physician assistant or registered nurse before supervising self-administration of medications. A licensed vocational nurse (LVN) or paramedic (under supervision) may teach the course from an established curriculum. Topics to be covered shall include:

(i) Prescription labels;

(ii) Medical abbreviations;

(iii) Routes of administration;

(iv) Use of drug reference materials;

(v) Monitoring/observing insulin preparation and administration;

(vi) Storage, maintenance, handling and destruction of medication;

(vii) Transferring information from prescription labels to the medication administration record and documentation requirements, including sample medications; and

(viii) Procedures for medication errors, adverse reactions and side effects.

(10) Female Residents. If female residents are housed, access to pregnancy management services shall be available.

(11) Mental Health. Access to mental health services shall be available to residents.

(12) Suicide Prevention. Each facility shall have a written suicide prevention and intervention program reviewed and approved by a qualified medical or mental health professional. All staff with resident supervision responsibilities shall be trained in the implementation of the suicide prevention program.

(13) Personnel.

(A) If treatment is provided to residents by health-care personnel other than a physician, psychiatrist, dentist, psychologist, optometrist, podiatrist or other independent provider, such treatment shall be performed pursuant to written standing or direct orders by personnel authorized by law to give such orders.

(B) If the facility provides medical treatment, personnel who provide health-care services to residents shall be qualified and appropriately licensed. Verification of current credentials and job descriptions shall be on file in the facility. Appropriate state and federal licensure, certification or registration requirements and restrictions apply.

(14) Informed Consent. If the facility provides medical treatment, the facility shall ensure residents are provided information

to make medical decisions with informed consent. All informed consent standards in the jurisdiction shall be observed and documented for resident care.

(15) Participation in Research. Residents shall not participate in medical, pharmaceutical or cosmetic experiments. This does not preclude individual treatment of a resident based on resident's need for a specific medical procedure that is not generally available.

(16) Notification. Individuals designated by the resident shall be notified in case of serious illness, injury or death.

(17) Health Records.

(A) If medical treatment is provided by the facility, accurate health records for residents shall be maintained separately and confidentially.

(B) If medical treatment is provided by the facility, the method of recording entries in the records, the form and format of the records, and the procedures for maintenance and safekeeping shall be approved by the health authority.

(C) If medical treatment is provided by the facility for a resident being transferred to another facility, summaries or copies of the medical history record shall be forwarded to the receiving facility prior to or at arrival.

(k) Discharge From CRFs. Discharge from CRFs shall be based on the following criteria:

(1) The resident has made alternative housing arrangements as approved by the supervising parole officer;

(2) The resident has satisfied a period of placement as a condition of parole or mandatory supervision;

(3) The resident has demonstrated non-compliance with program criteria or Board order; or

(4) The resident manifests an emergency medical or mental problem that requires hospitalization.

(l) Mail, Telephone and Visitation. The facility director shall have written policies which govern the facility's mail, telephone and visitation privileges for residents, including mail inspection, public phone use and routine and special visits. The policies shall address compelling circumstances in which a resident's mail both incoming and outgoing may be opened, but not read, to inspect for contraband.

(m) Religious Programs.

(1) The facility director shall have written policies that govern religious programs for residents. The policies shall provide that residents have the opportunity to voluntarily practice the requirements of a resident's religious faith, have access to worship/religious services and the use or contact with community religious resources, when appropriate.

(2) Under Texas Civil Practice & Remedies Code, Chapter 110, a CRF may not substantially burden a resident's free exercise of religion unless the application of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. There is a presumption that a policy or practice that applies to a resident in the custody of a CRF is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. The presumption may be rebutted with evidence provided by the resident.

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 February 18, 2009.

TRD-200900678
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: March 10, 2009
Proposal publication date: December 19, 2008
For further information, please call: (512) 463-9693

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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.

Final Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

ADOPTION OF REVISED WORKERS' COMPENSATION CLASSIFICATION RELATIVITIES AND AMENDMENTS TO THE TEXAS BASIC MANUAL OF RULES, CLASSIFICATIONS AND EXPERIENCE RATING PLAN FOR WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE UPDATING THE EXPECTED LOSS RATES AND DISCOUNT RATIOS TABLE

The Commissioner of Insurance (Commissioner) adopts the amendments proposed by the Texas Department of Insurance (Department) staff in a petition (Ref. No. W-1208-20) filed with the Office of the Chief Clerk of the Department on December 19, 2008. Notice of the proposal was published in the January 2, 2009, issue of the *Texas Register* (34 TexReg 71). The amendments were considered at a public hearing held under Docket No. 2703 on February 3, 2009, at 9:30 a.m., in Room 100 of the William P. Hobby Building, 333 Guadalupe Street, Austin, Texas. The amendments are adopted without changes to the proposed amendments.

The adopted amendments include (i) revised Texas Workers' Compensation Classification Relativities (classification relativities) to replace those adopted pursuant to Commissioner's Order No. 07-0915, dated October 23, 2007; and (ii) a revised table to amend the Texas Basic Manual of Rules, Classification, and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance (Basic Manual) concerning the Expected Loss Rates and Discount Ratios used in experience rating.

The Department received one comment regarding the proposed amendments from Texas Mutual Insurance Company. The commenter recommended that all future amendments to the classification relativities, expected loss rates, and discount ratios be made with a May 1st effective date. The commenter stated that maintaining the same date would allow all policyholders, regardless of their effective date, to receive consistent changes. The commenter further suggested that each set of amendments be effective for 12 months in order to ensure that all policyholders benefit equally from the changes. The Department appreciates the suggestions and will consider them in planning future updates to the classification relativities, expected loss rates, and discount ratios.

The Commissioner has jurisdiction over this matter pursuant to Article 5.96 and §2053.051 and §2053.052 of the Texas Insurance Code. Section 2053.051 requires the Department to determine hazards by class and establish classification relativities applicable to the payroll in each class for workers' compensation insurance. Section 2053.052 requires the Commissioner to adopt a uniform experience rating plan for workers' compensation insurance. Section 2053.051 and §2053.052 further provide that the classification system and experience rating plan be revised at least once every five years. Article 5.96 authorizes the Department 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 various lines of insurance, including workers' compensation insurance.

The Commissioner has determined that it is necessary to revise the classification relativities and the Basic Manual as proposed by staff in the December 19, 2008 petition in order to utilize the most recent experience data available. The revised classification relativities schedule and Basic Manual table, which are adopted without changes to the proposed amendments, are incorporated by reference into this Order.

This adoption is made pursuant to Article 5.96 of the Texas Insurance Code, which exempts actions taken under Article 5.96 from the requirements of the Administrative Procedures Act (Government Code, Title 10, Chapter 2001).

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the amendments to the classification relativities and the Basic Manual proposed by the staff petition (Ref. No. W-1208-20) and incorporated by reference into this Order are adopted.

IT IS FURTHER ORDERED that the revised classification relativities are available for immediate use by insurers and that their use is mandatory for all policies with an effective date on or after May 1, 2009, unless the insurer makes an independent filing to justify insurer-specific classification relativities.

IT IS FURTHER ORDERED that the amendments to the Basic Manual apply to all policies with an effective date on or after May 1, 2009.

TRD-200900717
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 19, 2009

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Review

Credit Union Department

Title 7, Part 6

The Texas Credit Union Commission will review and consider for re-adoption, revision, or repeal Chapter 91, §§91.101 (Definitions and Interpretations), 91.103 (Public Notice of Department Activities), 91.104 (Notice of Applications), 91.105 (Applications for Authorization from the Commissioner), 91.110 (Protest Procedures for Applications), 91.115 (Safety at Unmanned Teller Machines), 91.120 (Posting of Notice Regarding Certain Loan Agreements), 91.125 (Accuracy of Advertising), 91.201 (Incorporation Procedures), 91.202 (Form of Bylaws; Amendments to Articles of Incorporation and Bylaws), 91.205 (Use of Credit Union Name), 91.206 (Underserved Area Credit Unions--Secondary Capital Accounts), 91.209 (Reports and Charges for Late Filing), 91.210 (Foreign Credit Unions), 91.1003 (Mergers/Consolidations), 91.1005 (Conversion to a Texas Credit Union), 91.1006 (Conversions to a Federal or Out-of-State Credit Unions), 91.1007 (Conversion to a Mutual Savings Institution), 91.1008 (Conversion Voting Procedures and Restrictions; Filing Requirements), 91.1110 (Share and Deposit Insurance Requirements), 91.3001 (Opportunity to Submit Comments on Certain Applications), and 91.3002 (Conduct of Meetings to Receive Comments) of Title 7, Part 6 of the Texas Administrative Code in preparation for the Commission's Rule Review as required by §2001.039, Government Code.

An assessment will be made by the Commission as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Credit Union Department.

Comments or questions regarding these rules may be submitted in writing to, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699, or electronically to info@tcud.state.tx.us. The deadline for comments is March 31, 2009.

The Commission also invites your comments on how to make these rules easier to understand. For example:

* Do the rules organize the material to suit your needs? If not, how could the material be better organized?

* Do the rules clearly state the requirements? If not, how could the rule be more clearly stated?

* Do the rules contain technical language or jargon that isn't clear? If so, what language requires clarification?

* Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand? If so, what changes to the format would make the rule easier to understand?

* Would more (but shorter) sections be better in any of the rules? If so, what sections should be changed?

Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rule Section of the *Texas Register*. The proposed rules will be open for public comment prior to final adoption by the Commission.

TRD-200900769
Harold E. Feeney
Commissioner
Credit Union Department
Filed: February 23, 2009

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Adopted Rule Reviews

Texas Board of Architectural Examiners

Title 22, Part 1

The Texas Board of Architectural Examiners adopts the review of Title 22, Part 1, Chapter 1, Architects; Chapter 3, Landscape Architects; Chapter 5, Interior Designers; and Chapter 7, Administration. The proposed notice of review was published in the August 29, 2008, issue of the *Texas Register* (33 TexReg 7311).

During its review, the Board determined that the initial reasons for adopting these chapters continue to exist. The chapters are therefore adopted in accordance with the requirements of Texas Government Code, §2001.039.

The agency received no comments regarding the adoption of the review.

This concludes the Board's review of Chapter 1, Architects; Chapter 3, Landscape Architects; Chapter 5, Interior Designers; and Chapter 7, Administration, as required by Texas Government Code §2001.039.

TRD-200900817
Cathy L. Hendricks
Executive Director
Texas Board of Architectural Examiners
Filed: February 24, 2009

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Texas Department of Criminal Justice

Title 37, Part 6

The Texas Board of Criminal Justice (TBCJ or Board) has completed its review of §151.8, concerning Advisory Committees, in accordance with the requirements of Texas Government Code §2001.039. The Board has determined that the reasons for initially adopting §151.8 continue to exist, and it readopts the rule.

Notice of the review was published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10335). No comments were received as a result of that notice.

As a result of that rule review, the Texas Department of Criminal Justice published proposed amendments to §151.8 in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10299). The Board adopted the amended rule on February 13, 2009, and the adoption notice is published in this issue of the *Texas Register.*

TRD-200900679
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: February 18, 2009

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The Texas Board of Criminal Justice (TBCJ or Board) has completed its review of §151.75, Standards of Conduct for Financial Advisors and Service Providers, in accordance with the requirements of Texas Government Code §2001.039. The Board has determined that the reasons for initially adopting §151.75 continue to exist, and it readopts the rule.

Notice of the review was published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10335). Comments were received as a result of that notice, and changes were incorporated into the amended rule.

As a result of that rule review, the Texas Department of Criminal Justice published proposed amendments to §151.75 in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10300). The Board adopted the amended rule on February 13, 2009, and the adoption notice is published in this issue of the *Texas Register.*

TRD-200900680
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: February 18, 2009

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The Texas Board of Criminal Justice (TBCJ or Board) has completed its review of §161.21, concerning the Role of the Judicial Advisory Council, in accordance with the requirements of Texas Government Code §2001.039. The Board has determined that the reasons for initially adopting §161.21 continue to exist, and it readopts the rule.

Notice of the review was published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10335). No comments were received as a result of that notice.

As a result of that rule review, the Texas Department of Criminal Justice (TDCJ) published proposed amendments to §161.21 in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10301). The Board adopted the amended rule on February 13, 2009, and the adoption notice is published in this issue of the *Texas Register.*

TRD-200900681
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: February 18, 2009

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Texas Medical Board

Title 22, Part 9

The Texas Medical Board (Board) adopts the review of Chapter 162, Supervision of Medical School Students, §162.1 and §162.2, pursuant to the Texas Government Code, §2001.039. The proposed rule review was published in the January 9, 2009, issue of the *Texas Register* (34 TexReg 265).

Elsewhere in this issue of the *Texas Register*, the Board contemporaneously adopts amendments to §162.1.

The agency's reason for adopting the rules contained in this chapter continues to exist.

No comments were received regarding adoption of the review.

This concludes the review of Chapter 162, Supervision of Medical School Students.

TRD-200900652
Mari Robinson, J.D.
Interim Executive Director
Texas Medical Board
Filed: February 17, 2009

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The Texas Medical Board (Board) adopts the review of Chapter 189, Compliance Program, §§189.1 - 189.14, pursuant to the Texas Government Code, §2001.039. The proposed rule review was published in the January 9, 2009, issue of the *Texas Register* (34 TexReg 265).

Elsewhere in this issue of the *Texas Register,* the Board contemporaneously adopts amendments to §189.1 and §189.2.

The agency's reason for adopting the rules contained in this chapter continues to exist.

No comments were received regarding adoption of the review.

This concludes the review of Chapter 189, Compliance Program.

TRD-200900653
Mari Robinson, J.D.
Interim Executive Director
Texas Medical Board
Filed: February 17, 2009

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Texas State Board of Pharmacy

Title 22, Part 15

The Texas State Board of Pharmacy adopts the review of Chapter 297 (§§297.1 - 297.9), concerning Pharmacy Technicians and Pharmacy Technician Trainees, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules. The proposed review was published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10515).

No comments were received.

The agency finds the reason for adopting the rule continues to exist.

TRD-200900721
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: February 20, 2009

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 §34.23(1)

$V = a \div e \div t + f$

V = value of a ticket

a = amount of the expenditure made by a person for the right to use a suite

e = number of events to which the person has the right to use the suite

t = number of suite tickets the person has the right to purchase or use per event

f = the face value of the ticket, if the ticket was not included in the suite price

Figure: 1 TAC §34.25(c)

$V = a \div e \div t + f$

V = value of a ticket

a = amount of the expenditure made by a person for the right to use a suite

e = number of events to which the person has the right to purchase a suite ticket

t = number of suite tickets the person has the right to purchase per event

f = the face value of the ticket

Figure: 1 TAC §34.26(c)

$V = a \div e \div t + f$

V = value of a ticket

a = amount of the expenditure made by a person for the right to use a suite

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t = number of suite tickets the person has the right to purchase per event

f = the face value of the ticket

Figure: 1 TAC §34.27(c)

$V = a \div e \div t + f$

V = value of a ticket

a = amount of the expenditure made by a person for the right to use a suite

e = number of events to which the person has the right to purchase a suite ticket

t = number of suite tickets the person has the right to purchase per event

f = the face value of the ticket

Figure: 30 TAC §331.104(b)

Calcium (Ca) in mg/L	Alkalinity (Alk) in standard units
Magnesium (Mg) in mg/L	pH in standard units
Sodium (Na) in mg/L	Arsenic (As) in mg/L
Potassium (K) in mg/L	Cadmium (Cd) in mg/L
Carbonate (CO_3) in mg/L	Iron (Fe) in mg/L
Bicarbonate (HCO_3) in mg/L	Lead (Pb) in mg/L
Sulfate (SO_4) in mg/L	Manganese (Mn) in mg/L
Chloride (Cl) in mg/L	Mercury (Hg) in mg/L
Nitrate (NO_3, as nitrogen (N)) in mg/L	Molybdenum (Mo) in mg/L
Fluoride (F) in mg/L	Selenium (Se) in mg/L
Silica (SiO_2) in mg/L	Uranium (U) in mg/L
Total Dissolved Solids (TDS) in mg/L	Ammonia as N (N) in mg/L
Electrical Conductivity (EC) in unhos/cm	Radium-226 (Ra-226) in pCi/L

Figure: 30 TAC §336.210(e)

Radioactive Material*	Release Fraction	Quantity (curies)	Radioactive Material*	Release Fraction	Quantity (curies)	Radioactive Material*	Release Fraction	Quantity (curies)
Ac-228 (89)	0.001	4,000	In-114m (49)	0.01	1,000	Xe-133 (54)	1.0	900,000
Am-241 (95)	0.001	2	Ir-192 (77)	0.001	40,000	Y-91 (39)	0.01	2,000
Am-242 (95)	0.001	2	Fe-55 (26)	0.01	40,000	Zn-65 (30)	0.01	5,000
Am-243 (95)	0.001	2	Fe-59 (26)	0.01	7,000	Zr-93 (40)	0.01	400
Sb-124 (51)	0.01	4,000	Kr-85 (36)	1.0	6,000,000	Zr-95 (40)	0.01	5,000
Sb-126 (51)	0.01	6,000	Pb-210 (82)	0.01	8	Any other ß-emitter	0.01	10,000
Ba-133 (56)	0.01	10,000	Mn-56 (25)	0.01	60,000			
Ba-140 (56)	0.01	30,000	Hg-203 (80)	0.01	10,000	Mixed fission products	0.01	1,000
Bi-207 (83)	0.01	5,000	Mo-99 (42)	0.01	30,000			
Bi-210 (83)	0.01	600	Np-237 (93)	0.001	2	Mixed corrosion products	0.01	10,000
Cd-109 (48)	0.01	1,000	Ni-63 (28)	0.01	20,000			
Cd-113 (48)	0.01	80	Nb-94 (41)	0.01	300			
Ca-45 (20)	0.01	20,000	P-32 (15)	0.5	100	Contaminated equipment, ß-	0.001	10,000
Cf-252 (98)	0.001	9(20mg)	P-33 (15)	0.5	1,000			
C-14 (6)**	0.01	50,000	Po-210 (84)	0.01	10			
Ce-141 (58)	0.01	10,000	K-42 (19)	0.01	9,000	Irradiated material, any form other than solid non-combustible	0.01	1,000
Ce-144 (58)	0.01	300	Pm-145 (61)	0.01	4,000			
Cs-134 (55)	0.01	2,000	Pm-147 (61)	0.01	4,000			
Cs-137 (55)	0.01	2,000	Ru-106 (44)	0.01	200			
Cl-36 (17)	0.5	100	Sm-151 (62)	0.01	4,000			
Cr-51 (24)	0.01	300,000	Sc-46 (21)	0.01	3,000			
Co-60 (27)	0.001	5,000	Se-75 (34)	0.01	10,000	Irradiated material, solid non-combustible	0.001	10,000
Cu-64 (29)	0.01	200,000	Ag110m (47)	0.01	1,000			
Cm-242 (96)	0.001	60	Na-22 (11)	0.01	9,000			
Cm-243 (96)	0.001	3	Na-24 (11)	0.01	10,000			
Cm-244 (96)	0.001	4	Sr-89 (38)	0.01	3,000	Mixed radioactive waste, ß-	0.01	1,000
Cm-245 (96)	0.001	2	Sr-90 (38)	0.01	90			
Eu-152 (63)	0.01	500	Sr-35 (16)	0.5	900			
Eu-154 (63)	0.01	400	Tc-99 (43)	0.01	10,000	Packaged waste, ß-***	0.001	10,000
Eu-155 (63)	0.01	3,000	Tc-99m (43)	0.01	400,000			
Ge-68 (32)	0.01	2,000	Te-127m(52)	0.01	5,000			
Gd-153 (64)	0.01	5,000	Te-129m(52)	0.01	5,000	Any other α-emitter	0.001	2
Au-198 (79)	0.01	30,000	Tb-160 (65)	0.01	4,000			
Hf-172 (72)	0.01	400	Tm-170 (69)	0.01	4,000	Contaminated equipment, α	0.0001	20
Hf-181 (72)	0.01	7,000	Sn-113 (50)	0.01	10,000			
Ho-166 (67)	0.01	100	Sn-123 (50)	0.01	3,000	Packaged waste***	0.0001	20
H-3 (1)	0.5	20,000	Sn-126 (50)	0.01	1,000			
I-125 (53)	0.5	10	Ti-144 (22)	0.01	100			
I-131 (53)	0.5	10	V-48 (23)	0.01	7,000			

* For combinations of radionuclides, consideration of the need for an emergency plan is required if the sum of the ratios of the quantity of each radionuclide authorized to the quantity listed for that radionuclide in this paragraph exceeds one. ( ) indicates atomic number.

** Non CO forms only.

*** Waste packaged in Type B containers does not require an emergency plan.

IN ADDITION

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.

Department of Assistive and Rehabilitative Services

Notice of Request for Comments on IDEA Part C Funds for Early Childhood Intervention

The Texas Department of Assistive and Rehabilitative Services (DARS), Division for Early Childhood Intervention, is soliciting comments related to its annual application for federal funds for early childhood intervention services. DARS will be requesting funding under the Individuals with Disabilities Education Act, Part C for federal fiscal year 2009. The annual funding application will be submitted to the U.S. Department of Education , Office of Special Education Programs on May 18, 2009. The application can be viewed on the DARS web site at: http://www.dars.state.tx.us. The Texas Department of Assistive and Rehabilitative Services, Division for Early Childhood Intervention is providing an opportunity to comment on the application from March 6, 2009 until May 5, 2009.

To request copies of the application or to make comments concerning early childhood intervention services in Texas, please, contact:

Cynthia Henderson, M.Ed., Lead Policy Specialist, Texas Department of Assistive and Rehabilitative Services, Division of Early Childhood Intervention, 4900 North Lamar Boulevard, Austin, Texas 78751-2399, Mail Code 3029, cynthia.henderson@dars.state.tx.us

TRD-200900821
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Department of Assistive and Rehabilitative Services
Filed: February 24, 2009

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Comptroller of Public Accounts

Notice of Request for Proposals

Pursuant to §1201.027, Texas Government Code; Chapter 2254, Subchapter B and Chapter 404, Subchapter H; the Comptroller of Public Accounts (Comptroller) announces its Request for Proposals (RFP #192a) from qualified, independent firms to serve as Financial Advisor to the Comptroller. The Comptroller desires to obtain the services of a Financial Advisor related to the document preparation, issuance, sale, and delivery of Tax and Revenue Anticipation Notes, including Commercial Paper Notes (Notes) as well as assistance in handling of disclosure issues relating to the Notes. The successful respondent will be expected to begin performance of the contract on or about May 1, 2009.

Contact: Parties interested in submitting a proposal should contact Thomas H. Hill, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., Rm 201, Austin, Texas 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. The Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP will be available for pick-up at the above-referenced address on March 6, 2009, between 10:00 a.m. and 5:00 p.m., Central Zone Time (CZT), and during normal business hours thereafter. The Comptroller will also make the RFP available electronically on the Electronic State Business Daily after Friday, March 6, 2009, 10:00 a.m. (CZT).

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Friday, March 20, 2009. Prospective respondents are encouraged to fax or e-mail non-mandatory Letters of Intent and Questions to (512) 463-3669 or contracts@cpa.state.tx.us to ensure timely receipt. The Letter of Intent must be addressed to Thomas H. Hill, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. Non-mandatory Letters of Intent and Questions received after this time and date will not be considered. On or about Friday, March 27, 2009, the Comptroller expects to post responses to questions as a revision to the Electronic State Business Daily notice on the issuance of this RFP.

Closing Date: Proposals must be delivered to the Office of the Assistant General Counsel, Contracts, at the location specified above (Room 201) no later than 2:00 p.m. (CZT), on Friday, April 10, 2009. Proposals received in Room 201 after this time and date will not be considered regardless of the reason for the late delivery and receipt. Respondents are encouraged to verify and are solely responsible for verifying timely receipt of proposals in that office (Room 201).

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Comptroller shall make the final decision on any contract award or awards resulting from this RFP.

The Comptroller reserves the right, in its sole discretion, to accept or reject any or all proposals submitted. The Comptroller is not obligated to award or execute any contracts on the basis of this notice or the distribution of any RFP. The Comptroller shall not pay for any costs incurred by any entity in responding to this notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - March 6, 2009, 10:00 a.m. CZT; Non-Mandatory Letter of Intent to propose and Questions Due - March 20, 2009, 2:00 p.m. CZT; Official Responses to Questions posted - March 27, 2009, or as soon thereafter as practical; Proposals Due - April 10, 2009, 2:00 p.m. CZT, Contract Execution - May 1, 2009, or as soon thereafter as practical; and Commencement of Project Activities - May 1, 2009.

TRD-200900813
Pamela G. Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: February 23, 2009

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Notice of Request for Proposals

Pursuant to §1201.027, Texas Government Code; Chapter 2254, Subchapter A, and Chapter 404, Subchapter H; the Comptroller of Public Accounts (Comptroller) announces its Request for Proposals (RFP #192b) from qualified, independent law firms to serve as Bond Counsel to the Comptroller. The Comptroller desires to obtain the services of Bond Counsel in connection with a variety of issues related to the

issuance, sale, and delivery of Tax and Revenue Anticipation Notes, including Commercial Paper Notes (Notes) as well as assisting in handling all disclosure issues relating to the Notes. The successful respondent will be expected to begin performance of the contract on or about May 1, 2009.

Contact: Parties interested in submitting a proposal should contact Thomas H. Hill, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., Rm 201, Austin, Texas 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. The Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP will be available for pick-up at the above-referenced address on March 6, 2009, between 10:00 a.m. and 5:00 p.m., Central Zone Time (CZT), and during normal business hours thereafter. The Comptroller will also make the RFP available electronically on the Electronic State Business Daily Friday, March 6, 2009, 10:00 a.m. (CZT).

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Friday, March 20, 2009. Prospective respondents are encouraged to fax or e-mail non-mandatory Letters of Intent and Questions to (512) 463-3669 or contracts@cpa.state.tx.us to ensure timely receipt. The Letter of Intent must be addressed to Thomas H. Hill, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. Non-mandatory Letters of Intent and Questions received after this time and date will not be considered. On or about Friday, March 27, 2009, the Comptroller expects to post responses to questions as a revision to the Electronic State Business Daily notice on the issuance of this RFP.

Closing Date: Proposals must be delivered to the Office of the Assistant General Counsel, Contracts, at the location specified above (ROOM 201) no later than 2:00 p.m. (CZT), on Friday, April 10, 2009. Proposals received in ROOM G-24 after this time and date will not be considered regardless of the reason for the late delivery and receipt. Respondents are encouraged to and solely responsible for verifying timely receipt of proposals in that office (ROOM 201).

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Comptroller shall make the final decision on any contract award or awards resulting from this RFP.

The Comptroller reserves the right, in its sole discretion, to accept or reject any or all proposals submitted. The Comptroller is not obligated to award or execute any contracts on the basis of this notice or the distribution of any RFP. The Comptroller shall not pay for any costs incurred by any entity in responding to this notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - March 6, 2009, 10:00 a.m. CZT; Non-Mandatory Letter of Intent to propose and Questions Due - March 20, 2009, 2:00 p.m. CZT; Official Responses to Questions posted - March 27, 2009, or as soon thereafter as practical; Proposals Due - April 10, 2009, 2:00 p.m. CZT, Contract Execution - May 1, 2009, or as soon thereafter as practical; and Commencement of Project Activities - May 1, 2009.

TRD-200900814
Pamela G. Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: February 23, 2009

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Notice of Request for Proposals

Pursuant to §2107.003, Texas Government Code, the Comptroller of Public Accounts (Comptroller), announces its issuance of a Request for Proposals (RFP #192c) for the purpose of obtaining collection services from a qualified firm for the collection of delinquent state tax accounts that do not meet the minimum thresholds to be referred to the Texas Attorney General for collection but are required by law to be collected by the Comptroller. The successful respondent, if any, will be expected to begin performance of the contract on or before September 1, 2009.

Contact: Parties interested in submitting a proposal should contact Thomas H. Hill, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., Rm 201, Austin, Texas 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. The Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP will be available for pick-up at the above-referenced address on March 6, 2009, between 10:00 a.m. and 5:00 p.m., Central Zone Time (CZT), and during normal business hours thereafter. The Comptroller will also make the RFP available electronically on the Electronic State Business Daily Friday, March 6, 2009, 10:00 a.m. (CZT).

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Friday, March 20, 2009. Prospective respondents are encouraged to fax or e-mail non-mandatory Letters of Intent and Questions to (512) 463-3669 or contracts@cpa.state.tx.us to ensure timely receipt. The Letter of Intent must be addressed to Thomas H. Hill, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. Non-mandatory Letters of Intent and Questions received after this time and date will not be considered. On or about Wednesday, March 25, 2009, the Comptroller expects to post responses to questions as a revision to the Electronic State Business Daily notice on the issuance of this RFP.

Closing Date: Proposals must be delivered to the Office of the Assistant General Counsel, Contracts, at the location specified above (ROOM 201) no later than 2:00 p.m. (CZT), on Friday, April 10, 2009. Proposals received in ROOM G-24 after this time and date will not be considered regardless of the reason for the late delivery and receipt. Respondents are encouraged to and solely responsible for verifying timely receipt of proposals in that office (ROOM 201).

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Comptroller shall make the final decision on any contract award or awards resulting from this RFP.

The Comptroller reserves the right, in its sole discretion, to accept or reject any or all proposals submitted. The Comptroller is not obligated to award or execute any contracts on the basis of this notice or the distribution of any RFP. The Comptroller shall not pay for any costs incurred by any entity in responding to this notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - March 6, 2009, 10:00 a.m. CZT; Non-Mandatory Letter of Intent to propose and Questions Due - March 20, 2009, 2:00 p.m. CZT; Official Responses to Questions posted - March 27, 2009, or as soon thereafter as practical; Proposals Due - April 10, 2009, 2:00 p.m. CZT; Contract Execution - May 8, 2009, or as soon thereafter as practical; transition to work under new contract to begin May 8, 2009 or as soon thereafter as practical and actual Commencement of Project Activities - September 1, 2009.

TRD-200900815

Pamela G. Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: February 24, 2009

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, 303.008, 303.009, 304.003, and 346.101, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 03/02/09 - 03/08/09 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 03/02/09 - 03/02/09 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009[3] for the period of 02/01/09 - 02/28/09 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009 for the period of 02/01/09 - 02/28/09 is 18% for Commercial over $250,000.

The standard quarterly rate as prescribed by §303.008 and §303.009 for the period of 04/01/09 - 06/30/09 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The standard quarterly rate as prescribed by §303.008 and §303.009 for the period of 04/01/09 - 06/30/09 is 18% for Commercial over $250,000.

The retail credit card quarterly rate as prescribed by §303.009[1] for the period of 04/01/09 - 06/30/09 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The lender credit card quarterly rate as prescribed by §346.101 Texas Finance Code[1] for the period of 04/01/09 - 06/30/09 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The standard annual rate as prescribed by §303.008 and §303.009[4] for the period of 04/01/08 - 06/30/09 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The standard annual rate as prescribed by §303.008 and §303.009 for the period of 04/01/09 - 06/30/09 is 18% for Commercial over $250,000.

The retail credit card annual rate as prescribed by §303.009[1] for the period of 04/01/09 - 06/30/09 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 03/01/09 - 03/31/09 is 5.00% for Consumer/Agricultural/Commercial/credit through $250,000.

The judgment ceiling as prescribed §304.003 for the period of 03/01/09 - 03/31/09 is 5.00% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

[4]Only for open-end credit as defined in §301.002(14), Texas Finance Code.

TRD-200900831
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 24, 2009

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Commission on State Emergency Communications

Public Notice of Workshop and Request for Comments on Provisioning 9-1-1 Service for Converged Services

The Commission on State Emergency Communications (CSEC) will hold a workshop regarding provisioning 9-1-1 service for converged services. The focus of the workshop will be on the deployment of femtocells and Unlicensed Mobile Access technology (UMA) and their provisioning issues and impacts for 9-1-1 service. The workshop will be held on **Wednesday, April 8, 2009, at 10:00 a.m., at the William P. Hobby Building, 333 Guadalupe Street, Room 102, Austin, Texas 78701**. Please check-in at the main desk for a "Visitor" pass. Those wishing to participate via telephone may do so by dialing 1-866-751-5725, then entering room number *8426051* (the star key must be entered before and after the room number).

The agenda for the workshop will be as follows:

I. Welcoming Remarks by CSEC

II. Overview of Converged Services

III. Delivery of 9-1-1 Service in a Converged Service Environment

IV. 9-1-1 Entity Perspective

V. Service Provider Perspective

VI. Open Discussion

VII. Closing

Prior to the workshop, participants are requested to file written comments to CSEC questions. For questions, responses thereto, and workshop updates please go to the *What's New* section of CSEC's website (www.911.state.tx.us).

Comments may be submitted electronically to csecinfo@csec.state.tx.us or by mailing them to CSEC, c/o Elizabeth Smith, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942. Please include in the subject line "Comments for Converged Services Workshop." The deadline for submitting written comments is **Friday, April 3, 2009 at 5:00 p.m.**

CSEC staff intends to submit a report on the workshop to the Commissioners at the April Open Meeting. As a result thereof, a rulemaking proceeding may be initiated.

Please register for the workshop and indicate whether you will be participating in person or by phone by emailing Elizabeth Smith at elizabeth.smith@csec.state.tx.us or calling her at (512) 305-6928. Hearing and speech-impaired individuals with a telecommunications device for the deaf may contact CSEC at (512) 305-6925.

Questions about the workshop or this notice should be referred to Patrick Tyler at (512) 305-6915 or patrick.tyler@csec.state.tx.us

TRD-200900848
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Filed: February 25, 2009

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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 **April 6, 2009**. 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) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on April 6, 2009**. 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: Beach Road Municipal Utility District; DOCKET NUMBER: 2008-1806-MWD-E; IDENTIFIER: RN101613818; LOCATION: Matagorda County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 Texas Administrative Code (TAC) §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013563001, Interim Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permit effluent limits for total ammonia nitrogen and flow; PENALTY: $4,350; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 76023-1452, (713) 767-3500.

(2) COMPANY: Bosque Utilities Corporation; DOCKET NUMBER: 2008-1696-MWD-E; IDENTIFIER: RN102342821; LOCATION: Navarro County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013528001, Interim Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with the permit effluent limits for total ammonia nitrogen; and 30 TAC §305.125(17) and TPDES Permit Number WQ0013528001, Sludge Provisions, by failing to submit the annual sludge report; PENALTY: $6,600; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: CLS Excavation, Inc.; DOCKET NUMBER: 2008-1397-EAQ-E; IDENTIFIER: RN105551733; LOCATION: Williamson County; TYPE OF FACILITY: rock quarry; RULE VIOLATED: 30 TAC §213.23(a)(1), by failing to obtain approval of a contributing zone plan (CZP); PENALTY: $1,875; ENFORCEMENT COORDINATOR: Lauren Smitherman, (512) 239-5223; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(4) COMPANY: City of Electra; DOCKET NUMBER: 2009-0004-PWS-E; IDENTIFIER: RN103783056; LOCATION: Electra, Wichita County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(d)(2)(B) and §290.110(b)(2) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to operate the facility's disinfection equipment to maintain a minimum total chlorine residual of 0.5 milligrams per liter (mg/L) throughout the distribution system; PENALTY: $215; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(5) COMPANY: J. R. Garman, Jr. dba Garman & Sons Dairy; DOCKET NUMBER: 2008-1312-AGR-E; IDENTIFIER: RN101529386; LOCATION: Deaf Smith County; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §321.46(a)(2), by failing to maintain a copy of the pollution prevention plan on-site; 30 TAC §321.38(c)(2), by failing to ensure that the design specifications and completed construction specifications are certified by a licensed Texas professional engineer; 30 TAC §321.46(d) and General Permit Number TXG921055 Part IV.A, by failing to maintain operational records on site; and 30 TAC §321.36(d)(2) and General Permit Number TXG921055 Part III. A(11)(a), by failing to develop and implement a nutrient management plan; PENALTY: $5,340; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 3916 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(6) COMPANY: City of Itasca; DOCKET NUMBER: 2008-1729-MWD-E; IDENTIFIER: RN101920270; LOCATION: Hill County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010423001, Effluent Limitations and Monitoring Requirements Numbers 1 and 6, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for total suspended solids, five-day biochemical oxygen demand, and dissolved oxygen; PENALTY: $4,580; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(7) COMPANY: KRAS INVESTMENTS, LLC dba Bastrop Texaco; DOCKET NUMBER: 2008-1736-PST-E; IDENTIFIER: RN102464914; LOCATION: Bastrop, Bastrop County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (C), by failing to submit a fully and accurately completed underground storage tank (UST) registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current delivery certificate; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; 30 TAC §334.45(c)(3)(A), by failing to ensure that emergency shutoff valves are installed and securely anchored at the base of the dispensers; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to provide release detection for the USTs by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.50(d)(1)(B)(iii)(I) and the Code, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount remaining in the tanks each operating day; 30 TAC §115.222(3) and THSC, §382.085(b), by failing to comply with vapor control requirements for emission limitation anywhere in the liquid transfer or vapor balance system; and 30 TAC §115.222(6)

and THSC, §382.085(b), by failing to ensure that each vapor balance system vent line is equipped with a pressure-vacuum relief valve set to open at a pressure of no more than eight ounces per square inch; PENALTY: $20,673; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(8) COMPANY: M. KASHMIRI MANAGEMENT, INC. dba Star Market; DOCKET NUMBER: 2008-1873-PST-E; IDENTIFIER: RN101381671; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(4)(C) and the Code, §26.3475(d), by failing to inspect and test the corrosion protection system for operability and adequacy of protection; PENALTY: $3,073; ENFORCEMENT COORDINATOR: Brianna Carlson, (956) 425-6010; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(9) COMPANY: MPII, Inc. dba Mission Park Dominion Funeral Chapel; DOCKET NUMBER: 2008-1745-EAQ-E; IDENTIFIER: RN105594253; LOCATION: Bexar County; TYPE OF FACILITY: cemetery; RULE VIOLATED: 30 TAC §213.23(a)(1), by failing to obtain approval of a CZP; PENALTY: $750; ENFORCEMENT COORDINATOR: Lauren Smitherman, (512) 239-5223; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(10) COMPANY: Nelson Brothers Ready Mix, Limited; DOCKET NUMBER: 2008-1647-AIR-E; IDENTIFIER: RN102302353; LOCATION: Prosper, Collin County; TYPE OF FACILITY: concrete manufacturing plant; RULE VIOLATED: 30 TAC §106.4 and §111.111(a)(1)(B) and THSC, §382.085(b), by failing to control visible emissions from a stationary source and by failing to maintain emission control equipment in good condition and operating properly; 30 TAC §106.201(a) and THSC, §382.085(b), by failing to sprinkle the sand stockpile with water and/or dust suppressant chemicals; and 30 TAC §101.201(b) and THSC, §382.085(b), by failing to keep a final record of all reportable and non-reportable emission events onsite for a minimum of five years; PENALTY: $1,975; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: NILA AKASH ENTERPRISES, INC. dba Express Lane Food Mart; DOCKET NUMBER: 2008-1954-PST-E; IDENTIFIER: RN103038709; LOCATION: Webster, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $2,721; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: O'Donnell Oil & Butane Company, Inc.; DOCKET NUMBER: 2008-1874-PST-E; IDENTIFIER: RN105650675 and RN101867893; LOCATION: Lynn County; TYPE OF FACILITY: aboveground storage tanks (ASTs) with key-operated fuel pumps for retail sales of gasoline and diesel; RULE VIOLATED: 30 TAC §334.127(a)(1) and the Code, §26.346, by failing to register the ASTs within 30 days of installation; and 30 TAC §334.126(a)(1), by failing to provide notification to the agency at least 30 days prior to installing new ASTs; PENALTY: $3,710; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(13) COMPANY: Rip Griffin Truck Service Center, Inc.; DOCKET NUMBER: 2008-1779-AIR-E; IDENTIFIER: RN104544788; LOCATION: Lubbock, Lubbock County; TYPE OF FACILITY: truck service and fuel transportation center; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by failing to comply with the maximum Reid vapor pressure (RVP) requirement of seven pounds per square inch absolute; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(14) COMPANY: SANM, INC. dba Rick's Drive In; DOCKET NUMBER: 2008-1665-PST-E; IDENTIFIER: RN101377471; LOCATION: Denton, Denton County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(1), (5), and (7)(A) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for review; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to onboard refueling vapor recovery compatible systems; 30 TAC §115.242(3)(J) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition; 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available for the inspection; 30 TAC §334.7(d)(3), by failing to provide an amended UST registration to the agency for any change or additional information regarding the USTs; 30 TAC §334.49(c)(2)(C) and the Code, §26.3475(d), by failing to inspect the impressed current cathodic protection system; 30 TAC §334.49(c)(4) and the Code, §26.3475(d), by failing to have the cathodic protection inspected and tested for operability and adequacy of protection; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to ensure that all USTs are monitored in a manner which will detect a release; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors for performance and operational reliability; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.50(d)(1)(B)(iii)(I) and the Code, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube; and 30 TAC §334.45(c)(3)(A), by failing to install an emergency shutoff valve on each pressurized delivery or product line and ensure that it is securely anchored at the base of the dispenser; PENALTY: $17,600; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: SAVE N MORE CORPORATION dba Save One Stop; DOCKET NUMBER: 2008-1855-PST-E; IDENTIFIER: RN101819936; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $2,414; ENFORCEMENT COORDINATOR: Michael Pace, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(16) COMPANY: Sayed Ridi dba S R Auto Sales; DOCKET NUMBER: 2008-1718-PST-E; IDENTIFIER: RN102474087; LOCATION: Houston, Harris County; TYPE OF FACILITY: automotive sales business; RULE 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, a UST system; and 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs; PENALTY: $3,325; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(17) COMPANY: Targa Midstream Services Limited Partnership; DOCKET NUMBER: 2008-1299-AIR-E; IDENTIFIER: RN102583291 and RN100222900; LOCATION: Mont Belvieu, Chambers County; TYPE OF FACILITY: bulk materials storage and distribution terminal and a natural gas fractionator; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 22088, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §101.201(f) and THSC, §382.085(b), by failing to submit additional information to the TCEQ within the established time frame; 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to have authorization for the loading of 792 trucks with a butane/butylene mix; 30 TAC §116.115(c), Air Permit Number 56431, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(b)(1)(G) and (H) and THSC, §382.085(b), by failing to properly report Incident Number 98657; PENALTY: $21,602; Supplemental Environmental Project offset amount of $10,801 applied to Barbers Hill Independent School District-Alternative Fueled Vehicle and Equipment Program; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(18) COMPANY: City of Thornton; DOCKET NUMBER: 2008-1767-MWD-E; IDENTIFIER: RN102844461; LOCATION: Limestone County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §30.350(d) and §305.125(1) and TPDES Permit Number WQ0010824001, Other Requirements Number 1, by failing to employ or contract a licensed individual to operate the facility; PENALTY: $3,475; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(19) COMPANY: Value Family Properties - Denton, L.P.; DOCKET NUMBER: 2008-1712-WQ-E; IDENTIFIER: RN101269611; LOCATION: Denton, Denton County; TYPE OF FACILITY: wastewater collection system; RULE VIOLATED: the Code, §26.121, by failing to prevent the unauthorized discharge of wastewater from the collection system; the Code, §26.039(b), by failing to provide non-compliance notification; and 30 TAC §217.63(b), by failing to equip the lift station with an audio-visual alarm system; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200900816
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 24, 2009

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Enforcement Orders

A default order was entered regarding Tajrangeza Khail dba Benny's Food Mart and Aiedeh Husainat dba Benny's Food Mart, Docket No. 2006-0169-PST-E on February 13, 2009 assessing $8,925 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 Chez-Salin Quality Cleaners, Inc. dba Rodeo Cleaners 1, dba Rodeo Cleaners 2, dba Rodeo Cleaners 3, and dba Lyric South Cleaners Docket No. 2006-0708-DCL-E on February 13, 2009 assessing $4,740 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 Kirtley Gravel Co., Inc. dba Sharp Sand and Gravel, Docket No. 2007-0141-WR-E on February 13, 2009 assessing $525 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney, at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Del Rio, Docket No. 2007-0696-PWS-E on February 13, 2009 assessing $2,448 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari Gilbreth, Staff Attorney, at (512) 239-1320, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Consolidated Construction Recycling Services, Ltd., Docket No. 2007-1090-MSW-E on February 13, 2009 assessing $10,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari Gilbreth, Staff Attorney, at (512) 239-1320, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Cisco, Docket No. 2007-1123-MLM-E on February 13, 2009 assessing $29,235 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Cox, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Valero Refining-Texas, L.P., Docket No. 2007-1234-AIR-E on February 13, 2009 assessing $181,200 in administrative penalties.

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.

A default order was entered regarding Cesar Vasquez, Docket No. 2007-1272-WOC-E on February 13, 2009 assessing $1,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Cox, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Accord Construction, Inc., Docket No. 2007-1420-AIR-E on February 13, 2009 assessing $30,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Cox, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Catherine E. Harris, Docket No. 2007-1534-LII-E on February 13, 2009 assessing $2,337 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 Victor R. Galvan, Docket No. 2007-1584-LII-E on February 13, 2009 assessing $1,050 in administrative penalties with $210 deferred.

Information concerning any aspect of this order may be obtained by contacting Thomas 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 City of Alvarado, Docket No. 2007-1903-MLM-E on February 13, 2009 assessing $54,900 in administrative penalties with $54,900 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator, at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dr. Gobbler, Ltd., Docket No. 2007-1974-MLM-E on February 13, 2009 assessing $1,575 in administrative penalties with $315 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.

An agreed order was entered regarding Alumax Mill Products, Inc., Docket No. 2008-0380-AIR-E on February 13, 2009 assessing $46,350 in administrative penalties with $9,270 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 Sherman Dry Clean City, Inc. dba Dry Clean City, Docket No. 2008-0387-DCL-E on February 13, 2009 assessing $3,500 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator, at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding William Donald Smith dba Sunset Mobile Home Park, Docket No. 2008-0429-MWD-E on February 13, 2009 assessing $20,800 in administrative penalties with $4,160 deferred.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator, at (713) 767-3553, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Jeff Rowland, Docket No. 2008-0434-WR-E on February 13, 2009 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney, at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Joe F. Slater, Docket No. 2008-0634-LII-E on February 13, 2009 assessing $1,336 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Stephanie Frazee, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Roy Silva dba Roy's Chevron, Docket No. 2008-0657-PST-E on February 13, 2009 assessing $9,746 in administrative penalties with $1,949 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Lopez, Enforcement Coordinator, at (512) 239-1896, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Agustin Ramirez and Ruth Ramirez, Docket No. 2008-0694-MSW-E on February 13, 2009 assessing $1,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tammy Mitchell, Staff Attorney, at (512) 239-0736, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Premcor Refining Group Inc., Docket No. 2008-0742-AIR-E on February 13, 2009 assessing $46,213 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Bryan Elliott, Enforcement Coordinator, at (512) 239-6162, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WEHBE INVESTMENTS, INC. dba Cedar Park Food Store, Docket No. 2008-0765-PST-E on February 13, 2009 assessing $5,400 in administrative penalties with $1,080 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator, at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GM Trucks & Equipment, Docket No. 2008-0954-WQ-E on February 13, 2009 assessing $16,200 in administrative penalties with $3,240 deferred.

Information concerning any aspect of this order may be obtained by contacting Steve Villatoro, Enforcement Coordinator, at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dwight Ball dba Lazy Acres Mobile Home Park, Docket No. 2008-0961-PWS-E on February 13, 2009 assessing $1,293 in administrative penalties with $258 deferred.

Information concerning any aspect of this order may be obtained by contacting Christopher Keffer, Enforcement Coordinator, at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Formosa Plastics Corporation, Texas, Docket No. 2008-0973-AIR-E on February 13, 2009 assessing $8,814 in administrative penalties with $1,762 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 Arrowhead Shores Home Owners Association, Docket No. 2008-0982-MLM-E on February 13, 2009 assessing $1,050 in administrative penalties with $210 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator, at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DCP Midstream, LP, Docket No. 2008-1003-AIR-E on February 13, 2009 assessing $7,600 in administrative penalties with $1,520 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator, at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Delta County Municipal Utility District, Docket No. 2008-1028-PWS-E on February 13, 2009 assessing $2,210 in administrative penalties with $442 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator, at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hereford Highway Properties, Ltd., Docket No. 2008-1030-WQ-E on February 13, 2009 assessing $5,600 in administrative penalties with $1,120 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 3AR INC dba Quick Way, Docket No. 2008-1036-PST-E on February 13, 2009 assessing $24,962 in administrative penalties with $4,992 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 Kempenaar Real Estate, LTD. dba Still Meadow Dairy, Docket No. 2008-1041-AGR-E on February 13, 2009 assessing $8,085 in administrative penalties.

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 Maclovio Ramon, Docket No. 2008-1057-MSW-E on February 13, 2009 assessing $1,050 in administrative penalties with $210 deferred.

Information concerning any aspect of this order may be obtained by contacting John Shelton, Enforcement Coordinator, at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Richland Special Utility District, Docket No. 2008-1089-PWS-E on February 13, 2009 assessing $1,370 in administrative penalties with $274 deferred.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villarreal, Enforcement Coordinator, at (361) 825-3425, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Metroplex Quarry's, Inc., Docket No. 2008-1090-WQ-E on February 13, 2009 assessing $14,311 in administrative penalties with $2,862 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator, at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Michael L. O'Neill dba Frontier Park Marina, Docket No. 2008-1103-PWS-E on February 13, 2009 assessing $716 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney, at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SHREEDHAR CORPORATION INC. dba Phillips 66 Truck Stop, Docket No. 2008-1117-PST-E on February 13, 2009 assessing $29,155 in administrative penalties with $5,831 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Lopez, Enforcement Coordinator, at (512) 239-1896, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BASF Fina Petrochemicals Limited Partnership, Docket No. 2008-1147-AIR-E on February 13, 2009 assessing $36,050 in administrative penalties with $7,210 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 Enterprise Products Operating LLC, Docket No. 2008-1148-AIR-E on February 13, 2009 assessing $10,100 in administrative penalties.

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 Cargill Meat Solutions Corporation, Docket No. 2008-1149-AIR-E on February 13, 2009 assessing $19,294 in administrative penalties with $3,858 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 Bert & Heidi Velson DBA Mike Schouten Feedlot, Docket No. 2008-1178-AGR-E on February 13, 2009 assessing $850 in administrative penalties with $170 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 Rohm and Haas Texas Incorporated, Docket No. 2008-1182-AIR-E on February 13, 2009 assessing $9,575 in administrative penalties with $1,915 deferred.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator, at (713) 767-3553, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Petrochemicals LP, Docket No. 2008-1194-AIR-E on February 13, 2009 assessing $3,625 in administrative penalties with $725 deferred.

Information concerning any aspect of this order may be obtained by contacting Raymond Marlow, Enforcement Coordinator, at (409) 899-8785, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SWH Realty, Ltd., Docket No. 2008-1215-PST-E on February 13, 2009 assessing $8,450 in administrative penalties with $1,690 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator, at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Fort Worth, Docket No. 2008-1224-WQ-E on February 13, 2009 assessing $8,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Evette Alvarado, Enforcement Coordinator, at (512) 239-2573, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TexSand Distributors, LP, Docket No. 2008-1261-AIR-E on February 13, 2009 assessing $7,020 in administrative penalties with $1,404 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator, at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding K-YOBA, INC. dba Jedco 21, Docket No. 2008-1276-PST-E on February 13, 2009 assessing $7,922 in administrative penalties with $1,584 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator, at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding South Fort Worth RV Ranch, L.L.C., Docket No. 2008-1285-MWD-E on February 13, 2009 assessing $3,870 in administrative penalties with $774 deferred.

Information concerning any aspect of this order may be obtained by contacting Steve Villatoro, Enforcement Coordinator, at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mansfield Plumbing Products LLC, Docket No. 2008-1291-AIR-E on February 13, 2009 assessing $1,050 in administrative penalties with $210 deferred.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator, at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Saint-Gobain Ceramics & Plastics, Inc., Docket No. 2008-1313-AIR-E on February 13, 2009 assessing $2,475 in administrative penalties with $495 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 Earnhardt El Paso Motors, LP dba BMW of El Paso and Mazda of El Paso, Docket No. 2008-1319-PST-E on February 13, 2009 assessing $21,017 in administrative penalties with $4,203 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 UTLX Manufacturing, Inc, Docket No. 2008-1323-AIR-E on February 13, 2009 assessing $1,975 in administrative penalties with $395 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 Wyman-Gordon Forgings, Inc., Docket No. 2008-1351-AIR-E on February 13, 2009 assessing $3,725 in administrative penalties with $745 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 City of Kerrville, Docket No. 2008-1373-MWD-E on February 13, 2009 assessing $12,300 in administrative penalties with $2,460 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 Swea Gardens Estates Utility, Inc., Docket No. 2008-1375-PWS-E on February 13, 2009 assessing $210 in administrative penalties with $42 deferred.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator, at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding XTO Energy Inc., Docket No. 2008-1383-AIR-E on February 13, 2009 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Kirk Schoppe, Enforcement Coordinator, at (512) 239-0489, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Willow Park, Docket No. 2008-1386-MWD-E on February 13, 2009 assessing $2,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Steve Villatoro, Enforcement Coordinator, at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding METRO SUPPLIERS, INCORPORATED dba Austin Texaco, Docket No. 2008-1435-PST-E on February 13, 2009 assessing $7,500 in administrative penalties with $1,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator, at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding West Fraser, Inc. dba Henderson Lumber Mill, Docket No. 2008-1468-AIR-E on February 13, 2009 assessing $2,250 in administrative penalties with $450 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 El Paso Independent School District, Docket No. 2008-1491-AIR-E on February 13, 2009 assessing $2,440 in administrative penalties with $488 deferred.

Information concerning any aspect of this order may be obtained by contacting Kirk Schoppe, Enforcement Coordinator, at (512) 239-0489, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PROTON REALTY CO. dba C Store 104, Docket No. 2008-1523-PST-E on February 13, 2009 assessing $5,103 in administrative penalties with $1,020 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 The Goodyear Tire & Rubber Company, Docket No. 2008-1541-AIR-E on February 13, 2009 assessing $6,422 in administrative penalties with $1,284 deferred.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator, at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Wagner & Brown, Ltd., Docket No. 2008-1567-WR-E on February 13, 2009 assessing $575 in administrative penalties with $115 deferred.

Information concerning any aspect of this order may be obtained by contacting Evette Alvarado, Enforcement Coordinator, at (512) 239-2573, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Elkhart, Docket No. 2008-1639-MWD-E on February 13, 2009 assessing $8,720 in administrative penalties with $1,744 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 City Of Shiner, Docket No. 2008-1685-MWD-E on February 13, 2009 assessing $2,440 in administrative penalties with $488 deferred.

Information concerning any aspect of this order may be obtained by contacting Carlie Konkol, Enforcement Coordinator, at (361) 825-3422, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Endeavour, Inc. dba Endeavour Windy Hill Estates, Docket No. 2008-1506-WQ-E on February 13, 2009 assessing $700 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 ENCINO DEVELOPERS, INC., Docket No. 2008-1517-WQ-E on February 13, 2009 assessing $700 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 SR Denton 2181 LLC, Docket No. 2008-1797-WQ-E on February 13, 2009 assessing $700 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-200900855
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 25, 2009

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Notice of District Hearing

Notice issued February 18, 2009 through February 19, 2009

TCEQ Docket No. 2008-1461-DIS; The Texas Commission on Environmental Quality (TCEQ) will conduct a hearing on an application for conversion (Application) of Fort Bend County Fresh Water Supply District No. 2 (District) to a Municipal Utility District. The Application was filed with the TCEQ and included a resolution by the District's Board of Directors (Applicant). The TCEQ will conduct this hearing under the authority of Chapters 49 and 54 of the Texas Water Code, Title 30, Chapter 293 of the Texas Administrative Code (TAC) and the procedural rules of the TCEQ. The TCEQ will conduct the hearing at: 9:30 a.m., Wednesday, May 20, 2009, Building E, Room 201S, 12100 Park 35 Circle, Austin, Texas.

The District was created on January 23, 2001 under Article XVI, Section 59 of the Texas Constitution. Under this law the District had the authority to operate under Texas Water Code Chapters 49 and 53 as a fresh water supply district. The material filed with the Application states that conversion is necessary and the District desires to attract new development once drainage powers has been acquired.

HEARING. As required by the Texas Water Code Chapter §54.032 and Title 30 of the TAC §293.15, the above hearing regarding this application will be held no earlier than 14 days after notice of this hearing is published in a newspaper with general circulation in the county or counties in which the District is located. The purpose of this hearing is to provide all interested persons the opportunity to appear and offer testimony for or against the proposal contained in the resolution.

At the hearing, pursuant to the Texas Water Code §54.033 the Commission will determine if converting the current district into a municipal utility district that operates under Texas Water Code Chapter 54 would serve the best interest of the District and would be a benefit to the land

and property included in the District, or, if there is any opposition to the proposed conversion, the Commission may refer the application to the State Office of Administrative Hearings for a contested case hearing on the application.

TCEQ Docket No. 2008-1778-DIS; The TCEQ will conduct a hearing on an application for dissolution (Application) of Northeast Medina County Water Control and Improvement District No. 1 (District). The Application was filed with the TCEQ and includes a petition by the Board of Director of the District. The TCEQ will conduct this hearing under the authority of Chapters 51 and 49 of the Texas Water Code (TWC), Title 30, Chapter 293 of the TAC, and the procedural rules of the TCEQ. The TCEQ will conduct the hearing at: 9:30 a.m., Wednesday, May 6, 2009, Building E, Room 201S, 12100 Park 35 Circle, Austin, Texas.

The District was created by the County Commissioners, on December 8, 1986, and was organized under the terms and provisions of Article XVI, Section 59 of the Texas Constitution, and Chapters 49 and 51, Texas Water Code. The District contains 1454.716 acres of land within Medina County, Texas. Pursuant to 30 TAC §293.131, the petition filed with the Application states that dissolution is desirable and necessary because the District is not required for the development of land within its boundaries.

The petition filed with the Application states that the District: (1) has not performed any of the functions for which it was created for five consecutive years preceding the date of the Application, (2) is financially dormant, and (3) has no outstanding bonded indebtedness.

An affidavit from the State Comptroller of Public Accounts was included in the Application certifying that the District has no bonded indebtedness. The District has no known assets or liabilities.

Pursuant to TWC §49.327, if the request for dissolution is approved, the District's assets, if any, will escheat to the State of Texas and will be administered by the State Comptroller of Public Accounts and disposed of in the manner provided by Chapter 74 of the Texas Property Code.

CONTESTED CASE HEARING. The purpose of this hearing is to provide all interested persons the opportunity to appear and offer testimony for or against the proposal contained in the Application. At the hearing, pursuant to TWC §49.324, the TCEQ will determine if the District should be dissolved.

INFORMATION. For information regarding the date and time this application will be heard before the TCEQ, please submit written inquiries to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC-103, at the same address. For additional information, individual members of the public may contact the Districts Review Team at (512) 239-4691. General information regarding TCEQ is available on the internet at www.tceq.state.tx.us.

Si desea información en Español, puede llamar al 1-512-239-0200.

Persons with disabilities who plan to attend this hearing and who need special accommodations at the hearing should call the TCEQ Office of Public Assistance at 800-687-4040 or 800-RELAY-TX (TDD), at least one week prior to the hearing.

TRD-200900854
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 25, 2009

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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 **April 6, 2009**. 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.

Copies 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) 239-400 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 78711-087 and must be **received by 5:00 p.m. on April 6, 2009**. Comments may also be sent by facsimile machine to the attorney at (512) 239-434. 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: Angelina County Water Control and Improvement District Number 3; DOCKET NUMBER: 2006-2239-MWD-E; TCEQ ID NUMBER: RN102739422; LOCATION: 10,450 feet north of the intersection of State Highway 59 and Farm-to-Market Road 2021 and 22,700 feet east of the intersection of State Highway 59 and Farm-to-Market Road 2021, Angelina County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: TWC, §26.121(a), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number 14201001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, by failing to comply with permit effluent limits; PENALTY: $4,410; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(2) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2006-1028-IHW-E; TCEQ ID NUMBER: RN100209857; LOCATION: 2001 Gulfway Drive, Port Arthur, Jefferson County; TYPE OF FACILITY: organic chemical manufacturing facility; RULES VIOLATED: 30 TAC §335.6(b) and (c), by failing to update the Notice of Registration; 30 TAC §335.2(b) and 40 Code of Federal Regulations (CFR) §262.20(b), by failing to dispose of hazardous wastes at an authorized facility; 30 TAC §335.69(a) and 40 CFR §262.34(a), by failing to prevent exceedance of the hazardous waste accumulation time of 90 days; and 30 TAC §335.69(d)(1) and §335.112(a)(8) and 40 CFR §262.34(a)(1)(i) and §265.173, by failing to keep a container of hazardous waste closed; PENALTY: $21,837; STAFF ATTORNEY: Benjamin Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Beaumont Regional

Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: City Market Group of Sun City, L.P. dba City Market; DOCKET NUMBER: 2008-0369-MLM-E; TCEQ ID NUMBER: RN101498913; LOCATION: 440 Del Webb Boulevard, Suite 200, Georgetown, Williamson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(1)(A) and TWC, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring); 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring); 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedure for the UST system; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube according to the UST registration and self-certification form; 30 TAC §115.222(6) and Texas Health and Safety Code (THSC), §382.085(b), by failing to ensure that each vapor balance system vent line is equipped with a pressure-vacuum relief valve set to open at a pressure of no more than eight ounces per square inch; and 30 TAC §213.5(d)(1), by failing to provide a functioning continuous monitoring leak detection system that is capable of immediately alerting of possible leakages; PENALTY: $15,740; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(4) COMPANY: Fatima Family Village, Inc. dba Fatima Family Village Mobile Home Park; DOCKET NUMBER: 2006-1777-PWS-E; TCEQ ID NUMBER: RN101236685; LOCATION: 1003 Gulf Bank Road, Houston, Harris County; TYPE OF FACILITY: mobile home park with a public water supply system; RULES VIOLATED: 30 TAC §290.41(c)(1)(F), by failing to provide a sanitary control easement or an approved exception to the easement requirement that covers the land within 150 feet of the well; 30 TAC §290.41(c)(3)(B), by failing to provide a well casing that extends a minimum of 18 inches above the elevation of the finished floor of the pump room or natural ground surface; 30 TAC §290.46(m)(4), by failing to maintain all distribution system lines and related appurtenances in a watertight condition; 30 TAC §290.45(b)(1)(E)(i) and THSC, §341.0315(c), by failing to provide a minimum well capacity of 1.0 gallon per minute per connection; and 30 TAC §21.4 and §290.51 and TWC, §5.702, by failing to pay all consolidated water quality and public health service annual and late fees for Fiscal Years 2003 - 2006 in a timely manner for Financial Administration Account Numbers 23004447 and 91010746; PENALTY: $417; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(5) COMPANY: Gene's Go Truck Stop, Inc.; DOCKET NUMBER: 2008-1318-PST-E; TCEQ ID NUMBER: RN102247251; LOCATION: 2419 North Main Street, Junction, Kimble County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued TCEQ delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; and 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; PENALTY: $2,500; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(6) COMPANY: Lozano, Ltd. dba Lozano Store; DOCKET NUMBER: 2008-1436-PST-E; TCEQ ID NUMBER: RN102450343; LOCATION: United States Highway 83 and Farm-to-Market Road 3169 East, San Ygnacio, Zapata County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued TCEQ delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as motor fuel; 30 TAC §334.50(b)(1)(A), (d)(1)(B)(ii), (iii)(I) and TWC, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the month plus 130 gallons, and by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the UST identification number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube according to the UST registration and self-certification form; PENALTY: $7,650; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Laredo Regional Office, 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(7) COMPANY: N T & M, Inc. dba Fine Cleaners; DOCKET NUMBER: 2006-1334-DCL-E; TCEQ ID NUMBER: RN104161476; LOCATION: 11111 West Little York Road, Houston, Harris County; TYPE OF FACILITY: dry cleaning facility; RULES VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form to TCEQ for a dry cleaning and/or drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Dinniah Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(8) COMPANY: Vinklarek Underground Utilities Company; DOCKET NUMBER: 2007-1871-PST-E; TCEQ ID NUMBER: RN101493740; LOCATION: Texas Highway 71 East near Old Bastrop Road, Del Valle, Travis County; TYPE OF FACILITY: real estate where four USTs were installed; RULES VIOLATED: 30 TAC §334.7(d)(3), by failing to provide amended registration regarding USTs within 30 days from the date of occurrence of the change or addition; 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, an existing UST system 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 registration fees for TCEQ Account Number 0024377U for the Fiscal Years of 1991 - 2006; PENALTY: $3,675; STAFF ATTORNEY: Benjamin Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

TRD-200900820
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 24, 2009

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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 **April 6, 2009**. 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.

Copies 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 April 6, 2009**. 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: Alfredo C. Cruz; DOCKET NUMBER: 2006-1875-LII-E; TCEQ ID NUMBER: RN103838520; LOCATION: 12014 Dogwood Mountain Road, Houston, Harris County; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §30.5(a) and §344.4(a), TWC, §37.003(a) and Texas Occupations Code, § 1903.251, by failing to hold an irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing, or servicing an irrigation system; PENALTY: $625; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(2) COMPANY: Don Burroughs; DOCKET NUMBER: 2007-0805-MSW-E; TCEQ ID NUMBER: RN104574603; LOCATION: 7400 Block of Holmes Road, Nederland, Jefferson County; TYPE OF FACILITY: unauthorized disposal facility; RULES VIOLATED: 30 TAC §330.15(c), by failing to dispose of municipal solid waste at an authorized facility; PENALTY: $1,050; STAFF ATTORNEY: Barham Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(3) COMPANY: Frank E. Daniels; DOCKET NUMBER: 2008-0597-MLM-E; TCEQ ID NUMBER: RN105168314; LOCATION: 1407 Novella Avenue, Adkins, Bexar County; TYPE OF FACILITY: animal feeding operation; RULES VIOLATED: 30 TAC §101.4 and §321.47(c)(2), by failing to prevent a nuisance condition; PENALTY: $1,050; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: Gilbert Espinosa; DOCKET NUMBER: 2008-0354-OSS-E; TCEQ ID NUMBER: RN105107171; LOCATION: 819 Unit B Williams, Eden, Concho County; TYPE OF FACILITY: residential property; RULES VIOLATED: 30 TAC §285.3(i) and TWC, §26.121, by failing to prevent the unauthorized discharge of waste and the prohibited use of a cesspool; PENALTY: $627; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(5) COMPANY: Gregory W. Boyd; DOCKET NUMBER: 2008-0135-LII-E; TCEQ ID NUMBER: RN104946199; LOCATION: 6717 Harry Road, San Antonio, Bexar County; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §334.94(b), by failing to include the required statement: "Irrigation in Texas is regulated by the Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087," on all written contracts and bills to install irrigation systems; 30 TAC §334.95(a), by failing to design an irrigation system, or portion thereof, so as to require the use of any component part in a way which does not exceed the manufacturer's performance limitations for the part, unless the use is necessary to accommodate special site conditions; PENALTY: $207; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(6) COMPANY: Industrial Anchors, Inc.; DOCKET NUMBER: 2008-0470-WQ-E; TCEQ ID NUMBER: RN102809332; LOCATION: 7225 Frint Drive, Beaumont, Jefferson County; TYPE OF FACILITY: industrial steel manufacturing business; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities under a Texas Pollutant Discharge Elimination System Multi-sector general permit; PENALTY: $2,000; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(7) COMPANY: Mohammad A. Swati; DOCKET NUMBER: 2008-0724-PST-E; TCEQ ID NUMBER: RN101773232; LOCATION: 1107 Cordrey Street, Orange, Orange County; TYPE OF FACILITY: property that previously contained two inactive underground storage tanks (USTs); RULES VIOLATED: 30 TAC §334.7(d)(3), by failing to provide an amended UST registration to the TCEQ for any change or additional information regarding USTs within 30 days from the date of occurrence of the change; PENALTY: $1,100; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(8) COMPANY: Price Construction, Ltd.; DOCKET NUMBER: 2007-0876-AIR-E; TCEQ ID NUMBER: RN102743747; LOCATION: 2538 Broadbent Avenue, Del Rio, Val Verde County; TYPE

OF FACILITY: portable asphalt plant; RULES VIOLATED: 30 TAC §101.201(e) and Texas Health and Safety Code (THSC), §382.085(b), by failing to notify the TCEQ of an excess opacity event; and 30 TAC §111.111(a)(8)(A) and THSC, §382.085(b), by allowing excess opacity emissions; PENALTY: $5,145; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Laredo Regional Office, 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(9) COMPANY: Quick & Convenience Pro-Victoria 1, L.L.C. dba Midway Truck Stop; DOCKET NUMBER: 2007-0976-PST-E; TCEQ ID NUMBER: RN101261535; LOCATION: 16262 United States Highway 59 North, Victoria, Victoria County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A) and (d)(1)(B)(ii), by failing to monitor USTs for releases at a frequency of at least once per month (not to exceed 35 days between monitoring), and by failing to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the month plus 130 gallons; 30 TAC §334.72(2), by failing to report a suspected release to the agency within 24 hours of discovery; 30 TAC §334.74, by failing to investigate a suspected release within 30 days of the discovery; 30 TAC §334.10(b), by failing to have the required UST records maintained, readily accessible, and available for inspection upon request by a representative of the TCEQ; 30 TAC §334.7(d)(3), by failing to provide written notice of any change or additional information to the executive director within 30 days from the date of the occurrence of the change or addition, or within 30 days from the date on which the owner or operator first became aware of the change or addition; and 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the UST identification number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube according to the UST registration and self-certification form; PENALTY: $31,620; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(10) COMPANY: Raul Perez; DOCKET NUMBER: 2008-1356-MSW-E; TCEQ ID NUMBER: RN105530968; LOCATION: intersection of 19th Street and Henrietta Street, Kingsville, Kleberg County (site) and 107 East County Road 2155, Kingsville, Kleberg County (fuel station); TYPE OF FACILITY: unauthorized landfill (site) and trucking fuel station (fuel station); RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; and 30 TAC §205.6, TWC, §5.702 and §26.0291, and TCEQ Agreed Order Docket Number 2004-0712-MLM-E, Ordering Provision Number 1, by failing to pay outstanding fees associated to aboveground storage tank fees and the administrative penalty for Agreed Order Docket Number 2004-0712-MLM-E for TCEQ Account Numbers 61966A and 23601766; PENALTY: $15,000; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(11) COMPANY: Red Rock Water Supply Corporation; DOCKET NUMBER: 2008-0836-PWS-E; TCEQ ID NUMBER: RN101451193; LOCATION: 1718 Bridle Bit Road, Flower Mound, Denton County; TYPE OF FACILITY: public water supply facility; RULES VIOLATED: 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the Consumer Confidence Report (CCR) to each bill paying customer by July 1st of each year and by failing to submit a copy of the annual CCR and certification that the CCR has been distributed to the customers of the water system and that the information in the CCR is correct and consistent with compliance monitoring data to the TCEQ by July 1st of each year; and 30 TAC §290.51(a)(6) and TWC, §5.702, by failing to pay all annual and late Public Health Service fees for TCEQ Financial Administration Account Number 90610113 for Fiscal Years 2002 - 2008 to the TCEQ in a timely manner; PENALTY: $624; STAFF ATTORNEY: Stephanie J. Frazee; Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(12) COMPANY: Richard Green dba R & B Homes; DOCKET NUMBER: 2008-0555-WQ-E; TCEQ ID NUMBER: RN105119838; LOCATION: Farm-to-Market 730 at the intersection with Sandstone Lane, Weatherford, Parker County; TYPE OF FACILITY: single-family residential construction site; RULES 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 to waters in the State and to develop and implement a storm water pollution prevention plan; PENALTY: $2,100; STAFF ATTORNEY: Xavier Guerra, Litigation Division; MC R-13, (210) 403-4016; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Sakina, Inc. dba Express Lane 26; DOCKET NUMBER: 2006-1770-PST-E; TCEQ ID NUMBER: RN103052320; LOCATION: 2603 County Road 403, Pearland, Brazoria County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(a)(1)(A), (b)(1)(A), (2)(A)(i), and (d)(1)(B)(ii) and TWC, §26.3475(a) and (c)(1), by failing to have a release detection method capable of detecting a release from any portion of the UST system which contained regulated substances; and 30 TAC §334.49(c)(4) and TWC, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection within three to six months after installation and at a subsequent frequency of at least once every three years; PENALTY: $5,100; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(14) COMPANY: Silvester and Martha Martinez; DOCKET NUMBER: 2008-0537-MSW-E; TCEQ ID NUMBER: RN104436357; LOCATION: 10123 Deer Creek Road, Carlsbad, Tom Green County; TYPE OF FACILITY: real property; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the disposal of municipal solid waste at an unauthorized solid waste facility; PENALTY: $1,050; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (325) 655-9479.

TRD-200900819
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 24, 2009

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Notice of Opportunity to Comment on Shutdown/Default Order of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Order (S/DO). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998,

cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order 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. In accordance with 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 **April 6, 2009**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/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 S/DO is not required to be published if those changes are made in response to written comments.

A copy of the proposed S/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 S/DO shall be sent to the attorney designated for the S/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 April 6, 2009**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DO and/or the comment procedure at the listed phone numbers; however, comments on the S/DO shall be submitted to the commission in **writing**.

(1) COMPANY: Ari Ari Ltd. dba Desoto Beverages; DOCKET NUMBER: 2008-0445-PST-E; TCEQ ID NUMBER: RN100586189; LOCATION: 901 North I-35 East, Desoto, Dallas County; TYPE OF FACILITY: beverage store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the underground storage system; 30 TAC §334.50(d)(1)(B)(ii) and (iii)(I) and TWC, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flow-through for the month plus 130 gallons; by failing to provide release detection by failing to conduct inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each day; 30 TAC §115.245(2), by failing to verify proper operation of the Stage II vapor recovery system at least once every 12 months; and 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs within 30 days of the occurrence of the change or addition; PENALTY: $19,471; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5486; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200900818

Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 24, 2009

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Notice of Opportunity to Request a Public Meeting for a New Municipal Solid Waste Transfer Station Registration Application

February 17, 2009 through February 19, 2009

NOTICE OF OPPORTUNITY TO REQUEST A PUBLIC MEETING FOR A NEW MUNICIPAL SOLID WASTE TRANSFER STATION REGISTRATION APPLICATION NO. 40237

APPLICATION. Saguaro Corporation, P.O. Box 780710, Wichita, Kansas 67278, has applied to the Texas Commission on Environmental Quality (TCEQ) for proposed Registration (No. 40237), to construct and operate a Type V municipal solid waste transfer station. The proposed facility, El Paso C&D Recycling Plant will be located 1290 feet South of Farm-to-Market Road 659/Pelicano Drive and 900 feet West of Aviation Way, El Paso in El Paso County. This facility is requesting authorization to transfer and recycle municipal solid waste which includes concrete and mixed rubble, wood, drywall, asphalt roofing, metals, brick, structural clay products, masonry, plastics, and glass. The registration application is available for viewing and copying at the TCEQ Region 6 Office, 401 E. Franklin Ave., Ste. 560, El Paso, TX 79901-1212 and may be viewed online at http://www.source-environmental.com/applications/default.htm.

PUBLIC COMMENT/PUBLIC MEETING. Written public comments or written requests for a public meeting must be submitted to the Office of Chief Clerk at the address included in the information section below. Comments may also be received if a public meeting is held on the facility. A public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the development is to be located, or if there is a substantial public interest in the proposed development. The purpose of the public meeting is for the public to provide input for consideration by the commission, and for the applicant and the commission staff to provide information to the public. A public meeting is not a contested case hearing. The executive director will review and consider public comments and written requests for a public meeting submitted prior to the notice of final determination. The executive director is not required to file a response to comments.

EXECUTIVE DIRECTOR ACTION. The executive director shall, after review of an application for registration, determine if the application will be approved or denied in whole or in part. If the executive director acts on an application, the chief clerk shall mail or otherwise transmit notice of the action and an explanation of the opportunity to file a motion to reconsider the executive director's decision. The chief clerk shall mail this notice to the owner and operator, the public interest counsel, to adjacent landowners as shown on the required land ownership map and landowners list, and to other persons who timely filed public comment in response to public notice. Not all persons on the mailing list for this notice will receive the notice letter from the Office of the Chief Clerk.

INFORMATION. Written public comments or requests to be placed on the permanent mailing list for this application should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-30887 or electronically submitted to http://www5.tceq.state.tx.us/rules/ecomments/. Individual members of the general public may contact the Office of Public Assistance at

1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from Saguaro Corporation at the address stated above or by calling Mr. Sean Gillespie, President at (316) 259-6907.

NOTICE OF OPPORTUNITY TO REQUEST A PUBLIC MEETING FOR A NEW MUNICIPAL SOLID WASTE TRANSFER STATION - REGISTRATION APPLICATION NO. 40241

APPLICATION. Mr. Otley L. Smith, III, 2613 Skyway Drive, Grand Prairie, Texas 75052, has applied to the Texas Commission on Environmental Quality (TCEQ) for proposed Registration No. 40241, to construct and operate a Type V municipal solid waste transfer station. The proposed facility, Oncore Technology, LLC will be located at 2613 Skyway, Grand Prairie, in the Airport Industrial Park, near the intersection of State Highway 360 and Interstate Highway 20, in Tarrant County. This facility is requesting authorization to collect, store, treat, and transfer medical waste from health care-related facilities which includes animal waste, bulk blood, bulk human body fluids, sharps, and other health care-related items that have come into contact with body fluids or blood. The registration application is available for viewing and copying at the TCEQ Region 4 Office, 2309 Gravel Dr., Fort Worth, 76118-6951 and may be viewed online at: http://www.oncoreus.com/registration.html.

PUBLIC COMMENT/PUBLIC MEETING. Written public comments or written requests for a public meeting must be submitted to the Office of Chief Clerk at the address included in the information section below. Comments may also be received if a public meeting is held on the facility. A public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the development is to be located, or if there is a substantial public interest in the proposed development. The purpose of the public meeting is for the public to provide input for consideration by the commission, and for the applicant and the commission staff to provide information to the public. A public meeting is not a contested case hearing. The executive director will review and consider public comments and written requests for a public meeting submitted prior to the notice of final determination. The executive director is not required to file a response to comments.

EXECUTIVE DIRECTOR ACTION. The executive director shall, after review of an application for registration, determine if the application will be approved or denied in whole or in part. If the executive director acts on an application, the chief clerk shall mail or otherwise transmit notice of the action and an explanation of the opportunity to file a motion to reconsider the executive director's decision. The chief clerk shall mail this notice to the owner and operator, the public interest counsel, to adjacent landowners as shown on the required land ownership map and landowners list, and to other persons who timely filed public comment in response to public notice. Not all persons on the mailing list for this notice will receive the notice letter from the Office of the Chief Clerk.

INFORMATION. Written public comments or requests to be placed on the permanent mailing list for this application should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically submitted to http://www5.tceq.state.tx.us/rules/ecomments/. Individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from Oncore Technology, LLC at the address stated above or by calling Mr. Otley L. Smith, III, President at (972) 786-7060.

Further information may also be obtained from Abilene Environmental Landfill Inc. at the address stated above or by calling Mr. James Lawrence, P.G., SCS Engineers at (817) 571-2288.

TRD-200900852
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 25, 2009

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Notice of Water Quality Applications

The following notices were issued during the period of February 9, 2009 through February 19, 2009.

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

NRG TEXAS POWER LLC which operates the Cedar Bayou Electric Generating Station, has applied for a renewal of TPDES Permit No. WQ0001241000, which authorizes the discharge of once-through cooling water, utility wastewater, storm water and previously monitored effluent (PME) at a daily average flow not to exceed 1,616,000,000 gallons per day via Outfall 001; metal cleaning wastes/ash pond wastewater, storm water, PME from Outfall 201, and wastewater from mariculture lab at a daily average flow not to exceed 281,000 gallons per day via Outfall 101; treated domestic wastewater from the mariculture laboratory facility on a flow variable basis via Outfall 201; low volume waste sources on a flow variable basis via Outfalls 002 and 004; low volume waste sources and storm water on a flow variable basis via Outfall 003; and treated domestic wastewater from the power plant on a flow variable basis via Outfall 005. The facility is located on the east bank of Cedar Bayou approximately one and one-half miles south of the intersection of State Highway 146 and Farm-to-Market Road 565 in the City of Baytown, Chambers County, Texas.

CITY OF STEPHENVILLE has applied for a renewal of TPDES Permit No. WQ0010290001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,000,000 gallons per day. The facility is located approximately 6,300 feet southeast of the intersection of U.S. Highway 377 and Farm-to-Market Road 914 in Erath County, Texas.

TEXAS PARKS AND WILDLIFE DEPARTMENT has applied for a renewal of TPDES Permit No. WQ0011234001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility is located approximately 0.4 mile east of Farm-to-Market Road 89 on Park Road 32 and approximately 4 miles southwest of the intersection of Farm-to-Market Road 89 and Farm-to-Market Road 613 in Taylor County, Texas

THE CITY OF RANGER has applied for a renewal of TPDES Permit No. WQ0011557003, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 550,000 gallons per day. The facility is located on the northeast corner of Garrett Street and Lackland Avenue in the City of Ranger, approximately 2,500 feet north-northwest of the intersection of U.S. Highway 80 and Farm-to-Market Road 571 in Eastland County, Texas.

CITY OF O'BRIEN has applied for a renewal of TPDES Permit No. WQ0013616001 which authorizes the discharge of treated domestic

wastewater at a daily average flow not to exceed 20,000 gallons per day. The current permit also authorizes the disposal of treated domestic wastewater via irrigation of 7.1 acres of non-public access agricultural land. The facility is located approximately 0.8 mile north of the intersection of State Highway 6 and Farm-to-Market Road 2229, north of the City of O'Brien on the west side of State Highway 6 in Haskell County, Texas. The irrigation site is located on land adjacent to the wastewater treatment facilities.

SOUTHWEST MILAM WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. WQ0014524001 which authorizes the discharge of filter backwash water at a daily average flow not to exceed 60,000 gallons per day. The facility is located on the west side of Milam County Road 334 approximately 3.5 miles south of U.S. Highway 79, 4 miles east of Rockdale in Milam County, Texas.

ALLOY POLYMERS TEXAS LP which operates Alloy Polymers WWTP, a plastics compounding plant, has applied for a renewal of TPDES Permit No. WQ0002207000, which authorizes the discharge of storm water and previously monitored effluent on a flow variable basis via Outfall 001; treated contact cooling water, boiler blowdown, cooling tower blowdown, process wash water, and separately treated domestic wastewater at a daily average flow not to exceed 180,000 gallons per day via internal Outfall 101; and treated domestic wastewater on an intermittent and flow variable basis via internal Outfall 201. The facility is located south of the intersection of State Highway 287 and Farm-to-Market Road 2160, approximately three miles north of the City of Crockett, Houston County, Texas.

CITY OF ALBANY has applied for a renewal of TPDES Permit No. WQ0010035001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 290,000 gallons per day. The facility is located approximately one mile southeast of the intersection of U.S. Highways 180 and 283; approximately 3200 feet east of U.S. Highway 283 in Shackelford County, Texas.

CITY OF NEEDVILLE has applied for a renewal of TPDES Permit No. WQ10343001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 400,000 gallons per day. The facility is located at 14206 Church Street south of Buffalo Creek and south of the City of Needville, approximately 0.4 mile east and 0.8 mile south of the intersection of State Highway 36 and Farm-to-Market Road 1236 in Fort Bend County, Texas.

THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) has initiated a minor modification WQ0010397005 of the Texas Pollutant Discharge Elimination System (TPDES) permit issued to the Brownsville Public Utility Board, 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 10,000,000 gallons per day. The facility is located located adjacent to and east of Robindale Road approximately half mile north of the intersection of Robindale Road and Farm-to-Market Road 802 in Cameron County, Texas.

THE CITY OF PLAINVIEW has applied for a renewal of TPDES Permit No. WQ0010537001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,300,000 gallons per day. The facility is located adjacent to Running Water Draw, approximately 2 miles southeast of the intersection of U.S. Highway 70 and State Highway Loop 445 (U.S. Highway-Business Route 87) in Hale County, Texas.

CITY OF WEST has applied for a renewal of TPDES Permit No. WQ0010544001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 450,000 gallons per day. The current permit also authorizes distribution and marketing of sewage sludge. The facility is located approximately 2,000 feet northeast of the intersection of Farm-to-Market Road 2311 and Farm-to-Market Road 2114 in the City of West in McLennan County, Texas.

CITY OF ABERNATHY has applied for a renewal of Permit No. WQ0010774001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 380,000 gallons per day via surface irrigation of 180 acres of non-public access agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located northeast of the City of Abernathy, approximately 1.5 miles north and 0.2 mile east of the intersection of Interstate Highway 27 and Farm-to-Market Road 2060 in Hale County, Texas.

LAKE CONROE HILLS MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011569001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 320,000 gallons per day. The facility is located near the shore of Lake Conroe at the intersection of Shoreline Drive and Lake Breeze Lane, 0.5 mile south of Farm-to-Market Road 1097 and approximately five miles west of the City of Willis in Montgomery County, Texas.

TEXAS PARKS AND WILDLIFE DEPARTMENT has applied for a renewal of Permit No. WQ0011704001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 5,000 gallons per day via surface irrigation of 3.6 acres of non-public access pastureland. This permit will not authorize a discharge of pollutants into waters in the State. TCEQ received this application on October 29, 2008. The wastewater treatment facility and disposal site are located adjacent to Park Road 33 and about 0.5 mile due south of the boat ramps which are at the east terminus of Park Road 33 in Possum Kingdom State Park in Palo Pinto County, Texas.

PLANTATION MUNICIPAL UTILITY DISTRICT has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0011971001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 440,000 gallons per day. The applicant has requested that the 550,000 gallons per day final phase be deleted from the permit. The facility is located at 802 Tara Plantation Drive on the north bank of Rabbs Bayou, approximately 4,000 feet north of Booth-Richmond Road (Farm-to-Market Road 2759) and approximately 3,250 feet east of Crabb River Road in Fort Bend County, Texas.

TEXAS AMERICAN WATER COMPANY has applied for a renewal of TPDES Permit No. WQ0014039001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 92,400 gallons per day. The facility is located approximately 1,300 feet south of County Road 424 and approximately 3,600 feet west of Mustang Road in Brazoria County, Texas.

AQUA DEVELOPMENT INC has applied for a renewal of TPDES Permit No. WQ0014147001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 220,000 gallons per day. The facility is located approximately 4,200 feet west of Farm-to-Market Road 3210 and approximately 2,900 feet west of the Brazos River in Hood County, Texas.

ACTION MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0014212001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 487,000 gallons per day. The applicant has requested that the 820,000 gallons per day final phase be deleted from the permit. The facility is located on the north bank of the Brazos River approximately 13.5 miles downstream of the De Cordova Bend Reservoir Dam and

approximately 0.5 mile due west of the Pecan Plantation Airport in Hood County, Texas.

CITY OF MCGREGOR has applied for a renewal of TPDES Permit No. WQ0010219002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,100,000 gallons per day. The facility is located adjacent to and west of State Highway 317, approximately 2 miles south of the intersection of U.S. Highway 84 and State Highway 317 in McLennan 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-200900851
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 25, 2009

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Texas Facilities Commission

Request for Proposals #303-9-10104-B

The Texas Facilities Commission (TFC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), announces the issuance of Request for Proposals (RFP) #303-9-10104-B. TFC seeks a five or ten year lease of approximately 4,948 square feet of office space in Southwest Tarrant County, Texas.

The deadline for questions is March 13, 2009 and the deadline for proposals is March 20, 2009 at 3:00 p.m. The award date is April 15, 2009. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=81115*.

TRD-200900719
Kay Molina
General Counsel
Texas Facilities Commission
Filed: February 19, 2009

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Request for Proposals #303-9-11262

The Texas Facilities Commission (TFC), on behalf of the Department of Public Safety (DPS), announces the issuance of Request for Proposals (RFP) #303-9-11262. TFC seeks a five (5) and a ten (10) year lease of approximately 4,998 square feet of office space in Laredo, Texas.

The deadline for questions is March 18, 2009 and the deadline for proposals is March 31, 2009 at 3:00 p.m. The award date is April 15, 2009. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=81138*.

TRD-200900718
Kay Molina
General Counsel
Texas Facilities Commission
Filed: February 19, 2009

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General Land Office

Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that Jerry Patterson, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by George Rubalcaba, Licensed State Land Surveyor, conducted October 10, 2008, locating the following shoreline boundary:

Survey in Galveston County, a portion of the Texas Gulf Coast shoreline including the shoreline of the Michael B. Menard Survey, A-628 and the Edward Hall & Levi Jones Survey, A-121, along the Galveston Seawall from 10th Street to 61st Street.

For a copy of this survey or more information on this matter, contact Bill O'Hara Director of the Survey Division, Texas General Land Office by phone at (512) 463-5223, email Bill.O'Hara@glo.state.tx.us, or fax (512) 463-5098.

TRD-200900770
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: February 23, 2009

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Office of the Governor

Request for Grant Applications for the Drug Court Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that support eligible drug court programs during the state fiscal year 2010 grant cycle.

Purpose: The purpose of the Drug Court Program is to support drug courts as defined in Chapter 469 of the Texas Health and Safety Code, which incorporate the following ten essential characteristics:

(1) The integration of alcohol and other drug treatment services in the processing of cases in the judicial system;

(2) The use of a non-adversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants;

(3) Early identification and prompt placement of eligible participants in the program;

(4) Access to a continuum of alcohol, drug, and other related treatment and rehabilitative services;

(5) Monitoring of abstinence through weekly alcohol and other drug testing;

(6) A coordinated strategy to govern program responses to participants' compliance;

(7) Ongoing judicial interaction with program participants;

(8) Monitoring and evaluation of program goals and effectiveness;

(9) Continuing interdisciplinary education to promote effective program planning, implementation, and operations; and

(10) Development of partnerships with public agencies and community organizations.

Available Funding: Article 102.0178 of the Texas Code of Criminal Procedure establishes state funding for this purpose and designates CJD as the administering agency. Funds received under this article are deposited to the credit of the drug court account in the general revenue fund.

Standards: Grantees must comply with the standards applicable to this funding source cited in the Texas Administrative Code (1 TAC Chapter 3), and all statutes, requirements, and guidelines applicable to this funding.

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) proselytizing or sectarian worship;

(2) lobbying;

(3) vehicles or equipment for government agencies that are for general agency use;

(4) weapons, ammunition, explosives or military vehicles;

(5) admission fees or tickets to any amusement park, recreational activity or sporting event;

(6) promotional gifts;

(7) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement and/or social activities in any way;

(8) membership dues for individuals;

(9) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state or local funds (e.g., supplanting);

(10) fundraising;

(11) construction;

(12) medical services; and

(13) transportation, lodging, per diem or any related costs for participants, who attend training developed or coordinated using grant funds.

Eligible Applicants: Counties and Municipalities.

Requirements:

(1) The presiding judge of a drug court funded under this RFA must be an active judge holding elective office, master or magistrate.

(2) Pursuant to Texas Health and Safety Code §469.006, counties with populations of more than 200,000 are required to establish a drug court. Applicants from these counties must apply for federal and state funds available to pay the costs of the program.

(3) Applicants may apply to use state drug court funds to provide a portion of the required cash match for federal drug court grants.

Project Period: Grant-funded projects must begin on or after September 1, 2009, and expire on or before August 31, 2010.

Application Process: Applicants must access CJD's grant management website at https://cjdonline.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to mandated drug courts under Texas Health and Safety Code, §469.006.

Closing Date for Receipt of Applications: All applications must be certified via CJD's eGrants website on or before May 1, 2009.

Selection Process: Applications will be reviewed by CJD staff members or a group selected by the executive director of CJD. CJD will make all final funding decisions based on eligibility, reasonableness of the project, availability of funding, and cost-effectiveness.

Contact Person: If additional information is needed, contact Raoul Rivera at raoul.rivera@governor.state.tx.us or at (512) 463-1919.

TRD-200900849
Kevin Green
Assistant General Counsel
Office of the Governor
Filed: February 25, 2009

♦ ♦ ♦

Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on March 30, 2009, at 10:00 a.m. to receive public comment on the proposed interim per diem Medicaid reimbursement rate for large, state-operated Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) operated by the Texas Department of Aging and Disability Services (DADS).

The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC), §355.105(g), which requires public notice and hearings on proposed Medicaid reimbursements before such rates are approved by HHSC. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Josie Wheatfall by calling (512) 491-1445, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. As the single state agency for the state Medicaid program, HHSC proposes the following interim reimbursement rates for large state-operated ICF/MR facilities operated by DADS:

Large State-Operated ICF/MR Facilities - Medicaid Only clients

Proposed interim daily rate: $409.98

Large State-Operated ICF/MR Facilities - Dual-eligible Medicaid/Medicare clients

Proposed interim daily rate: $392.41

HHSC is proposing these interim rates so that adequate funds will be available to serve clients in these facilities. The proposed interim rates account for actual and projected increases in costs to operate these facilities. The proposed interim rates will be effective September 1, 2008, if approved.

Methodology and Justification. The proposed rates were determined in accordance with the rate setting methodologies codified at 1 TAC §355.456(e), relating to Reimbursement Methodology.

Briefing Package. A briefing package describing the proposed payment rates will be available on March 16, 2009. Interested parties may obtain a copy of the briefing package prior to the hearing by contact-

ing Josie Wheatfall by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at Josie.Wheatfall@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Josie Wheatfall, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Josie Wheatfall at (512) 491-1445; or by e-mail to Josie.Wheatfall@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Josie Wheatfall, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-200900766
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: February 20, 2009

♦ ♦ ♦

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
Wichita Falls	Jerry K. Myers M.D. Associated dba Breast Center of Texoma	L06221	Wichita Falls	00	02/02/09

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Allen	Presbyterian Hospital of Allen	L05765	Allen	16	02/11/09
Alvin	Solutia Inc.	L00219	Alvin	85	02/04/09
Amarillo	Northwestern Texas Healthcare System Inc. dba Northwestern Texas Hospital	L02054	Amarillo	83	02/13/09
Austin	Cellzdirect Inc.	L05866	Austin	02	01/30/09
Austin	Daughters of Charity Health Services of Austin dba Dell Children's Medical Center of Central Texas.	L06065	Austin	09	01/23/09
Austin	Live Oak Cardiology P.A.	L06198	Austin	01	02/11/09
Austin	ARA Imaging	L05862	Austin	42	02/11/09
Austin	Austin Radiological Association	L00545	Austin	152	02/11/09
Austin	St. David's Healthcare Partnership L.P. L.L.P.	L00740	Austin	103	02/11/09
Beaumont	Christus Health Southeast Texas dba Christus Hospital - St. Elizabeth	L00269	Beaumont	107	02/02/09
Bryan	Texas Municipal Power Agency	L02913	Bryan	22	02/02/09
Cleveland	Premier Cardiovascular Consultants	L06179	Cleveland	01	01/29/09
Corpus Christi	Radiology Associates L.L.P.	L04169	Corpus Christi	48	02/02/09
Corsicana	Navarro Hospital Inc. L.P. dba Navarro Regional Hospital	L02458	Corsicana	31	02/03/09
Cypress	North Cypress Medical Center Operating Company, L.L.C. dba North Cypress Medical Center	L06020	Cypress	13	01/30/09
Dallas	Baylor University Medical Center	L01290	Dallas	93	02/06/09
Dallas	Medical City Dallas Hospital dba Medical City	L01976	Dallas	180	01/30/09
Dallas	Medi-Physics Inc. dba G.E. Healthcare	L05529	Dallas	23	02/02/09
Dallas	Medi-Physics Inc. dba G.E. Healthcare	L05529	Dallas	24	02/05/09
Dallas	Presbyterian Cancer Center - Dallas L.L.C.	L06056	Dallas	01	02/05/09
Dallas	IBA Molecular North America Inc. dba IBA Molecular	L06174	Dallas	01	01/28/09
Denison	UHS of Texoma Inc.	L01624	Denison	62	02/11/09
El Paso	El Paso Healthcare System Ltd. dba Las Palmas Medical Center	L02715	El Paso	81	01/30/09
Fort Worth	Consultants in Cardiology	L04445	Fort Worth	19	02/06/09
Fort Worth	Cook Children's Medical Center	L04518	Fort Worth	18	01/30/09
Fort Worth	Tarrant County Cardiology	L04659	Fort worth	21	02/03/09
Fort Worth	Cook Children's Medical Center Department of Pathology	L04587	Fort Worth	14	02/11/09
Galveston	The University of Texas Medical Branch	L01299	Galveston	79	02/13/09
Garland	Insight Health Corporation	L05504	Garland	09	02/02/09
Granbury	Granbury Hospital Corporation dba Lake Granbury Medical Center	L02903	Granbury	31	01/28/09

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Groesbeck	South Limestone Hospital District dba Limestone Medical Center	L05932	Groesbeck	02	02/03/09
Harlingen	Heart Clinic P.L.L.C.	L04514	Harlingen	22	02/03/09
Houston	University of Texas M.D. Anderson Cancer Center	L00466	Houston	115	02/04/09
Houston	Texas Children's Hospital	L04612	Houston	44	02/06/09
Houston	Memorial Hermann Healthcare System dba Hermann Hospital	L04655	Houston	37	01/30/09
Houston	Cardiology Consultants of Houston	L05046	Houston	09	02/02/09
Houston	Advanced Nuclear Consultants	L06167	Houston	02	02/02/09
Jacksonville	Regional Health Care Center dba Mother Frances Hospital-Jacksonville	L05362	Jacksonville	25	02/06/09
La Porte	Sunoco Inc. (R and M) dba Sunoco Chemicals	L02778	La Porte	21	02/05/09
La Porte	Rohm and Haas Chemicals L.L.C.	L04368	La Porte	13	01/30/09
Longview	Eastman Chemicals Company	L00301	Longview	111	02/02/09
Lubbock	University Medical Center	L04719	Lubbock	102	01/30/09
Lubbock	University Medical Center	L04719	Lubbock	103	02/05/09
McAllen	Valley Heart Consultants	L05330	McAllen	10	02/03/09
Paris	Advanced Heart Care P.A.	L05290	Paris	27	02/02/09
Pasadena	Sunoco Inc. (R and M) dba Sunoco Chemicals	L02153	Pasadena	37	02/12/09
Plano	North Texas Regional Cancer Center	L05357	Plano	12	02/10/09
Plano	Texas Heart Hospital of the Southwest L.L.P. dba The Heart Hospital Baylor Plano	L06004	Plano	11	01/30/09
Port Lavaca	Union Carbide Corporation	L00051	Port Lavaca	92	02/10/09
Richardson	Medical Edge Healthcare Group P.A. dba PET/CT Center of Richardson	L05688	Richardson	08	02/10/09
Richmond	Oakbend Medical Center	L02406	Richmond	50	01/29/09
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	171	02/09/09
San Antonio	VHS San Antonio Partners L.L.C. dba Baptist Health System	L00455	San Antonio	183	02/04/09
San Antonio	Methodist Healthcare System of San Antonio dba Methodist Hospital	L00594	San Antonio	252	02/11/09
San Antonio	South Texas Radiology Imaging Centers	L03518	San Antonio	66	02/09/09
San Antonio	University of Texas Health Science Center at San Antonio Edinburg	L06029	San Antonio	03	02/12/09
San Antonio	VHS San Antonio Partners L.L.C. dba Baptist Health Care System	L00455	San Antonio	184	02/11/09
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	172	02/13/09
San Antonio	City Public Services	L02876	San Antonio	24	02/12/09
San Antonio	Medi-Physics Inc. dba G.E. Healthcare	L04764	San Antonio	36	02/09/09
San Antonio	Adult Cardiovascular Consultants P.A.	L05836	San Antonio	04	02/11/09
Sugarland	Southwest Cardiology Associates	L05749	Sugarland	04	02/11/09
The Woodlands	Memorial Hospital The Woodlands	L03772	The Woodlands	67	01/30/09
The Woodlands	St. Luke's The Woodlands Hospital	L05763	The Woodlands	19	02/06/09
Throughout Tx	Eagle NDT L.L.C.	L06176	Abilene	07	02/09/09
Throughout Tx	Eagle NDT L.L.C.	L06176	Abilene	08	02/12/09
Throughout Tx	J-W Wireline Company	L06132	Addison	10	02/05/09
Throughout Tx	Recon Petrotechnologies Inc.	L06026	Alvarado	09	02/10/09
Throughout Tx	Team Industrial Services Inc.	L00087	Alvin	200	02/06/09
Throughout Tx	Texas Department of Transportation	L00197	Austin	144	02/02/09
Throughout Tx	Qal-Tec Associates L.L.C.	L05965	Austin	08	02/09/09
Throughout Tx	Geosyntec Consultants	L06060	Austin	01	02/10/09
Throughout Tx	KXR Inspection Inc.	L01074	Barker	110	01/29/09

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout Tx	Luling Perforators Inc.	L05870	Buda	02	01/30/09
Throughout Tx	CME Testing and Engineering Inc.	L05263	College Station	09	02/02/09
Throughout Tx	NDE Solutions L.L.C.	L05879	College Station	21	02/12/09
Throughout Tx	Berry Fabricators	L01575	Corpus Christi	55	01/29/09
Throughout Tx	Escot NDE Inc. dba Basin Industrial X-Ray	L05002	Corpus Christi	31	02/03/09
Throughout Tx	N-Spec Quality Services Inc.	L05113	Corpus Christi	34	02/03/09
Throughout Tx	National Inspection Services L.L.C.	L05930	Crowley	22	02/03/09
Throughout Tx	National Inspection Services L.L.C.	L05930	Crowley	21	02/02/09
Throughout Tx	Geotel Engineering Inc.	L05674	Dallas	05	01/30/09
Throughout Tx	IRISNDT Inc.	L04769	Deer Park	68	02/09/09
Throughout Tx	H and H X-Ray Services Inc.	L02516	Flint	77	01/30/09
Throughout Tx	H and H X-Ray Services Inc.	L02516	Flint	78	02/11/09
Throughout Tx	Gray Wireline Service Inc.	L03541	Fort Worth	32	02/04/09
Throughout Tx	Weatherford International Inc.	L04286	Fort Worth	80	02/05/09
Throughout Tx	The Dow Chemical Company	L00451	Freeport	86	02/11/09
Throughout Tx	Stork Testing and Metallurgical Consulting Inc.	L00299	Houston	133	01/29/09
Throughout Tx	Wood Group Logging Services Inc.	L05262	Houston	33	01/29/09
Throughout Tx	Material Inspection Technology Inc.	L05672	Houston	30	01/30/09
Throughout Tx	Key Electric Wireline Services L.L.C.	L06003	Houston	05	02/10/09
Throughout Tx	E.I. Du Pont De Nemours and Company	L01753	Ingleside	42	02/12/09
Throughout Tx	Acuren Inspection Inc.	L01774	La Port	250	02/09/09
Throughout Tx	Southern Services Inc.	L05270	Lake Jackson	52	02/12/09
Throughout Tx	Mas-Tek Engineering and Associates Inc.	L04864	Longview	11	02/05/09
Throughout Tx	Hi-Tech Testing Service Inc.	L05021	Longview	74	02/03/09
Throughout Tx	Hi-Tech Testing Services Inc.	L05021	Longview	75	02/12/09
Throughout Tx	Anatec Texas Inc.	L04865	Nederland	78	02/05/09
Throughout Tx	Big State X-Ray	L02693	Odessa	74	01/29/09
Throughout Tx	Texas Gamma Ray L.L.C.	L05561	Pasadena	88	02/05/09
Throughout Tx	Techcorr USA L.L.C.	L05972	Pasadena	58	02/11/09
Throughout Tx	Midwest Inspections Services	L03120	Perrytown	113	02/12/09
Throughout Tx	Burge-Martinez Consulting Inc.	L05907	San Antonio	05	02/04/09
Waco	Hillcrest Baptist Medical Center	L00845	Waco	85	02/02/09
Webster	Bharat Patel M.D. P.A. dba Bay Area Heart Center	L05444	Webster	07	01/30/09

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Baytown	Bayer Materialscience L.L.C.	L01577	Baytown	65	02/04/09
Waco	Baylor University	L00343	Waco	27	02/04/09

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Corpus Christi	M. Ayman Ghraowi M.D. P.A. dba South Texas Institute of Cancer	L05652	Corpus Christi	09	02/04/09
Houston	Positron Corporation	L03806	Houston	31	02/06/09
Wichita Falls	Associated Wireline Services Inc.	L00835	Wichita Falls	16	02/05/09

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, P.O. Box 149347, Austin, Texas 78714-9347. For information call (512) 834-6688.

TRD-200900771
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: February 23, 2009

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Texas Department of Insurance

Proposed Fiscal Year 2009 Research Agenda for the Texas Department of Insurance Workers' Compensation Research and Evaluation Group

Labor Code §405.0026 requires the Commissioner of Insurance to adopt an annual research agenda for the Workers' Compensation Research and Evaluation Group (REG) at the Texas Department of Insurance (Department). Labor Code §405.0026 also requires the Department to publish a proposed research agenda in the *Texas Register* for public review and comment and the Commissioner of Insurance to hold a public hearing on the proposed research agenda if requested by a member of the public.

In November 2008, the REG posted a public request to stakeholders and the general public for research agenda suggestions on the Department's website. After reviewing responses from the general public, the REG developed the proposed FY 2009 Research Agenda using the following criteria:

Is the proposed research project required by statute or likely to be part of an upcoming legislative review?

Will the results of the proposed research project address the information needs of multiple stakeholder groups and/or legislative committees?

Are there available data to complete the project or can data be obtained easily and economically to complete the project?

Does the REG have sufficient resources to complete the project within FY 2009?

Based upon the responses received and the criteria outlined above, the REG proposes the following set of projects for the FY 2009 Research Agenda for public review and comment:

1. Completion and publication of the third edition of Workers' Compensation Health Care Network Report Card (required under Insurance Code §1305.502 and Labor Code §405.0025).

2. Continuing examination of the frequency of employers and workers' compensation claims participating in certified health care delivery networks.

3. An annual update of return-to-work outcomes for injured workers using data from the Texas Workforce Commission, including an examination of the characteristics associated with injured workers and employers who could benefit most from return-to-work outreach and coordination efforts.

4. An analysis of the expanded role and impact of designated doctors in the Texas workers' compensation system since the passage of House Bill (HB) 7 in 2005 in resolving new issues such extent of injury; the ability of a worker to return-to-work; and whether a worker's disability is a direct result of the compensable injury.

5. A preliminary analysis of the impact of the adoption of the *Official Disability Guidelines-Treatment in Workers' Comp* (ODG), published by Work Loss Data Institute (WLDI) in accordance with §413.011, Labor Code, on non-network treatment utilization, medical costs, and other injured worker outcomes.

6. A survey of the types of benefit data nonsubscribing employers currently collect for occupational injuries and illnesses and a survey of the methods used by nonsubscribing employers to evaluate the cost and quality of their benefit programs.

REQUEST FOR PUBLIC COMMENT OR PUBLIC HEARING. To be considered, written comments on the proposed FY 2009 Research Agenda must be submitted no later than 5:00 p.m. on April 6, 2009, 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 comments must be simultaneously submitted to D.C. Campbell, Director, Workers' Compensation Research and Evaluation Group, Mail Code 105-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered. For questions regarding the proposed agenda please contact D.C. Campbell at wcresearch@tdi.state.tx.us.

TRD-200900856
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: February 25, 2009

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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 February 3, 2009, 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.

In 2007, the 80th Legislature created the "Discount Health Care Programs Act" by adding a new Chapter 76 to Subtitle C, Title 2 of the Texas Health and Safety Code and giving the authority to regulate this new chapter to the Department. The Discount Health Care Program Act provides for the registration of discount health card card program operators with each of their programs and for the regulation of these programs' operations. The Department's revised enforcement plan includes penalty matrices for Discount Health Card Card Operators consistent with the administrative rules that were adopted effective January 1, 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) 539-5600 or by e-mail at enforcement@license.state.tx.us to obtain a copy of the revised plan.

TRD-200900801
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: February 23, 2009

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Texas Lottery Commission

Notice of Public Comment Hearing

A public hearing to receive public comments regarding proposed amendments to 16 TAC §402.402 relating to Registry of Bingo Workers, will be held on March 18, 2009, at 10:00 a.m. at the Texas Lottery Commission, Commission Auditorium, First Floor, 611 E. Sixth Street, Austin, Texas 78701. Persons requiring any accommodation for a disability should notify Michelle Guerrero, Executive Assistant to the General Counsel, Texas Lottery Commission at (512) 344-5113 at least 72 hours prior to the public hearing.

TRD-200900802
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 23, 2009

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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 February 19, 2009, 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 Marcus Cable Associates, L.L.C. d/b/a Charter Communications for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 36715 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the Town of Shady Shores, Texas.

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 telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36715.

TRD-200900838
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 24, 2009

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on February 20, 2009, 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 Time Warner Cable for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 36726 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the municipality of Horizon City, Texas.

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 telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36726.

TRD-200900842
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 24, 2009

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Notice of Application for Service Area Exception

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on February 23, 2009, for an amendment to certificated service area for a service area exception within Kendall County, Texas.

Docket Style and Number: Application of Central Texas Electric Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for Electric Service Area Exception within Kendall County. Docket Number 36730.

The Application: Central Texas Electric Cooperative, Inc. (CTEC) filed an application for a service area boundary exception to allow CTEC to provide service to a specific customer located within the cer-

tificated service area of Bandera Electric Cooperative, Inc. (BEC). BEC has provided a letter of concurrence for the proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than March 13, 2009, 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 telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 36730.

TRD-200900841
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 24, 2009

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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 February 19, 2009, 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 TelCentris Communications, LLC for a Service Provider Certificate of Operating Authority, Docket Number 36721 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, and long distance 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 March 11, 2009. 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 36721.

TRD-200900839
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 24, 2009

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Notice of Application for Waiver from Requirements

Notice is given to the public of an application filed on February 20, 2009 with the Public Utility Commission of Texas for waiver from the requirements in P.U.C. Substantive Rule §26.420(f)(3)(B).

Docket Style and Number: Application of Flat Wireless, LLC for Waiver to Apply Safe Harbor Percentage to Calculate Texas Universal Service Fund (TUSF) Assessment Pursuant to P.U.C. Substantive Rule §26.420(f). Docket Number 36725.

The Application: Flat Wireless is a Commercial Mobile Radio Service (CMRS) provider. Flat Wireless states that it has elected to use the safe-harbor percentage approved by the Commission for its classification of telecommunications service provided. Flat Wireless requests that the commission grant it a permanent waiver from the requirements contained in P.U.C. Substantive Rule §26.420(f)(3)(A) to allow Flat Wireless to use the commission-ordered safe-harbor TUSF assessment methodology to calculate TUSF assessments.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by March 16, 2009, 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 telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 36725.

TRD-200900840
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 24, 2009

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South East Texas Regional Planning Commission

Request for Proposals for the Regional Interoperable Communications Plan

The South East Texas Regional Planning Commission seeks a qualified contractor(s) to improve interoperable communications capabilities and to support the implementation of the Texas Statewide Communication Interoperability Plan (SCIP) in the South East Texas region of Hardin, Jefferson and Orange Counties. The specific deliverables to accomplish this objective are:

Revising the Regional Interoperable Communications Plan (RICP) to describe how the region will achieve interoperability by 2015 to the level established by the Texas SCIP;

Establishing a Regional Standard Operating Procedure (SOP) to the level established by the Texas SCIP;

Entering communications equipment in the South East Texas region into the Communications Asset Survey and Mapping (CASM) to the standard and by the date established in the Texas SCIP and

Identification of interoperability training needs in the region for 2010-2015.

Deadline for completion of deliverables is November 2, 2009. Contract is not considered fulfilled until the RICP and the Regional SOP have been approved by the Texas Radio Coalition (TxRC), Governor's Division of Emergency Management (GDEM) and the South East Texas Regional Planning Commission (SETRPC) Executive Committee and until the successful completion of equipment entry into CASM to level required by TxRC and GDEM.

To receive a proposal package; please contact Sue Landry at (409) 899-8444, ext. 7514, slandry@setrpc.org or Robert Grimm at (409) 899-8444, ext. 7513, rgrimm@setrpc.org.

Final proposals are due by 12:00 noon on Monday, March 23, 2009 to SETRPC, 2210 Eastex Freeway, Beaumont, Texas 77703, Attn: Sue Landry. Fax or e-mail proposals will not be accepted. Proposals will be reviewed by the Interoperability Subcommittee based upon the criteria outlined in the Request for Proposal.

TRD-200900829
Jim Borel
Director of Finance
South East Texas Regional Planning Commission
Filed: February 24, 2009

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Texas Department of Transportation

Public Hearing Notice - Statewide Transportation Improvement Program

The Texas Department of Transportation (department) will hold a public hearing on Monday, March 16, 2009, at 10:00 a.m. at the Texas Department of Transportation, 200 East Riverside Drive, Room 1A-2, Austin, Texas to receive public comments on the March out of cycle 2009 Revisions to the Statewide Transportation Improvement Program (STIP) for FY 2008-2011. The STIP reflects the federally funded transportation projects in the FY 2008-2011 Transportation Improvement Programs (TIPs) for each Metropolitan Planning Organization (MPO) in the state. The STIP includes both state and federally funded projects for the nonattainment areas of Beaumont, Dallas-Fort Worth, El Paso, and Houston. The STIP also contains information on federally funded projects in rural areas that are not included in any MPO area, and other statewide programs as listed.

Title 23, United States Code, §134 and §135 require each designated MPO and the state, respectively, to develop a TIP as a condition to securing federal funds for transportation projects under Title 23 or the Federal Transit Act (49 USC §5301, et seq.).

Section 134(j) requires an MPO to develop its TIP in cooperation with the state and affected transportation operators, to provide an opportunity for interested parties to participate in the development of the program, and further requires the TIP to be updated at least once every four years and approved by the MPO and the Governor or Governor's designee. Section 135(g) requires the state to develop a STIP for all areas of the state in cooperation with the designated MPOs and, with respect to non-metropolitan areas, in consultation with affected local officials, and further requires an opportunity for participation by interested parties as well as approval by the Governor or the Governor's designee.

In accordance with 43 TAC §15.8(d), a copy of the proposed March out of cycle 2009 Revisions to the FY 2008-2011 STIP will be available for review, at the time the notice of hearing is published, at each of the department's district offices, at the department's Transportation Planning and Programming Division offices located in Building 118, Second Floor, 118 East Riverside Drive, Austin, Texas, and on the department's website at:

www.txdot.gov.

Persons wishing to review the March out of cycle 2009 Revisions to the FY 2008-2011 STIP may do so online or contact the Transportation Planning and Programming Division at (512) 486-5033.

Persons wishing to speak at the hearing may register in advance by notifying Lori Morel, Transportation Planning and Programming Division, at (512) 486-5033 not later than Friday, March 13, 2009, or they may register at the hearing location beginning at 9:00 a.m. on the day of the hearing. Speakers will be taken in the order registered. Any interested person may appear and offer comments or testimony, either orally or in writing; however, questioning of witnesses will be reserved exclusively to the presiding authority as may be necessary to ensure a complete record. While any persons with pertinent comments or testimony will be granted an opportunity to present them during the course of the hearing, the presiding authority reserves the right to restrict testimony in terms of time or repetitive content. Groups, organizations, or associations should be represented by only one speaker. Speakers are requested to refrain from repeating previously presented testimony. Persons with disabilities who have special communication or accommodation needs or who plan to attend the hearing may contact the Government and Public Affairs Division, at 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-9957. Requests should be made no later than three days prior to the hearing. Every reasonable effort will be made to accommodate the needs.

Further information on the FY 2008-2011 STIP may be obtained from Lori Morel, Transportation Planning and Programming Division, 118 East Riverside Drive, Austin, Texas 78704, (512) 486-5033. Interested parties who are unable to attend the hearing may submit comments to James L. Randall, P.E., Director, Transportation Planning and Programming Division, 118 East Riverside Drive, Austin, Texas 78704. In order to be considered, all written comments must be received at the Transportation Planning and Programming office by Monday, April 20, 2009, at 4:00 p.m.

TRD-200900850
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: February 25, 2009

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Texas A&M University System Board of Regents

Public Notice - Announcement of Finalist for the Position of Director of the Texas Engineering Experiment Station

Pursuant to §552.123, Texas Government Code, the following candidate is the finalist for the position of Director of the Texas Engineering Experiment Station. Upon the expiration of 21 days, final action is to be taken by the Board of Regents of The Texas A&M University System:

Dr. G. Kemble Bennett

TRD-200900836
Vickie Burt Spillers
Executive Secretary to the Board of Regents
Texas A&M University System Board of Regents
Filed: February 24, 2009

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Workforce Solutions Brazos Valley

Request for Quotes

On February 23, 2009, Workforce Solutions Brazos Valley Board (WSBVB) will release a Request for Quote (RFQ) for speakers for child care provider workshops and for employer business seminars. The quote requirements are contained in the Request for Quote which may be viewed and printed on line at www.bvjobs.org. The Board is seeking one or more contractors to provide the requested services.

Due Date:

An original and four copies of a written proposal are due to the Board's offices no later than 4:00 p.m. on March 23, 2009. No quotes will be accepted after this deadline.

Quotes may be hand delivered to:

Trish Buck, Program Manager

Workforce Solutions Brazos Valley Board

3991 East 29th St.

Bryan, Texas 7780

Attention: Workshop Speakers RFQ Response

Quotes may be mailed to:

Trish Buck, Program Manager

Workforce Solutions Brazos Valley Board

P.O. 4128

Bryan, Texas 77805

Attention: Workshop Speakers RFQ Response

Potential respondents may pose written questions concerning this RFQ by email. Contact Trish Buck, Program Manager at pbuck@bvcog.org. No questions will be accepted after March 16, 2009. The contact person for this RFQ is Trish Buck (979) 595-2800.

TRD-200900713
Tom Wilkinson
Executive Director
Workforce Solutions Brazos Valley Board
Filed: February 18, 2009

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 33 (2008) is cited
as follows: 33 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 "33 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 33 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 (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with 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).